Submission to Attorney General's Department

Review of the Disability Discrimination Act

14 November 2025

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Attorney-General's Department
Australian Government
Disability Discrimination Act Review
Via online submission: https://consultations.ag.gov.au/

Submission: *Disability Discrimination Act 1992* (Cth) Review

Thank you for providing the opportunity to make a submission to the Australian Government regarding the *Disability Discrimination Act 1992* (Cth) (the **DDA**). This submission focuses on questions outlined in the Disability Discrimination Act Review Issues Paper published on 1 August 2025 (the **Issues Paper**) and the best way to implement recommendations made by the Disability Royal Commission.

Reform to the DDA is welcomed, particularly with a view to modernise the legislation to meet the evolving needs of the disability community and better align Australia with its international law obligations under the *Convention on the Rights of Persons with Disabilities* (**CRPD**).

Westjustice also endorses the Joint Statement from the Network for Disability Law Reform and except for where our submission departs in respect of definitions, the Australian Discrimination Law Experts Group submission and Women with Disabilities Australia's submission.

1. About Westjustice

This submission is made by the Workers' Rights Program (**WRP**) of the Western Community Legal Centre Ltd, known as Westjustice. We are a rights-based community legal centre providing free legal help, financial counselling and support to people in the Western suburbs of Melbourne. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, and a growing Aboriginal and Torres Strait Islander community.

Westjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services. The WRP at Westjustice was established in 2014 and offers legal and work rights education to women and non-binary folk, international students, young people, newly arrived migrants and refugees, and people experiencing family and gender-based violence. See www.westjustice.org.au.

This submission is informed by the experiences of our WRP clients with disabilities and those who have sought assistance with disability discrimination. Across the whole WRP in the 2024-25 financial year, 16% of our clients had some form of disability, with the majority being psychological disabilities. In 2024, our specialist Equality Law Service saw a 38.3% increase in the legal assistance services sought by workers in Melbourne's West concerning

workplace discrimination. The most common discrimination law problem type that workers sought our advice and assistance with was workplace disability discrimination (20%).

Despite seeing many clients with discrimination-related matters in the context of employment, commonly involving requests for adjustments, these matters rarely progress using the DDA due to its longer timeframes, complexity, and limited accessibility. Clients often report feeling burdened by the need to justify even basic workplace accommodations, particularly when employers request extensive medical documentation, frequently justifying these requests on occupational health and safety grounds, which in practice can be invasive and create significant barriers to inclusion. Instead, we see clients often seeking advice on dismissal or workplace disputes, with time sensitive employment law frameworks, such as unfair dismissal or general protections under the *Fair Work Act 2009* (Cth) (**FWA**). These types of claims typically provide more practical avenues for redress for the clients we see.

Our clients experience barriers when seeking to make complaints about workplace discrimination as the regulatory burden under the DDA primarily falls on the people with disabilities instead of a regulator. This means that they must seek their own remedies and deal with a complex legal framework through individual complaints. The DDA is often not our choice of jurisdiction because of how it falls short of protecting our clients with disability or providing an accessible pathway for access to justice.

To inform this submission, we have also consulted with other programs within Westjustice, including the Women and Gender Diverse People's Rights Program (**WGDPRP**) which focuses on improving the safety of women and children in Melbourne's West, and the Children and Young People's Rights Program (**CYPRP**) which promotes the rights of young people aged 25 years and younger who live in Melbourne's West through its youth law clinics, school lawyer program, and out-of-home-care legal clinic.

2. Overview of submission

In summary, Westjustice considers that a fairer DDA would include the following key elements, which we detail in our submission below:

- The introduction of a positive duty under the DDA with broad application to require all duty holders to take reasonable and proportionate steps to eliminate disability discrimination, harassment/vilification and victimisation.
- Express recognition of intersectional discrimination – both for people with multiple disabilities and for people with multiple characteristics – which cause compounding disadvantage and loss, as a result of discrimination.
- Modern regulatory powers for the Australian Human Rights Commission (**AHRC**) with adequate funding and resourcing to implement these powers, to ensure that the regulatory burden does not fall on individuals to enforce their rights.
- Duty holders under the DDA should also have reporting requirements allowing access to data and increasing transparency to facilitate equitable outcomes and encourage compliance.
- A definition of "disability" which ensures that the broadest range of conditions, their symptoms and their treatment can be covered (including reproductive health

experiences which intersect with sex discrimination such as menopause or pregnancy)
- Simple and clear definitions and legal tests that can be easily understood and applied
- The definition of "inherent requirements" codified into law with an obligation for employers to establish written documentation of what inherent requirements are for a particular role with credible supporting evidence
- A standalone right to adjustments without the qualifier of "reasonable"; and a requirement to consult on those adjustments and respond in writing, like in the *Fair Work Act 2009* (Cth)
- Government authorities included as duty holders under the DDA with obligations in the administration of Commonwealth, State and Territory laws and programs including police, child protection, courts, and corrections.

3. Summary of recommendations

Westjustice makes the following recommendations:

Definition of disability

1. That disability should be broadly defined in the *Disability Discrimination Act 1992* (Cth), inclusive of psychosocial, episodic, and invisible disabilities and with sufficient flexibility to accommodate evolving understanding of disability and recognise that people may be living with multiple disabilities.

2. The definition of disability in the *Disability Discrimination Act 1992* (Cth) should ensure it covers a broad range of health conditions and symptoms that traditionally have not been considered disabilities, and replace outdated terminology with more neutral language, by making the following amendments (with new terms underlined):

> (4) ***disability,*** **in relation to a person, means** -
> (a) total or partial loss <u>or change</u> to a person's bodily or mental functions; or
> (b) total or partial loss <u>or change</u> to a part of the body; or
> …
> (e) <u>irregularity or difference in formation or functioning of a part</u> of the person's body; or
> (f) a <u>condition</u> that results in the person learning differently from a person without the condition; or
> (g) a <u>condition</u> that affects a person's thought processes, perception of reality, emotions or judgment or that results in behaviours of concern; or
> <u>(gg) a person's health status;</u>

Further consultation, including with the medical profession and health researchers, should be undertaken on the definition of "health status" but it should cover indicators, evaluation, assessment, diagnostics and diagnoses of a person's health.

3. That the definition of disability in the *Fair Work Act 2009* (Cth) be updated to expressly include any updated definition that is adopted in the DDA.

Addressing Intersectionality

4. The *Disability Discrimination Act 1992* (Cth) should be amended to include an express reference to the ability to bring intersectional claims for multiple or combined protected attributes and guidance must be developed by the AHRC on how employers and the Courts should deal with these intersectional claims.

Definition of direct discrimination

5. That the *Disability Discrimination Act 1992* (Cth) be amended to remove the comparator test.

6. That the *Disability Discrimination Act 1992* (Cth) be amended to introduce a reverse onus of proof.

7. The *Disability Discrimination Act 1992* (Cth) be simplified by repealing section 5 and replacing it with new subsections 5(1) and 5(2). The subsections would read as follows:

> *(1) For the purposes of this Act, a person (the alleged discriminator) directly discriminates against another person (the aggrieved person), if the person treats, or proposes to treat, the aggrieved person unfavourably on the ground of the aggrieved person's disability.*
>
> *(2) For the purposes of subsection (1), an alleged discriminator who has treated, or proposes to treat, the aggrieved person unfavourably bears the burden of proving that the treatment or proposed treatment was not on the ground of the aggrieved person's disability.*

Definition of indirect discrimination

8. The test for indirect discrimination in the Disability Discrimination Act 1992 (Cth) should be simplified by:

> a) repealing subsections 6(3) and (4) to remove the "reasonableness" element in the definition of indirect discrimination; and
>
> b) repealing subsection 6(1)(b) to remove the 'comply' element of the test for indirect discrimination; and
>
> c) repealing subsection 6(2) in the context of strengthening the duty to provide adjustments as discussed at question 16 of this submission; and
>
> d) introducing a reverse onus of proof.

Interpreting the DDA in line with the CPRD

9. The Objects clause of the *Disability Discrimination Act 1992* (Cth) should be amended to ensure it is interpreted in line with the Convention of the Rights of People with Disabilities by inserting a new subsection 3(d) as follows:

(d) to give effect to Australia's obligations under international law with respect to protections against discrimination for people with disabilities under the Convention on the Rights of Persons with Disabilities.

10. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 4(3):

    (3) This Act must be interpreted in a way that is beneficial to a person or persons with disability, to the extent it is possible to do so consistently with—

        (a) the objects of this Act

        (b) the International Covenant on Civil and Political Rights

        (c) the Convention on the Rights of Persons with Disabilities

        (d) the International Covenant on Economic, Social and Cultural Rights.

11. In accordance with the 2023 report of the Australian Human Rights Commission *Free and Equal,* Australia should enact a national Human Rights Act.

12. The Australian Government should strengthen anti-discrimination protection through consolidation and harmonisation of existing laws.

Positive duty for duty holders to eliminate discrimination

13. The *Disability Discrimination Act 1992* (Cth) should be amended to introduce a positive duty under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the *Sex Discrimination Act 1984* (Cth), but extending to all duty holders under the Act in all areas of public life.

14. That affected individuals and registered organisations or unions should be able to bring their own claims for breach of the positive duty.

15. The Australian Human Rights Commission should be given modern regulatory powers including (but not limited to) the power to conduct own-motion investigations, pursue enforcement action (including commencing proceedings), issue compliance notices, enforceable undertakings and infringement notices.

16. The Australian Human Rights Commission powers should be extended by amending the *Australian Human Rights Commission Act 1986* (Cth) in the following ways:

    a) Part II, Division 4A (ss 35A–35K) be amended by inserting the words 'or disability discrimination' after 'sex discrimination' where these words appear.

    b) to clarify that any reference to 'disability discrimination' means any conduct that is unlawful under the *Disability Discrimination Act 1992* (Cth).

    c) such that a person found to have contravened the positive duty in the *Disability Discrimination Act 1992* (Cth) may be ordered to pay a civil penalty.

d) to clarify that the power given to courts to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct, and to include relevant examples of orders that can be made.

e) repeal section 13(4) of the *Disability Discrimination Act 1992* (Cth) allowing the AHRC be provided with discretion to accept a complaint that has previously been lodged in a state jurisdiction.

f) implement Recommendation 50 of the Australian Law Reform Commission's Report 'Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence', that section 46PO be amended to clarify that the power given to courts to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct, and to include relevant examples of orders that can be made.

Strengthening the duty to provide adjustments

17. The *Disability Discrimination Act 1992* (Cth) should be amended to repeal existing adjustment provisions in sections 5(2) and 6(2) as set out in Recommendations 7 and 8 and include the following standalone provision as a new section 10A which applies to all duty holders under the Act:

    10A. Duty to make adjustments
    It is unlawful for a person to fail or refuse to make an adjustment for:
    (a) a person with a disability; or
    (b) a group of persons with disability,

    unless making the adjustment would impose an unjustifiable hardship on the person.

18. The *Disability Discrimination Act 1992* (Cth) should be amended by:

    (a) replacing all references to 'reasonable adjustments' with 'adjustments',

    (b) revising the notes that refer to such adjustments to ensure they reflect the scope of the obligation,

    (c) repealing the definition of 'reasonable adjustment' in section 4, and

    (d) extending the duty to make adjustments consistently across all areas of public life.

19. In designing the standalone duty, the interoperability of *Disability Discrimination Act 1992* (Cth) requirements with the National Disability Insurance Scheme should be considered to ensure people with disability are not left without supports in circumstances where supports are refused by the National Disability Insurance Agency on the basis that they should instead be provided by way of an adjustment under the *Disability Discrimination Act 1992* (Cth).

Definition of and considerations for unjustifiable hardship

20. Section 11 of the *Disability Discrimination Act 1992* (Cth) should be amended to clarify the definition of the 'unjustifiable hardship' defence by inserting the new subsections 11(1)(aa), 11(1)(ab) and 11(1A) and (2) as follows:

> *(aa) the nature and extent of the first person's consultations with any person with disability concerned;*
>
> *(ab) the first person's consideration of all available and appropriate alternative measures or actions, including those that would reduce or remove any hardship to the first person;*
>
> *…*
>
> *(1A) The person relying on unjustifiable hardship must:*
>
> *(a) create and retain all documents recording the person's consideration (if any) of each of the factors in subsection (1); and*
>
> *(b) provide reasons in writing within 21 days to the person concerned for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.*
>
> *(2) Adjustments can only be refused if the person relying on 'unjustifiable hardship' has:*
>
> *(a) discussed the request with the person with a disability; and*
>
> *(b) genuinely tried to reach agreement about the adjustment; and*
>
> *(c) agreement has not been reached.*
>
> *(3) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.*

Inherent requirements defence

21. Section 21A(2) of the *Disability Discrimination Act 1992* (Cth) should be amended to expand the factors to be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of the particular work, by adding new subsections (ba) and (bb) before (c):

> *(2) ...*
> *(ba) the nature and extent of any adjustments that were made or could be made to enable the aggrieved person to perform the inherent requirements;*
>
> *(bb) the extent of consultation with the aggrieved person about adjustments;*

22. Section 21A of the *Disability Discrimination Act 1992* (Cth) should be amended to include an express obligation on the person (the discriminator):

> (a) to clearly set out in writing the inherent requirements of a job in the event of relying on the inherent requirement defence of section 21A(1)(b); and
>
> (b) bear the burden of proving with credible evidence that a requirement is genuinely inherent

23. The *Disability Discrimination Act 1992* (Cth) should be amended to insert into section 4 a new definition of 'inherent requirements' to be read in conjunction with section 21A:

> '*Inherent requirements' are the duties, tasks, functions or competencies that are necessary and essential to the core nature or purpose of the particular work, and which are incapable of being eliminated or modified without fundamentally altering that nature or purpose, and without which, the particular work would not be the same.*

Exclusionary discipline and suspension

24. Section 22(2)(b) of the *Disability Discrimination Act 1992* (Cth) should be amended to cover 'suspension and exclusion' as well as expulsions.

Offensive behaviour and vilification protections

25. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision to prohibit offensive behaviour because of disability, modelled on sections 18C of the *Race Discrimination Act 1975* (Cth):

> ***Section 39A Offensive behaviour because of disability***
>
> *(1) It is unlawful for a person (the first person) to do an act, otherwise than in private, if:*
>
> *(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
>
> *(b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.*
>
> *(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
>
> *(a) causes words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the sight or hearing of people who are in a public place.*
>
> *(3) In this section:*
>
> ***public place** includes*
>
> *(a) any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*
> *(b) places that can be attended by the public in person or viewed online electronically, such as a website or mobile phone application.*

26. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision to provide a limited defence to offensive conduct, modelled on sections 18D of the *Race Discrimination Act 1975* (Cth):

> ***Section 39B Exception***
>
> *Section 39A does not render unlawful anything said or done reasonably and in good faith:*
>
> *(a) in the performance, exhibition or distribution of an artistic work; or*
>
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
>
> *(c) in making or publishing:*
>
> *(i) a fair and accurate report of any event or matter of public interest; or*
>
> *(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

27. The *Disability Discrimination Act 1992* (Cth) should be amended to prohibit disability vilification, by inserting a new provision as follows:

> ***Section 39C Vilification because of disability***
>
> *It is unlawful for a person (the first person) to do an act otherwise than in private, if:*
>
> *(a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;*
>
> *(b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and*
>
> *(c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.*

Services provided by police officers

28. Amend section 29 of the *Disability Discrimination Act 1992* (Cth) to cover policing and the broader justice system as a protected area of life under State and Territory laws and programs by including a standalone area of public life or by amending section 29 as follows:

> ***29 Administration of Commonwealth, State and Territory laws and programs***
>
> *(a) It is unlawful for a person who:*
>
> *i. performs any function or exercises any power under a Commonwealth, State or Territory law, or for the purposes of a Commonwealth, State or Territory program, or*

ii. has any other responsibility for the administration of a Commonwealth, State or Territory law or the conduct of a Commonwealth, State or Territory program,

to discriminate against another person on the ground of the other person's disability, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

(b) For the avoidance of doubt, State or Territory laws or programs includes the administration of functions performed by police, corrections and child protection authorities.

29. That the Commonwealth Government coordinate a program of work with State and Territory governments to amend the governing legislation for police in each state and territory to impose a duty on police to exercise their powers and functions without discrimination.

Exemptions

30. The Australian Government should initiate a detailed review of the exemptions in the *Disability Discrimination Act 1992* (Cth) including:
    a) the operation and wording of section 46 to ensure that duty holders must design and create their policies and products only following a rigorous analysis of appropriate, relevant and up to date actuarial and statistical data;
    b) the operation and wording of section 47 in respect of ensuring that policing and the broader justice system are covered as duty holders to the greatest extent;
    c) the operation of section 52 insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination;
    d) giving consideration to renaming the 'exemptions' as 'exceptions' in line with other anti-discrimination law;
    e) conducting the review with particular reference to the rights recognised by the Convention on the Rights of Persons with Disabilities and the Concluding observations on the combined second and third periodic reports of Australia made by the United Nations Committee on the Rights of Persons with Disabilities.

Further reform options

31. That the *Disability Discrimination Act 1992* (Cth) be amended to restrict the use of non-disclosure agreements (NDAs).

32. That time limits for making complaints under the *Disability Discrimination Act 1992* (Cth) be extended to six (6) years in line with the *Fair Work Act 2009* (Cth) general protections provisions.

Our response to the consultation questions

4. Our submission in response to the Issues Paper

This submission does not seek to provide answers to all 51 Consultation Questions in the Issues Paper. Where we do not have a position or expertise on a particular matter, this submission has simply not addressed or provided a response on those matters.

We acknowledge the findings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) and broadly support legislative reforms that implement and build on the 15 recommendations of the Disability Royal Commission (**DRC**) directly relating to the DDA which were accepted in principle by the Australian Government.

We support better alignment with the *Convention on the Rights of Persons with Disabilities* (**CRPD**), of which Australia is a signatory. The CRPD sets out the fundamental human rights of people with disability and requires signatory countries to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with disabilities on an equal basis with others. The DDA is one of the key ways that Australia implements the CRPD in domestic law in lieu of a more streamlined framework of a national Human Rights Act.

We see significant scope to improve the way the DDA operates to better protect against discrimination against people with disabilities and implement the CRPD. We strongly recommend broad reform to shift the DDA away from a complaints-driven system which has historically relied on the action of individuals, often without resources, to bring complaints against respondents. The DDA needs to be a strong regulatory framework for proactive prevention of discrimination, systemic compliance and access to justice for people with disabilities living in Australia.

We strongly support implementation of a positive duty to prevent disability discrimination, a modern regulatory role for the Australian Human Rights Commission (**AHRC**) including strengthened powers, a standalone duty to make adjustments, and clear legal tests that do not unfairly burden complainants. Alongside this the Australian Government must invest in legal assistance ensuring dedicated funding for specialist advocacy and legal services, so that people with disability can access their rights, to ensure the laws achieve their aim.

Any DDA reform should place certain overarching principles at the forefront of decision making, including centering lived experience, clarity, consistency, intersectionality, accessibility, restorative and preventive. These principles have informed the recommendations of this submission.

Abbreviations

Anti-Discrimination Act 1991 (Qld)	**Qld ADA**
Age Discrimination Act 2004 (Cth)	**ADA**
Australian Human Right Commission	**AHRC**

Disability Royal Commission	**DRC**
Discrimination Act 1991 (ACT)	**ACT DA**
Equal Opportunity Act 2010 (Vic)	**Victorian EOA**
Equal Opportunity Act 1984 (WA)	**WA EOA**
Fair Work Act 2009 (Cth)	**FWA**
Race Discrimination Act 1975 (Cth)	**RDA**
Sex Discrimination Act 1984 (Cth)	**SDA**
United Nations Convention on the Rights of Persons with Disabilities	**CRPD**
Victorian Equal Opportunity and Human Rights Commission	**VEOHRC**

Part 1 – Updating understandings of disability and disability discrimination

Definition of disability

Consultation questions

1. How should disability be defined in the Disability Discrimination Act?
2. What factors should be considered in developing a new definition of disability?

Recommendations

1. That disability should be broadly defined in the *Disability Discrimination Act 1992* (Cth), inclusive of psychosocial, episodic, and invisible disabilities and with sufficient flexibility to accommodate evolving understanding of disability and recognise that people may be living with multiple disabilities.

2. The definition of disability in the *Disability Discrimination Act 1992* (Cth) should cover a broad range of health conditions and symptoms that traditionally have not been considered disabilities, and replace outdated terminology with more neutral language, by making the following amendments (with new terms underlined):

   (4) ***disability, in relation to a person, means*** *-*

   (a) total or partial loss or change to a person's bodily or mental functions; or
   (b) total or partial loss or change to a part of the body; or
   …
   (e) irregularity or difference in formation or functioning of a part of the person's body; or
   (f) a condition that results in the person learning differently from a person without the condition; or
   (g) a condition that affects a person's thought processes, perception of reality, emotions or judgment or that results in behaviours of concern; or
   (gg) a person's health status;
   …
   Further consultation, including with the medical profession and health researchers, should be undertaken on the definition of "health status" but it should cover

indicators, evaluation, assessments, diagnostics and diagnoses of a person's health.

3. That the definition of disability in the *Fair Work Act 2009* (Cth) be updated to expressly include any updated definition that is adopted in the DDA.

As noted in the Issues Paper, the current definition in section 4 of the DDA reflects a medicalised approach which is incompatible with contemporary understandings of disability. The DDA should have a clear and accessible, but rights-based, functional and inclusive, definition of disability that avoids the medicalised models of deficit language. Moreover, any changes to the definition of disability must be shaped by lived experience and developed in close consultation with the disability community. Where possible, it should align with the CRPD and reflect values of dignity, autonomy, inclusion, and equality into the definition.

Following discussions with disability rights advocates, we consider that the outdated and stigmatising language must be removed, particularly references to 'malfunction, malformation or disfigurement'; 'disorder or malfunction', and 'disturbed behaviour'. Our recommendation is that more neutral language is used to replace these terms, and we have been guided by both the submissions of the Disability Discrimination Legal Service (DDLS), as well as the Australian Discrimination Law Experts Group (ADLEG) to provide the above recommended wording.

We also consider there to be health concerns that may not be clearly covered by the current definition of disability, which are not reflective of lived experience, or particular circumstances of intersectional attributes that might fit under the DDA. This review presents an opportunity to clarify the definition to better meet the needs of these people. For example, in a recent report by La Trobe University, it was found that 60% of women say menopause symptoms affect their work, but that only 17% had access to support or adjustments.[1] Currently menopause symptoms do not clearly fit within the DDA framework as menopause isn't a 'loss', 'malfunction' or 'illness'; it is a typical and natural hormonal bodily process. The existing framework of the DDA makes it a reasonable place to house the recognition of, and the ability to request adjustments on the basis of, changes to a person's body or a health status that has the effect of hindering a person's full participation in the workforce or other areas of public life.

Similarly, there is no current right to request workplace adjustments to accommodate the physical effects of pregnancy such as back pain, nausea or fatigue, either under the *Sex Discrimination Act 1984* (Cth) (**SDA**) or the DDA. Research on pregnancy discrimination by Monash University in 2022 found that 19% of survey respondents had employers who refused to accommodate requests for temporary changes to employment to address health and safety concerns.[2]

While a person can request flexible working arrangements on the basis of pregnancy under section 65(1A)(aa) of the FWA, our experience shows that these are likely to focus on location, hours of work or start/finish times rather than temporary alteration of duties. If

a pregnant person cannot perform their whole role due to pregnancy, they can be transferred to a 'safe' job or be sent on leave.[3] There are no rights in-between and academics have called for pregnancy, having "biological manifestation in the changing body and a limiting social response as seen in work norms and structures" to be considered a form of impairment under the DDA to extend protections.[4]

By way of example, in the Victorian Civil and Administrative Tribunal case *Bevilacqua v Telco Business Solutions (Watergardens) PL* [2015] VCAT 269, the Tribunal confirmed that "[i]n ordinary life a pregnant woman suffering morning sickness is not considered to be a person with a disability",[5] meaning that a claim for reasonable adjustments could not be made. Rather, only in certain circumstances where morning sickness was so serious as to become a "malfunction of a party of the body" would it be considered a disability.

For Ms Bevilacqua, her initial diagnosis was simply 'morning sickness' and so until she received the updated diagnosis of Hyperemesis Gravidarum (involving a 'serious disruption to her normal bodily functioning') she was not entitled to reasonable adjustments under *Equal Opportunity Act 2010* (Vic) (**Victorian EOA**).[6] However, Ms Bevilacqua's symptoms according to the decision were not materially different before or after the diagnosis including migraines, extreme nausea and dehydration, and pain in her back, ankles, and feet. It is unfair and inequitable that she had to first prove a diagnosis and have the doctor make her hours of work changes mandatory before she could be allowed to request adjustments.

For these reasons, we recommend two further changes to the definition of disability. First, the inclusion of the word 'changes' in subsections (a) and (b), and second, the addition of a new subsection (gg) of 'a person's health status'.

These amendments should be added to the definition of disability to expressly cover:

- health conditions or experiences that result in changes to a person's physical or mental health, but may otherwise fall through the gaps or not be considered a 'disability', such as living with HIV or other blood-borne illnesses, mental health or psychosocial health conditions, symptoms and treatments of cancer such as radiography or chemotherapy, or natural hormonal or bodily changes occurring at puberty, pregnancy, menopause and peri-menopause and the health effects of those changes (such as fatigue, pain, nausea, impact on the bladder etc).
- injuries (such as workplace injuries) that do not clearly result in a loss of bodily or mental function or loss of a part of the body but have in fact changed that person's physical or mental health in a way that impacts their ability to do their job or otherwise interact with areas of public life covered by the DDA;
- assessments, diagnosis, medical procedures or treatment of an illness, injury, or condition covered by the other elements of the definition, such as undergoing human assisted reproductive methods such as in-vitro fertilisation, or the likelihood of your physical or mental health declining over time due to a disability or genetic predisposition towards a disability.

The term of 'health status' may need further definition within the DDA to ensure its ordinary usage is clear, guided by health researchers, medical practitioners, occupational therapists, allied health practitioners, and the disability community.

Client story: Bianca* fell pregnant a few months into starting a new job in an administrative support role. Bianca's pregnancy symptoms in her first trimester included morning sickness, feeling nauseous throughout the day, and getting severe motion sickness when travelling to and from work. Bianca provided her boss with a medical certificate stating that she was too unwell to travel to work, and that work from home was recommended. Occasionally when Bianca's pregnancy symptoms were particularly bad, she would call her boss in the morning and take a day of sick leave.

A few weeks later Bianca's manager called her into a meeting and said that they need someone who can come into the office full-time, which Bianca couldn't do because of her pregnancy symptoms. Bianca was also told that if she wants to take sick leave, she needs to provide 3 to 4 days' notice. Bianca was dismissed shortly after this meeting.

(*not her real name)

Bianca's story is an example of why it is important for the DDA to expressly cover changes to a person's bodily functions and their health status, including symptoms of pregnancy and other reproductive related health conditions. Whilst Bianca may have the basis to make an argument that she was discriminated against on the basis of her pregnancy, a likely reason for the discrimination appears not to be *because* of her pregnancy, but because of the sick leave and physical health conditions which came as a result of her pregnancy.

The express coverage of health status in the DDA would help strengthen Bianca's claim, allow her to request workplace adjustments to accommodate her pregnancy changes and symptoms, and in conjunction with the amendments to intersectionality discussed at question 3 in this submission, and will mean Bianca can put forward the best legal arguments to reflect the conduct she experienced without having to fit forms of discrimination into legislative definitions that are not fit for purpose.

Client story: Jaz* was diagnosed with endometriosis a few years ago and can still experience severe "flare ups" where she would be fatigued and experiencing immense pain, and where her symptoms could fluctuate over short periods of time in severity and seriousness. A particularly severe "flare" resulted in hospitalisation, and her doctor ordered bed rest, meaning she had to take sick leave.

Jaz asked her manager for some adjustments at work to help her manage those symptoms, but her manager rejected these requests.

(*not her real name)

Jaz's story is a clear example of why the DDA needs to extend the definition of disability to expressly include changes to bodily functions, irregularity or difference in formation or functioning of a part of the person's body and health status, so that conditions such as endometriosis and their temporary changes to their body as a result can make the requests for adjustments they need to be able to participate fully in the workplace.

If a wholly alternative definition is being considered rather than amendments to the current definition, the *Disability Inclusion Act 2024 (ACT)*[7] contains a definition more in keeping with contemporary understandings and should be used as a guide for strengthening and aligning the DDA definition, ensuring any definition reform is tailored (as opposed to imported) and compatible with other reforms recommended by the DRC.

Factors to be considered in developing a new definition

Lived experience with disability and the views of the disability community should be paramount in developing a new definition of disability. Moreover, the views of Aboriginal and Torres Strait Islanders with a disability should also be sought out and listened to.

Outdated language such as 'malfunction, malformation or disfigurement' should be discarded,[8] and replaced with language compatible with the social model understanding of disability. Any amendments should be in line with the CRPD and related jurisprudence to ensure that the DDA is brought closer to Australia's international human rights obligations.

Any proposed definition should remain broad and continue to protect people affected by invisible disabilities and health conditions that may not have been traditionally viewed by the disability community as a disability, but that nonetheless hinders a person's full participation in society when they interact with barriers to accessibility and stigma. Any changes must ensure that the definition remains broad and accessible to complainants and it is critical to ensure that any amended definition does not inadvertently create additional barriers, steps or difficulties.

Consideration must also be given to ensuring the definition of disability in the FWA is consistent and aligned with any updated DDA definition.

Addressing intersectionality

Consultation questions

3. Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?
4. Could any other changes be made to the Disability Discrimination Act to recognise and provide protection for people with disability who have intersecting identities, or addressing compounding discrimination?

Recommendation

4. The *Disability Discrimination Act 1992* (Cth) should be amended to include an express reference to the ability to bring intersectional claims for multiple or combined protected attributes and guidance must be developed by the AHRC on how employers and the Courts should deal with these intersectional claims.

We support amending the DDA to expressly clarify that claims alleging unlawful discrimination include discrimination on the basis of intersecting or combined protected attributes, including multiple disabilities.

Procedural barriers

Our clients currently face significant procedural barriers to bringing claims under Commonwealth law where they have intersecting protected attributes, such as pregnancy, sex, race and disability. While it is possible to bring a claim to the AHRC for dispute resolution combining allegations under multiple Commonwealth anti-discrimination act simultaneously, the process following conciliation is not as simple. The complex nature of the court system and the current fragmented nature of Commonwealth anti-discrimination legislation means that an applicant would still be required to make a claim under each relevant act and address each test of discrimination (which can be significantly different) for each protected attribute alleged to be the basis for discrimination.

This requirement places an increased burden on people bringing intersectional discrimination claims who are often already experiencing disadvantage, may have disabilities that affect their cognitive functioning and ability to prepare comprehensive written claims, which in turn will impact the accessibility of justice for those without legal representation.

Victorian EOA approach

Comprehensive and consolidated anti-discrimination legislation such as the Victorian EOA provides a better basis for claims based on multiple protected attributes. This is because it recognises the need to protect intersectional identities and ensures the same legal tests apply for all attributes. We note our recommendations 11 and 12 below that we support the enactment of a national Human Rights Act and consolidation and harmonisation of anti-discrimination laws. This would more meaningfully allow applicants to address intersectional claims.

However, our experiences of the Victorian EOA in bringing intersectional claims has demonstrated that the compounding nature of intersectional discrimination is not expressly considered in the damages assessment. In the absence of consolidated/harmonised anti-discrimination laws or a comprehensive Human Rights Act, we submit that any inclusion of intersectional claims within the DDA must also consider how damages might be best awarded and potentially guidance provided in a drafting note or in AHRC guidelines (discussed below).

Development of judicial guidance

An explicit reference to intersectional claims could help strengthen the DDA and provide a framework for applicants and decision makers alike in which to make and consider these types of claims. We would recommend freely available jurisdictional guidance, such as an

AHRC published practice note, on best practice approach when interpreting and applying the law with regard to intersectional claims. This guidance could build on the work of Diversity Council Australia and the 'Applying Intersectionality at Work' guide as a best practice approach. Guidance documents should make reference to the compounding effect that intersectional vulnerabilities can have on an individual, particularly when decision makers are making an assessment of damages in terms of impact and outcomes.

Addressing intersecting identities

The need to meet the requirements of multiple pieces of Commonwealth legislation to run an intersectional claim is a significant disincentive to using the DDA and other Federal anti-discrimination jurisdiction. We suggest further consideration be given to cross-referencing the *Sex Discrimination Act* (**SDA**), *Race Discrimination Act* (**RDA**) and *Age Discrimination Act* (**ADA**) so that an intersectional complaint may proceed under the DDA alone, notwithstanding that it is based on multiple attributes, as long as disability is one of those attributes.

Client story: Jose* had been living and working in Australia for quite a number of years when he sustained a bad back injury. At the time he was working in a customer service role and asked to work from home for a period to help manage the back pain. At this time, he was also working towards Permanent Residency and was about to sit his English language test.

Jose's boss made several disparaging and unlawful comments about both his ability to speak English, and his requests for adjustments to work from home. Jose was then dismissed from his job shortly after. When we spoke to Jose to give him advice on his options to bring a claim, he wasn't sure if the dismissal and other generally hostile behaviour was because of his disability or because of his race. This added an extra layer of complexity and uncertainty to Jose's Australian Human Rights Commission (AHRC) claim.

(*not his real name)

Amending the definition of direct discrimination (Rec 4.23)

Consultation questions

5. What test should be used to ensure that the definition of direct discrimination is easy to understand and implement for both duty holders and people with disability, and why?
6. How should the burden of proof be addressed in the Disability Discrimination Act?

Recommendations

5. That the *Disability Discrimination Act 1992* (Cth) be amended to remove the comparator test.

6. That the *Disability Discrimination Act 1992* (Cth) be amended to introduce a reverse onus of proof.

7. The *Disability Discrimination Act 1992* (Cth) be simplified by repealing section 5 and replacing it with new subsections 5(1) and 5(2). The subsections would read as follows:

    (1) For the purposes of this Act, a person (the alleged discriminator) directly discriminates against another person (the aggrieved person), if the person treats, or proposes to treat, the aggrieved person unfavourably on the ground of the aggrieved person's disability.

    (2) For the purposes of subsection (1), an alleged discriminator who has treated, or proposes to treat, the aggrieved person unfavourably bears the burden of proving that the treatment or proposed treatment was not on the ground of the aggrieved person's disability.

We support the DRC's proposed amendments in Recommendation 4.23 but note given our other recommendation to introduce a standalone right to adjustments, consider the numbering would be different (i.e. not a new (1) and (1A) as the remaining ss5(2) and (3) would no longer be required.

Comparator test

We support the DRC recommendation to remove the 'comparator' test in the current definition of direct discrimination, which involves someone being treated 'less favourably' in not materially different circumstances.

The task of identifying an appropriate comparator has been a point of contention in case law and is a practically difficult and artificial test.[9] This is particularly true for people with intersecting identities, or multiple disabilities (as noted in the ADLEG submission) as it is unclear how to choose who an applicant would be compared against in these circumstances. Therefore, removing the comparator test is likely to improve protection for people with intersecting identities or for whom identifying a comparator would be arbitrary or impossible leading to hypothetical comparators being created simply for the sake of the test.

We support the DRC recommendation that the test should instead focus on whether a person has been treated *unfavourably* because of their disability, known as the detriment test, which can be found in the Victorian EOA as well as other state anti-discrimination legislation. A detriment test would allow Federal Courts to draw on established jurisprudence from other state anti-discrimination jurisdictions as well as the Federal FWA (which also use similar detriment tests).

Burden of proof

We support the DRC recommendation to shift the burden of proof so that the alleged discriminator would need to prove that the reason for their treatment of the person with

disability was *not* because of the person's disability. The current model requiring the person with disability to establish the reasons for the treatment is particularly burdensome and a significant barrier, especially as the alleged discriminator would usually have the relevant information and records to explain why they acted or failed to act in a particular way.

We support the DRC recommendation as it would better align the DDA with other Federal Acts such as the FWA[10] which does not require an applicant to establish a primary case of discrimination but only requires the applicant to prove that the conduct occurred and that they have a disability, before the alleged discriminator must then prove that the conduct was not on the basis of the person's disability. We see this as the preferable approach as it does not require the applicant to establish a primary case of discrimination and our experience is that on the whole, the FWA is a preferred choice of jurisdiction as a result of the reverse onus.

Under the proposed changes to section 5 of the DDA, an alleged discriminator would effectively be required to provide applicants with relevant information on the circumstances surrounding any unfavourable treatment early in the process. This could lead to more cases being conciliated successfully, offsetting any risk of increased litigation.

Amending the definition of indirect discrimination (Rec 4.24)

Consultation questions

7. How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?
8. Should the reasonableness element in the definition of indirect discrimination be
    a. removed
    b. retained and supplemented with a list of factors to consider
    c. replaced by a legitimate and proportionate test
    d. other
9. Should the language of 'does not or would not comply, or is not able or would not be able to comply' be removed from the definition of indirect discrimination?

Recommendation

8. The test for indirect discrimination in the *Disability Discrimination Act 1992* (Cth) should be simplified by:

    a) repealing subsections 6(3) and (4) to remove the "reasonableness" element in the definition of indirect discrimination; and

    b) repealing subsection 6(1)(b) to remove the 'comply' element of the test for indirect discrimination; and

    c) repealing subsection 6(2) in the context of strengthening the duty to provide adjustments as discussed at question 16 of this submission; and

d) introducing a reverse onus of proof.

We support simplifying the definition of indirect discrimination in section 6 of the DDA. Currently the definition of indirect discrimination in the DDA consists of 4 elements:

- The imposition of a condition or requirement; and
- Because of the disability, an aggrieved person cannot comply with that condition or requirement; and
- The requirement or condition disadvantages persons with the disability (i.e. a group of people with the same disability); and
- The condition or requirement is not reasonable in all the circumstances.

Reasonableness element

The fourth element (the reasonableness element) does not focus on the treatment of the aggrieved person constituting discrimination but places a qualifier on the type of conduct that can be included. Practically this requires an aggrieved person to prove the condition was not reasonable – without requiring the respondent to take responsibility for proving that it was reasonable. The burden of proof in indirect discrimination matters needs to be shifted onto the respondent rather than the person with disability to ensure fairness and accessibility.

A more inclusive and accessible approach to defining indirect discrimination would be to align the DDA with the Victorian EOA, which focuses on whether a condition or requirement disadvantages a person with a protected attribute, without requiring proof of non-compliance or reasonableness.

As raised in the Issues Paper there is a reasonableness element in most other Australian jurisdictions' indirect discrimination tests.[11] Some comparable legislation, such as the Victorian EOA, the indirect discrimination definition sets out a non-exhaustive list of factors to consider in assessing reasonableness.[12] However, we also note that the Victorian EOA does not have a standalone defence for 'unjustifiable hardship', and the reasonableness elements provided for in the definition of indirect discrimination show clear similarities to the DDA unjustifiable hardship provisions. For this reason, we do not recommend retaining the reasonableness element and adding in a list of factors as this would create further duplication with unjustifiable hardship.

Comply element

We support the DRC recommendation to remove the language of 'does not or would not comply or is not able or would not be able to comply' to be removed from the definition of indirect discrimination. We agree with the DRC findings that the 'comply' requirement is unnecessary, creates additional confusion, and that removing this requirement would simplify the definition of indirect discrimination. A more appropriate framing would assess whether the condition or requirement results in disadvantage, rather than whether the person can comply.

Current Australian legislation is fairly evenly split on whether this requirement exists within indirect discrimination definitions. There are clear learnings from legislation such as the SDA, which does not include this requirement, demonstrating that this requirement is somewhat superfluous and unnecessary, and that removing the requirement would better align the DDA with contemporary anti-discrimination standards.

Unjustifiable hardship exception

We do not think it is necessary to add an additional unjustifiable hardship provision into section 6(3) as recommended by the DRC at Recommendation 4.24. This is reasoned by the fact that the DDA already adequately provides for this defence in sections 21B and 29A respectively as defined by section 11. We discuss the unjustifiable hardship exception in more detail at question 19 of this submission.

Interpreting the Disability Discrimination Act in line with the Convention on the Rights of Persons with Disabilities (Rec 4.33 and 4.34)

Consultation questions

10. Should the Disabilities Convention be included in the objects provision of the Disability Discrimination Act?
11. Should the Disability Discrimination Act be expressly required to be interpreted in a way that is beneficial to people with disability, in line with human rights treaties?

Recommendations

9. The Objects clause of the *Disability Discrimination Act 1992* (Cth) should be amended to ensure it is interpreted in line with the Convention of the Rights of People with Disabilities by inserting a new subsection 3(d) as follows:

    (d) to give effect to Australia's obligations under international law with respect to protections against discrimination for people with disabilities under the Convention on the Rights of Persons with Disabilities.

10. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 4(3):

    (3) This Act must be interpreted in a way that is beneficial to a person or persons with disability, to the extent it is possible to do so consistently with—

    (a) the objects of this Act

    (b) the International Covenant on Civil and Political Rights

    (c) the Convention on the Rights of Persons with Disabilities

    (d) the International Covenant on Economic, Social and Cultural Rights.

11. In accordance with the 2023 report of the Australian Human Rights Commission *Free and Equal,* Australia should enact a national Human Rights Act.

12. The Australian Government should strengthen anti-discrimination protection through consolidation and harmonisation of existing laws.

We support the DRC recommended amendments to the objects provision of the DDA to ensure the Act is interpreted in a way that is beneficial to people with disability, to the extent it is possible to do so consistently with international treaties including the CRPD. These amendments would further align the Act with Australia's international obligations and make the DDA more consistent with modern rights-protective legislation such as the state Human Rights Acts, as well as strengthening the constitutional foundations of the DDA.

We support the DRC recommendation to insert the above proposed amendment at recommendation 10 to the DDA interpretation provision. This amendment may provide additional clarity and support consistent interpretation to promote beneficial and remedial interpretation of the Act. The amendment will also align the DDA more consistently with modern rights and protective legislation.

The Courts have traditionally agreed with beneficial and remedial interpretation of the DDA. As the High Court said in Purvis:

> *So far as the language of the Act permits, courts should construe the Act in a manner that furthers the goal of truly equal treatment for disabled persons.*[13]

These proposed amendments will further strengthen the basis of beneficial and remedial interpretation, would better align domestic law with international obligations, and guide courts, duty bearers, and administrative decision makers to interpret the DDA consistently with Australia's international obligations.

Although outside the scope of this submission, we reiterate our recommendation that as recommended by the 2023 report of the Australian Human Rights Commission *Free and Equal*, Australia should enact a Human Rights framework that applies nationally, encompassing the internationally recognised human rights found in the human rights treaties to which Australia is a party, combined with a consolidation and harmonisation of Commonwealth anti-discrimination laws which focuses on proactive prevention of discrimination.[14] This would be the best and most effective way to further the rights of people with disabilities and ensure the right to equality, the right to non-discrimination, and the right to full participation.

Part 2 – Positive duty to eliminate discrimination

Positive duty for duty holders to eliminate discrimination (Rec 4.27 and 4.28)

Consultation questions

12. If there was a positive duty in the Disability Discrimination Act, who should it apply to?
13. Are there lessons from the operation of the positive duty in the Sex Discrimination Act that could be incorporated into a positive duty in the Disability Discrimination Act?
14. What costs, benefits and other impacts would duty holders experience in meeting a positive duty under the Disability Discrimination Act? If you are an existing duty holder under the Disability Discrimination Act, please specify how you think meeting a positive duty would impact you.
15. Should there be exceptions or limits to the application of a positive duty?

Recommendations

13. The *Disability Discrimination Act 1992* (Cth) should be amended to introduce a positive duty under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the *Sex Discrimination Act 1984* (Cth), but extending to all duty holders under the Act in all areas of public life.

14. That affected individuals and registered organisations or unions should be able to bring their own claims for breach of the positive duty.

15. The Australian Human Rights Commission should be given modern regulatory powers including (but not limited to) the power to conduct own-motion investigations, pursue enforcement action (including commencing proceedings), issue compliance notices, enforceable undertakings and infringement notices.

16. The Australian Human Rights Commission powers should be extended by amending the *Australian Human Rights Commission Act 1986* (Cth) in the following ways:

    a) division 4A (ss 35A–35K) be amended by inserting the words ‘or disability discrimination’ after ‘sex discrimination’ where these words appear.

    b) to clarify that any reference to ‘disability discrimination’ means any conduct that is unlawful under the *Disability Discrimination Act 1992* (Cth).

    c) such that a person found to have contravened the positive duty in the *Disability Discrimination Act 1992* (Cth) may be ordered to pay a civil penalty.

d) to clarify that the power given to courts to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct, and to include relevant examples of orders that can be made.

e) repeal section 13(4) of the *Disability Discrimination Act 1992* (Cth) allowing the AHRC to be provided with discretion to accept a complaint that has previously been lodged in a state jurisdiction.

f) implement Recommendation 50 of the Australian Law Reform Commission's Report 'Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence', that section 46PO be amended to clarify that the power given to courts to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct, and to include relevant examples of orders that can be made.

To effectively prevent disability discrimination, we need strong legislative frameworks which require duty-holders to take positive steps to prevent discrimination, harassment and victimisation.

We support the introduction of a positive duty into the DDA as recommended by the DRC in recommendation 4.27, be modeled on the recent SDA *Respect@Work* reforms[15], but covering all duty-holders like the positive duty in the Victorian EOA.[16] Our experience is that the Victorian positive duty has operated well and been beneficial to people with disability, ensuring a proportionate and flexible approach is taken to preventing discrimination from occurring and placing the burden of assessing and improving conditions for people with disability on those with the power and resources to effect change. The extension of this duty is imperative to ensure people with disability basic dignity and equal access across all areas of public life.

These amendments will also further the principles of simplification and accessibility of the DDA to have the positive duty apply to the same duty-holders as other obligations under the Act.

In the event that the Australian Government disagrees, at a minimum, the positive duty should apply to all employers, persons conducting a business or undertaking (PCBUs), as well as healthcare and education providers, and all police and statutory authorities as described in a standalone provision as discussed at Question 31 of this submission.

Modern regulatory powers for the AHRC

A positive duty was incorporated into the SDA in 2022.[17] This implementation offers several important lessons for reform of the DDA, such as the importance of regulatory clarity and enforceability.

In order to best enforce the positive duty, the AHRC must be given modern regulatory powers, appropriate resourcing, as well as enforcement and compliance measures, to

ensure that duty-holders proactively prevent, rather than merely respond to, disability discrimination, harassment and victimisation. We note the AHRC's work on the SDA positive duty has been substantial and expanding the duty to the DDA would require appropriate resourcing. It is only with a positive duty that can be enforced, that a discrimination framework can truly claim to be protective.[18]

The AHRC therefore requires modern regulatory powers as set out below:

- Enforcement and compliance measures: The AHRC should be given appropriate resourcing and broader regulatory powers to investigate, to conduct own-motion investigations, compel attendance and the production of information and documents for the purposes of an investigation, pursue enforcement action (including commencing proceedings), as well as issue compliance notices, enforceable undertakings and infringement notices for breaches of the positive duty. Reforms should enable targeted audits, funding of the community legal sector, and court enforceable outcomes, so the burden does not continue to fall on individuals to bring complaints.
- Targeted education and assistance: The AHRC should develop guidance documents to educate duty holders on the positive duty and their obligations. This should include materials similar to those developed to assist employers and employees understand the positive duty under the SDA reforms, as well as public campaigns which make clear the type of conduct that constitutes disability discrimination and call on the community to address and respond to discrimination, harassment and victimisation.
- Codes of practice: Education alone may be insufficient and we call for stronger regulatory frameworks such as statutory codes of practice or other binding standards for discharging the duty, developed in consultation with the disability community and disability advocates. All consultation, codesign, and reform needs to be fully resourced so that the AHRC can engage effectively with the disability community and with subject matter experts to inform input.
- Stronger reporting and enforcement mechanisms: Individuals should be able to bring individual and representative enforcement complaints for breach of the positive duty as part of an individual claim under the DDA. There should also be stronger reporting mechanisms for those whose employers, service providers, or education providers are failing in their obligations under the positive duty, but do not necessarily have a strong individual legal claim. This will increase access to justice and provide alternative justice pathways for those without capacity and resources to bring individual claims under the other provisions of the DDA.
- Systemic remedies and a civil penalty regime: There needs to be specific deterrence for breach of the positive duty of duty-holders, by clarifying that courts can make orders to deter and prevent further discrimination, for example by requiring duty holders to take corrective action, engage in training or take other specific actions, and/or pay a civil penalty for any breach of the DDA[19]. We recommend any civil penalty regime be consistent with the FWA to ensure consistency that the same conduct should attract same penalty across jurisdictions. This is consistent with the ALRC's Recommendation 50 in its report *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence,* that the *Australian Human Rights Commission Act 1986 (Cth)* be amended such that a person found to have

contravened the positive duty in section 47C of the *Sex Discrimination Act 1984* (Cth) may be ordered to pay a civil penalty. In our work we see disability discrimination matters do not attract a typically high award of compensation, and as such our recommendation is for harsher deterrent on duty-holders through the ability to seek civil penalties paid to the individual complainant.

- Discretion to accept complaints: The DDA should be amended to improve equitable access to justice by removing barriers to bringing a complaint at both the state/territory and Commonwealth level. Under subsections 116(b) and (d) of the Victorian EOA, Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) has the discretion to decline to provide dispute resolution in a matter that has been adequately dealt with by a court or tribunal or where the person has commenced proceedings in another forum. The AHRC should be provided with similar discretion/powers to accept a matter that has been previously lodged in a state jurisdiction.
- Mandatory reporting obligations: The AHRC can only act where it 'reasonably suspects' non-compliance with the SDA duty. This can be a difficult threshold to meet and so broader inquiry powers (as set out above) and mandatory reporting obligations on employers, service providers, education providers, and all other duty holders under the Act are also required. We refer to the ADLEG submission which refers to evidence that allowing access to data and increasing transparency can facilitate equitable outcomes. The example being transparency used by the Workplace Gender Equality Agency (**WGEA**) in relation to pay equity, supported by evidence that it improves equality in pay. We support the ADLEG recommendation that a similar approach could be taken to data reported to the AHRC under the DDA, through the introduction of duties that compel or encourage organisations to reveal certain information, such as workforce composition data, progress on action plans, special measures implemented and complaints made. If such data were made publicly available, within the constraints of compliance with privacy legislation, it is likely compliance would be encouraged.
- Mandatory consultation on co-design: While the SDA model does not mandate consultation with affected communities, the Work Health and Safety framework does include consultation obligations and codes of practice. A positive duty under the DDA should incorporate similar regulatory framework requirements, ensuring that compliance strategies are co-designed with people with disability and reflect their lived experience.

Exceptions

We support the extension of this duty to all duty-holders regardless of size or resources, with no exceptions. The proposed wording of the positive duty, namely that a duty-holder is required 'to take reasonable and proportionate measures…as far as possible' will allow nuances for what they will reasonably be expected to do and implement to discharge the duty under the DDA, taking into account the size, nature, and resources, the practicability and cost of compliance measures, and any competing legal obligations. We often see employers hiding behind the title of a small business, even when they are a franchisee, to excuse unlawful behavior. A positive duty shouldn't be stopped just because a business only employs a small number of people, or a service only provides so much. The DDA

should extend the positive duty to all duty-holders and apply the duty in 'reasonable and proportionate measures' as set out above.

Part 3 Encouraging the inclusion of people with disability in employment, education, and other areas of public life

Strengthening the duty to provide adjustments (Rec 4.25 and 4.26)

Consultation questions

16. Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?
17. Should the scope of the duty to provide adjustments apply only to the existing areas of public life covered by the Disability Discrimination Act, or extend to other contexts?
18. Would removing the word 'reasonable' from the term 'reasonable adjustments' to align the language with the legal effect create any unintended consequences?

Recommendations

17. The *Disability Discrimination Act 1992* (Cth) should be amended to repeal existing adjustment provisions in sections 5(2) and 6(2) as set out in Recommendations 7 and 8 and include the following standalone provision as a new section 10A which applies to all duty holders under the Act:

    10A. Duty to make adjustments
    It is unlawful for a person to fail or refuse to make an adjustment for:
    (a) a person with a disability; or
    (b) a group of persons with disability,

    unless making the adjustment would impose an unjustifiable hardship on the person.

18. The *Disability Discrimination Act 1992* (Cth) should be amended by:

    (a) replacing all references to 'reasonable adjustments' with 'adjustments',

    (b) revising the notes that refer to such adjustments to ensure they reflect the scope of the obligation,

    (c) repealing the definition of 'reasonable adjustment' in section 4, and

    (d) extending the duty to make adjustments consistently across all areas of public life.

19. In designing the standalone duty, the interoperability of *Disability Discrimination Act 1992* (Cth) requirements with the National Disability Insurance Scheme should be considered to ensure people with disability are not left without supports in circumstances where supports are refused by the National Disability Insurance Agency on the basis that they should instead be provided by way of an adjustment under the *Disability Discrimination Act 1992* (Cth).

We support the DRC recommendation 4.26 to implement a standalone duty to make adjustments for any person with a disability, in any area of public life. The concept of making an adjustment for a person with a disability is a core principle of the CRPD which suggests the failure to make an adjustment should be recognised as a form of discrimination itself, not just an element of direct or indirect discrimination[20] in so far as it does not impose a 'disproportionate or undue burden'.[21] Noting the introduction of this standalone provision would in turn replace references to adjustments in sections 5 and 6 of the DDA (the definitions of direct and indirect discrimination) and those sections should be repealed.

This approach would be consistent with the CRPD and bring the DDA in line with Australia's obligations under international human rights law, which requires the reasonable accommodation of people with a disability to fully enjoy their human rights.[22] This amendment would also bring the DDA better in line with other anti-discrimination acts such as the Victoria EOA.[23]

As identified by the DRC, the introduction of a standalone provision may help overcome some difficulties with the current provisions on reasonable adjustments, including that they are not well understood by employers and education providers, and place an inappropriate onus on the person with disability.[24] The DDA should also make it clear that duty holders must consider requests in relation to adjustments in a timely manner (i.e. 5 business days) and clarify that duty holders can ask for reasonable additional information from the person who has made the request, as part of the consultation.

A duty to make adjustments under this standalone provision would still be subject to the 'unjustifiable hardship' defence even in circumstances where that defence is removed from the definition of 'indirect discrimination' as we set out at Question 19 in this submission.

Scope of the duty

The standalone duty to make adjustments should be extended to all duty-holders under the DDA, including all police and those administering Commonwealth, State or Territory programs and law, such as corrective services and child protection (in which people with disability are overrepresented), as described in a standalone provision as discussed at Question 31 of this submission. Although the duty may be required to be limited to circumstances inside the duty holder's control and knowledge.

In designing the standalone duty, the interoperability of DDA requirements with the NDIS should be considered to ensure people with disability are not left without supports in circumstances where supports are refused by the NDIA on the basis that they should instead be provided by way of an adjustment under the DDA. This can leave people with disability without support and limit access to justice.

Reasonableness element

We support the DRC recommendation 4.25 to remove 'reasonable' in 'reasonable adjustments' in an effort to clarify and simplify the concept. Reasonableness is a subjective element and has had the effect of causing confusion for both people with disability and duty-holders. We also refer to disability discrimination case law where the qualifier 'reasonable' has been interpreted by the Courts to excuse failures to make adjustments, undermining the original intent of the DDA.[25]

Definition of and considerations for unjustifiable hardship (Rec 4.32)

Consultation questions

19. What is your preferred approach to achieving greater fairness and transparency in claims of unjustifiable hardship:
    a. the Disability Royal Commission amendment as proposed
    b. a new definition of unjustifiable hardship
    c. other

Recommendation

20. Section 11 of the *Disability Discrimination Act 1992* (Cth) should be amended to clarify the definition of the 'unjustifiable hardship' defence by inserting the new subsections 11(1)(aa), 11(1)(ab) and 11(1A) and (2) as follows:

> *(aa) the nature and extent of the first person's consultations with any person with disability concerned;*
>
> *(ab) the first person's consideration of all available and appropriate alternative measures or actions, including those that would reduce or remove any hardship to the first person;*
>
> *…*
>
> *(1A) The person relying on unjustifiable hardship must:*
>
> *(a) create and retain all documents recording the person's consideration (if any) of each of the factors in subsection (1); and*
>
> *(b) provide reasons in writing within 21 days to the person concerned for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.*
>
> *(2) Adjustments can only be refused if the person relying on 'unjustifiable hardship' has:*
>
> *(a) discussed the request with the person with a disability; and*
>
> *(b) genuinely tried to reach agreement about the adjustment; and*
>
> *(c) agreement has not been reached.*
>
> *(3) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.*

We support the DRC recommendation 4.32 which proposes additions to the unjustifiable hardship definition to build on existing laws. We do not support the alternative definition put forward by the Issues Paper requiring an assessment of whether the benefit to the person affected/community outweighs the detriment/cost to the alleged discriminator.

We also recommend further consideration be given to the factors in section 11 to ensure any relevant reasonableness elements are fleshed out, and there is a proportionate element within the definition analogous to that found in the Victorian EOA.[26] Amending the DDA to better reflect the principles of the legitimate and proportionate test would achieve the current aims of the existing definition and also bring Australia closer in line with a best practice human rights law approach, and could, in the absence of a Human Rights Act, bring Australia closer to our international obligations under the CRPD.

Although outside the scope of this submission, our view is the best approach is to adopt a legitimate and proportionate test in a national Human Rights Act. As set out in the Issues Paper, the 'legitimate and proportionate' approach has had previous wide-reaching support and was recommended in the 2008 Senate Inquiry on the SDA as well as by the AHRC in its 2021 Position Paper.[27]

Finally, the unjustifiable defence should apply to the proposed standalone duty to make adjustments as discussed at Question 18 of this submission. In light of this, it should be clear that to rely on the defence the duty holder must have taken steps to discuss the adjustment request with the person with a disability, genuinely try to reach agreement with them about what is needed, and then provide reasons within 21 days in writing about why the request is rejected on unjustifiable hardship grounds. This provides a clear and fair process to both parties, ensures transparency in decision making, and brings the DDA process into alignment with the process for flexible work requests in the FWA so the processes are the same for either an adjustment request under the DDA or a flexible work request under the FWA. Further, any amendments should clarify that mere inconvenience, or the expenditure or resources, should not in and of itself constitute unjustifiable hardship.

In relation to the DRC proposed additions to the unjustifiable hardship definition:

- (1)(aa) Requirement to consult: We consider this a baseline requirement for duty-holders to consult with people with disability when making decisions about specific adjustments. We support defining the term consultation in section 4 of the DDA in line with the CRPD principles to include concepts on meaningful engagement, with views of the individual affected given due weight.
- (1)(ab) Requirement to consider available alternative measures: We consider this an important addition to the factors set out in the unjustifiable hardship definition to ensure duty holders are properly considering all factors involved. It should also assist in placing less emphasis on financial cost, requiring duty holders to have regard to broader public interest considerations as in the Victorian EOA.
- (1A)(a) Obligation to keep and maintain records: We consider this is a reasonable obligation on duty-holders to keep and maintain records relating to the consultation and reasons for decision. We make specific reference to the existing duty under the

FWA on employers to keep and maintain employee records for 7 years. This would not place any significant additional burden on employers, and the existing obligations under the FWA demonstrate that it is unlikely to create a considerable additional burden on any other duty-holder covered by these provisions under the DDA.

- (1A)(b) Requirement to provide reasons with reference to unjustifiable hardship factors: We consider this to be a reasonable requirement on duty-holders and again refer to the FWA where employers are already required to provide written reasons when rejecting a request for flexible working arrangements. Again, this requirement would not place any significant burden on employers and is unlikely to create a considerable additional burden on any other duty-holder covered by these provisions under the DDA. Further, a person with disability would have the benefit of receiving information on why an adjustment would pose an unjustifiable hardship, what alternatives were considered, and on what basis the adjustment they were seeking was rejected. This will in turn assist in understanding whether a genuine basis for a legal claim exists and reduce the amount of low-merit claims made to the AHRC, freeing up valuable time and resources.

The above proposed additions to the unjustifiable hardship definition will create a more robust regulatory framework which will assist duty-holders in guiding their decision making process at the time, promote transparent, evidence-based decision-making, and deter post-hoc rationalisation in the event a claim is brought against them.

Expanding the factors considered by employers when determining if an employee can carry out the inherent requirements of particular work (Rec 7.26)

Consultation questions

20. What are your views on amending the Disability Discrimination Act to consider the nature and extent of any adjustments made and encourage consultation between prospective or current employers and prospective or current employees before making employment decisions?
21. Are there other amendments to the Disability Discrimination Act that could support engagement between prospective or current employers and prospective or current employees to better understand the inherent requirements of a job?
22. Should any other amendments be made to the definition of inherent requirements, including factors that should be considered when deciding whether a person could carry out the inherent requirements of a job?

Recommendations

21. Section 21A(2) of the *Disability Discrimination Act 1992* (Cth) should be amended to expand the factors to be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of the particular work, by adding new subsections (ba) and (bb) before (c):

    (2) ...

    (ba) the nature and extent of any adjustments that were made or could be made to enable the aggrieved person to perform the inherent requirements;

(bb) the extent of consultation with the aggrieved person about adjustments;

22. Section 21A of the *Disability Discrimination Act 1992* (Cth) should be amended to include an express obligation on the person (the discriminator):

    (a) to clearly set out in writing the inherent requirements of a job in the event of relying on the inherent requirement defence of section 21A(1)(b); and

    (b) bear the burden of proving with credible evidence that a requirement is genuinely inherent

23. The *Disability Discrimination Act 1992* (Cth) should be amended to insert into section 4 a new definition of 'inherent requirements' to be read in conjunction with section 21A:

    '*Inherent requirements' are the duties, tasks, functions or competencies that are necessary and essential to the core nature or purpose of the particular work, and which are incapable of being eliminated or modified without fundamentally altering that nature or purpose, and without which, the particular work would not be the same.*

Incorporating these factors informs decision-making, guards against stereotypes, and ensures that incapacity is not asserted without first interrogating practicable adjustments.

The DDA amendments of s 21A should also include an express obligation on the employer or principal to clearly set out the inherent requirements of a job at the outset of consultation, particularly in the event of relying on the inherent requirements defence.

Client story: Anh* is a migrant worker with low English skills and has been working in a factory for almost 7 years. A few years into her employment, Anh developed a wrist injury from moving heavy products. After taking a short period of sick leave to recover, Anh came back to work and was moved to a different part of the factory so that she was only lifting the lighter products. Anh continued to work like this with no issues for around 4 years.

Recently Anh joined her union and started asking about her pay and making complaints about the safety of the factory. Around a week later, Anh was terminated on the basis that she couldn't meet the inherent requirements of her job because of her wrist injury. Anh was confused, because she had been working for the past 4 years with minimal issues. When pressed, Anh's boss kept reiterating 'inherent requirements' but could not, and would not, point out exactly what inherent requirement it was that Anh couldn't meet. Anh's only option now is to pursue legal action to try and find out what it is her boss says she can't do, and to try and get her job back.

Anh's age means she is struggling to get more factory work. Anh also requires an interpreter and is therefore unable to pursue her legal claim without the assistance of legal representation of a community legal centre.

*(*not her real name)*

An express obligation on employers and other relevant duty-holders will help support people like Anh and better guide employers on their obligations and best practices when it comes to dismissing people on this basis and relying on this defence.

Promoting improved understanding

While the concept of "inherent requirements" has been the subject of considerable judicial consideration, we recommend for the sake of clarity that a new definition is inserted into the DDA which codifies case law.[28]

Engagement between employers and employees in relation to the inherent requirements defence could be further strengthened through the development of Guidelines which set out illustrative examples of inherent requirements in a range of industries and roles, which should be developed by the AHRC in consultation with the disability community. This may assist in addressing the DRC concerns that the 'inherent requirements' rules have sometimes led to unnecessary exclusion of candidates with disabilities.[29]

The Guidelines should expressly prohibit the characterisation of certain elements of a job which should not be framed as inherent requirements, including KPIs (in relation to frequency/rate of tasks insofar as they relate to corporate targets) as an inherent requirement. We are of the view that KPIs can be inherently indirectly discriminatory against people with a disability as an additional barrier in circumstances where an employee with a disability can still complete the tasks required for a role, but not at the rate/frequency set by the employer. KPIs are more often than not a business target, and not a true performance indicator of the worker.

This also overlaps with the question of unjustifiable hardship as discussed at Question 19.

Further amendments

The DDA should include an express onus on the employer to clearly set out any inherent requirements of a job at the outset of consultation under the proposed standalone Duty to make Adjustments provision, to prevent unnecessary effort and disclosure of sensitive health information from a person with disability, if the adjustments they are requesting will mean they are still unable to meet the inherent requirements of the job.

Where genetic or health information is used to evaluate an employee or prospective employee's ability to perform the inherent requirements of a job, employers should be required to develop clearly defined job descriptions identifying these inherent requirements, to better protect both current and prospective employees.

Further consideration should also be given to inserting protections for the privacy of people with disabilities who may not wish to share their health information for the purpose

of contesting an inherent requirements defence. Where employers collect this information, they should be required to develop policies to ensure that private health information is used only in relevant and reasonable circumstances.

Exclusionary discipline and suspension (Rec 7.2)

Consultation questions

23. Should the concepts of exclusion and exclusionary discipline be defined in the Disability Discrimination Act?
24. Should there be exceptions or limits on when exclusion is unlawful?

Recommendation

24. Section 22(2)(b) of the *Disability Discrimination Act 1992* (Cth) should be amended to cover 'suspension and exclusion' as well as expulsions.

Westjustice, through its Children and Young People's Rights Program, has been operating a School Lawyer Program across a number of schools for over 10 years and co-chairs the national School Lawyer Reference Group. Through this work we have heard of students being subject to informal expulsions or school 'exclusions'. Students are told by schools that they are being considered for a formal expulsion, but they would not proceed with this action if the student and their family choose to unenroll from their school. If the student chooses to unenroll, the school is not mandated to support them to enrol into another school or registered training organisation. Students who identified as having a disability are overrepresented in expulsion data, putting this cohort of students at greater risk of that student disengaging from education, and increasing the risk of contact with the justice system, and we have grave concerns around this.

Defining concepts of exclusion and exclusionary discipline

We support concepts of exclusion and exclusionary discipline being defined and support the DRC Recommendation 7.2, specifically the proposed amendment to section 22(2)(b) of the DDA. We believe it is important to include a clear definition of what 'exclusion' and 'exclusionary discipline' means in practice. This should include both informal expulsions and being placed on a restricted timetable where they are not permitted to participate in all the classes that they are enrolled in. This is important because whilst the powers and grounds to suspend and expel students are clearly set out in the Department of Education Ministerial Order 1125 Policy, informal exclusions or 'exclusionary discipline' are not as clear.

Making express reference to 'suspension or exclusion' goes to removing any ambiguity and better captures informal suspensions, temporary exclusions, and restricted attendance. In addition, s22 of the DDA should make specific reference to the 'best interests of the child,' for consistency to reflect the existing language in the Disability Standards for Education.[30]

We are strongly supportive of clearer concepts, definitions, and more stringent regulation around the ability to engage in restrictive practices, including a requirement to have safety plans in place which don't include calling the police, with a requirement to consult with the young person, their family, and professional supports.

Our Children and Young People's Rights Program are seeing young people at schools frequently being subject to Police PSIO applications as the Respondent after incidents of behaviour that are manifestations of their disability. This is not unusual amongst children's lawyers and there is evidence from Victoria Legal Aid and the Victorian Ombudsman about the extent that children with disabilities are being affected.

Victoria Legal Aid Victoria reports that within their casework:

- 81% of PSIO matters involved disputes between children in schools[31]
- almost half of these were reported to live with neurodiversity and/or mental health issues[32] and
- nine out of ten young people who were charged with a breach of one of these PSIO were recorded as having a disability[33].

This demonstrates a further rationale for the benefit of having stronger preventative protections and safety plans in place for young people with disability to avoid them being the Respondents in PSIO/IVOs, avoid disengagement from education, and prevent unnecessary criminalisation of young people.

In their *Investigation into Victorian government school expulsion*, the Victorian Ombudsman found that most young people in juvenile justice had been suspended or expelled, whilst the overwhelming majority of people in the criminal justice system left school early:[34]

- 33.45% of all expulsions in 2016 were students who identified as having a disability or mental illness.[35]
- Of the 1094 children and young people with involvement with youth justice who were surveyed in 2015, 70% of students with clinically assessed intellectual functioning issues had been suspended or expelled from school.[36]

We also support a requirement for schools to mandatory report after each instance or use of restraint/seclusion or exclusionary discipline through a stronger framework within the State and Federal Departments of Education and through the Disability Standards for Education 2005. Any report should require Department follow up with the persons affected and include referrals to relevant support organisations and information on accessing the DDA for the young person and their families.

It is imperative that any excluded child is provided with the tools, materials and support from the school to continue their education while subject to any exclusionary discipline process. We also support the introduction of a review or appeals process for students with disability and their family or supports to challenge any use of restraint/seclusion or exclusionary discipline through Department review avenues with a range of restorative justice outcomes available.

Exceptions

Exclusionary discipline exacerbates behaviours of concern and increases disengagement and should not have any standing exceptions to allow its use. It would however be necessary for the DDA to set out a clear definition of 'exclusion' within the regulatory framework to avoid confusion or misunderstandings on what may constitute legitimate disciplinary action or a legitimate measure to prevent harm to both the young person with the disability as well as other students and staff.

Education serves as a fundamental protective factor that reduces the likelihood of young people coming into contact with the justice system. We strongly urge the Australian Government to take all action necessary to highlight the importance of protecting children with a disability from being excluded from school, and to strengthen the implementation of disability protections that limit the use of suspensions, expulsions and exclusions. Supporting continued educational engagement is a key safeguard against future involvement with the justice system, particularly for those with a disability.

Part 4 – Improving access to justice

Offensive behaviour and vilification protections (Rec 4.29 and 4.30)

Consultation questions

27. How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?
28. If the Disability Discrimination Act were to prohibit offensive behaviour and/or harassment, how should these terms be defined?
29. Should there be exemptions for any behaviour, similar to the Racial Discrimination Act?
30. Given the recent legislative developments, are there any further gaps in the legislative framework that could be addressed by amendments to the Disability Discrimination Act to protect people with disability from vilification?

Recommendations

25. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision to prohibit offensive behaviour because of disability, modelled on sections 18C of the *Race Discrimination Act 1975* (Cth):

    Section 39A Offensive behaviour because of disability

    (1) It is unlawful for a person (the first person) to do an act, otherwise than in private, if:

    (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

***public place** includes*

(c) any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.
(d) places that can be attended by the public in person or viewed online electronically, such as a website or mobile phone application.

26. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision to provide a limited defence to offensive conduct, modelled on sections 18D of the *Race Discrimination Act 1975* (Cth):

Section 39B Exception

Section 39A does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

27. The *Disability Discrimination Act 1992* (Cth) should be amended to prohibit disability vilification, by inserting a new provision as follows:

Section 39C Vilification because of disability

It is unlawful for a person (the first person) to do an act otherwise than in private, if:

(a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;

(b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and

(c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

We support the introduction of stronger anti-vilification provisions into the DDA to align with section 18C of the RDA, which is a harm-based test focusing on the impact of the conduct on the person with disability. We also support the inclusion of an equivalent provision to section 18D of the RDA, providing exceptions for art, journalism etc. Case law has found this is important to ensure the prohibition is a constitutionally valid limitation on free speech.

Finally, we support including into the DDA a test for disability vilification based on the RDA definition which has long set the civil standard for racially offensive conduct. Any definition or anti-vilification provision should target harm to people's dignity that could hamper access to public life; regulate behaviour rather than ideas; and operate at the appropriate civil level. Remedies should include any conduct necessary to remedy the harm caused and systemic remedies, such as apologies/retractions, and compensation, training, and other remedial action

Procedurally, claims for offensive or vilifying conduct should be able to be brought to the AHRC for conciliation and then to the Federal Courts for determination, in the same manner as other DDA claims. Claimants should also be able to seek interlocutory and final injunctive relief against publication of offensive and/or vilifying statements.

We support stronger anti-vilification measures in Federal law and support the DRC's proposed amendment in Recommendation 4.30(a) to introduce new provisions in relation to vilification on the ground of disability being unlawful.

However, in relation to Recommendation 4.30(b) and the extension of criminal penalties under state and territory laws, in light of the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) which passed earlier this year and the additional coverage of people with disability, we are of the view that the DDA should remain a Federal civil scheme and caution should be exercised before being used to plug gaps in state and territory criminal law. This would also support the simplification of the DDA to keep state and territory criminal law provisions separate.

Should the Australian Government look to implement this recommendation, it would need to further consider the risk of minorities being further criminalised under the extension of these laws, and whether acts of offensive behaviour and vilification can be better delt with through a civil scheme of stronger regulatory powers, penalties, and restorative justice outcomes.

Services provided by police officers (Rec 8.19)

Consultation questions

31. How could the Disability Discrimination Act be amended to ensure that it covers policing?
32. Are there any specific circumstances or situations relating to policing or justice that should be excluded from the application of the Disability Discrimination Act?

Recommendations

28. Amend section 29 of the *Disability Discrimination Act 1992* (Cth) to cover policing and the broader justice system as a protected area of life under State and Territory laws and programs by including a standalone area of public life or by amending section 29 as follows:[1]

    29 Administration of Commonwealth, State and Territory laws and programs

    (c) It is unlawful for a person who:

    i. performs any function or exercises any power under a Commonwealth, State or Territory law, or for the purposes of a Commonwealth, State or Territory program, or

    ii. has any other responsibility for the administration of a Commonwealth, State or Territory law or the conduct of a Commonwealth, State or Territory program,

    to discriminate against another person on the ground of the other person's disability, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

    (d) For the avoidance of doubt, State or Territory laws or programs includes the administration of functions performed by police, corrections and child protection authorities.

29. That the Commonwealth Government coordinate a program of work with State and Territory governments to amend the governing legislation for police in each state and territory to impose a duty on police to exercise their powers and functions without discrimination.

We support coverage of policing duties and powers in the DDA, but not as a "service" to be incorporated in section 4, as per DRC Recommendation 8.19. Rather, we submit this must be a standalone provision which extends to the administration of State and Territory programs, laws and exercise of functions, in order to include broader justice system and government authorities. An explicit inclusion would align the DDA with its protective purpose and with CRPD article 13 (effective access to justice).

Police must be accountable for their conduct when interacting with persons with disability, particularly with respect to their liberty and security rights. A standalone provision would

expressly extend to all search and arrest powers, including the full range of policing duties to ensure protection for victims, witnesses, suspects and people accused or found guilty of a crime.

Reforms should extend to protect against discrimination by all government agencies and statutory authorities, including in corrections/prisons, youth justice, out of-home group care arrangements and interactions with child protection as a priority. It should also include coverage of in-patient health facilities where someone may be held involuntarily under Court order, to ensure fair and non-discriminatory treatment whilst there.

A standalone provision would also embed the requirement for adjustments (e.g. communication supports, accessible procedures, trauma-informed practice) while preserving operational safety and legal authority. The importance of this is set out in the Client Story of Levi below.

It is also imperative that any reform includes an extension of the positive duty to all policing services and statutory authorities covered in the standalone provision. In order to effect this change, mandatory training is required for police and these new duty-holders in understanding behaviour when it is a manifestation of a persons' disability.

We recommend AHRC publish best practice guidelines on training requirements, with further policy requirements for Police and other relevant statutory authorities including updates to the Policing Manual in each State and Territory.

Our Women and Gender Diverse People's Rights team and our Children and Young People's Rights team often provide services in the Children's Court. Our lawyers see the criminalisation of young people with disability where parents call 000 in relation to behaviours that are manifestations of their child's disability seeking support and 'back up' where the situation has escalated beyond what is manageable for them. As a result of seeking help, the police have charged the young person with a disability as a respondent to an IVO matter or even charged the young person with disability with assault, despite parents' pleas not to.

Exceptions

We do not think there should be any circumstances or situations excluded from a standalone provision of the DDA.

Client story: Levi* is one of our clients in Parkville Youth Justice Precinct and is one of the few young people there doing their VCE. Levi has been diagnosed with a variety of disabilities.

Doing VCE in Parkville has been a constant struggle for Levi due to the constant disruptions in the youth precinct and the lack of DJCS/YJ staff on hand to monitor him and move him to class. When Levi does manage to attend his classes, he has expressed frustration that he is not allowed to use a laptop to write his SACS and instead has to write 1000-word essays and other assessments with a special issue pen which are bendy and

aren't ergonomically comfortable. Even though both Levi and his teacher have advocated for adjustments because Levi's disabilities mean his fine motor functions are not like an average young person and he particularly struggles using these pens - he has continuously been denied these adjustments. There are very few avenues for Levi to challenge these refusals when Youth Justice isn't covered by the DDA or any other anti-discrimination protection framework.

In the words of Levi in a speech given to the school staff about his access to education:

"It is crucial that these vulnerable young people are given the opportunity to break the tragic cycle that led the majority of them into custody in the first place. In my personal experience, when I am not able to get to class it feels like heavy chains weighing me down, trying to keep me imprisoned. Conversely, when I can go to a learning space, I know I have a purpose: the purpose of breaking out of the cycle. But I need your help to do it."

*(*not his real name)*

To ensure a nationally consistent approach in relation to preventing discrimination in the performance of policing duties, the Commonwealth should also coordinate a program of work with State and Territory governments to amend the governing legislation for police in each state and territory to impose a duty on police to exercise their powers and functions without discrimination, regardless of a person's alleged criminal status or other circumstances.

Part 5 – Exemptions

Exemptions

Consultation questions

33. Could any of the permanent exemptions be narrowed or updated, while balancing other policy considerations?
34. Should the Australian Human Rights Commission be given the power to grant special measures certificates?
35. Should a definition for special measures be added to the Disability Discrimination Act?
36. Should a definition for temporary exemptions be added to the Disability Discrimination Act?

Recommendation

30. The Australian Government should initiate a detailed review of the exemptions in the *Disability Discrimination Act 1992* (Cth) including:
    a) the operation and wording of section 46 to ensure that duty holders must design and create their policies and products only following a rigorous analysis of appropriate, relevant and up to date actuarial and statistical data;

b) the operation and wording of section 47 in respect of ensuring that policing and the broader justice system are covered as duty holders to the greatest extent;
c) the operation of section 52 insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination;
d) giving consideration to renaming the 'exemptions' as 'exceptions' in line with other anti-discrimination law;
e) conducting the review with particular reference to the rights recognised by the Convention on the Rights of Persons with Disabilities and the Concluding observations on the combined second and third periodic reports of Australia made by the United Nations Committee on the Rights of Persons with Disabilities.

The Issues Paper sets out the list of ten permanent exemptions under the DDA, and that they are intended to affect a careful balancing of competing public policy priorities.

We support the AHRC's *Free and Equal paper* recommendation that 'all permanent exemptions under federal discrimination laws be reviewed on a periodic basis to ensure they remain appropriate',[37] and that a permanent exemption should only exist in circumstances where they are strictly necessary and align with the objectives of the CRPD.

We are of the view that all permanent exemptions require urgent consideration, review and reform. We make particular reference to the 'superannuation and insurance' exemption at s 46 requires reform due to the problems with insurers relying on out of date or insufficient 'reasonable actuarial or statistical data'.[38] We refer to the VEOHRC's 2019 investigation into mental health discrimination by the travel insurance industry *Fair-Minded Cover* as an example of how people with disabilities can be discriminated against when obtaining insurance cover – and where insurers are not undertaking due diligence to obtain the appropriate actuarial data to "demonstrate a sufficient basis to claim the data exception".[39]

The Investigation found that, in an eight-month period, these travel insurers sold more than 365,000 policies containing blanket exclusion terms that discriminated against people with mental health conditions.[40] VEOHRC found that insurers must "design and issue travel insurance policies that are based on rigorous analysis of appropriate actuarial and statistical data, which is relevant and up to date".[41] The DDA could reform its insurance exception to better build this requirement into the terms of the defence rather than merely relying on 'reasonable' data.

We also consider the existing exemption for 'acts done under statutory authority' at s 47 will require further review and reform in relation to how it will intersect with any provision covering policing and the broader justice system including functions performed by

Corrections Victoria and child protection authorities, as recommended above at Question 31 of this submission.

We support the DRC recommendation 4.31 regarding reviewing the Migration Exemption.

We support the DRC recommendation for the Australian Government to initiate a further review of the operation of section 52 of the DDA.

Further review should specifically consider and ensure any exemptions under the DDA do not adversely compound the disadvantage experienced by migrant workers who are exploited in the workplace and sustain an injury because of that exploitation in future visa or citizenship applications.

Reform should consider all permanent exceptions in light of the overall purpose in discrimination law and Australia's obligations as a signatory to the CRPD to promote equality and fair treatment, having regard to whether they remain necessary, reasonable and proportionate.

Special measures

We support the AHRC being given the power to grant 'special measures' certificates. This power may assist in providing clarity to duty-holders on whether their conduct will fall within the meaning of a 'special measure'.

We support adding a definition of 'special measure' into the DDA, subject to any definition being aligned with relevant international law obligations under the CRPD and is developed in consultation with the disability community. We highlight the Victorian EOA which provides for an approach under which a person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, and that this conduct does not constitute discrimination and does not require an exemption finding or declaration from the Victorian Civil and Administrative Tribunal confirming the lawfulness of the conduct.[42]

We support adding a definition of 'temporary exemption', to differentiate them from 'special measures,' and to avoid any confusion amongst duty holders, subject to a provision allowing for review of a 'temporary exemption' during the exemption period, as a means of safeguarding and ensuring fit for purpose operating of all exemptions, whether temporary or permanent.

Part 6 – Modernising the Disability Discrimination Act (&)

Part 7 – Further opportunities for reform

Further reform options

Consultation questions

49. What additional guidance materials should be provided to the community, including duty holders, about the operation of the Disability Discrimination Act or specific amendments proposed in this paper?
50. How can we ensure the Disability Discrimination Act remains fit-for-purpose into the future?

Recommendations

31. That the *Disability Discrimination Act 1992* (Cth) be amended to restrict the use of non-disclosure agreements (NDAs).

32. That time limits for making complaints under the *Disability Discrimination Act 1992* (Cth) be extended to six (6) years in line with the *Fair Work Act 2009* (Cth) general protections provisions.

In order for the DDA to remain fit-for-purpose, it is imperative there is:

- Regular regulatory review: Regular reviews of the DDA should be prescribed after a reasonable period (i.e. every five years) to examine the effectiveness of the changes made with feedback and input from stakeholders and the disability community. This is to ensure that the DDA remains fit for purpose and isn't 'stuck in time' with the ability to react to new and emerging technologies (for example, consideration of changing technologies such as AI and recruitment bias).
- Mandatory Training & Resources: Introduction of government-funded disability confidence training delivered through the AHRC or similar body, which provides clearer guidance for employers and other duty-holders on their obligations under the DDA such as their positive duty. Drafting policies and conducting training without addressing the structural and cultural drivers of inequality is a particularly problematic approach for people with disability who experience intersecting forms of disadvantage, such as racism, gender-based violence, or economic insecurity. The AHRC must therefore develop and deliver disability confidence training to support systemic, structural change within organisations and duty holder communities.
- Reporting & Accountability: Introduce transparency mechanisms similar to WGEA for disability employment requiring employers, service providers, education providers, and all other duty holders under the Act to report on certain information, such as workforce composition data, progress on action plans, special measures implemented and complaints made. If such data were made publicly available, within the constraints of compliance with privacy legislation, it is likely compliance would be encouraged.
- JobAccess & Support Services: It is imperative that there be better promotion and utilisation of existing resources like JobAccess and the Employment Assistance Fund amongst both people with disabilities and employers. These schemes are in place to minimise any financial burden on the employer, and should be used accordingly, particularly in respect of the unjustifiable hardship provisions.
- Centre lived experience: All DDA reforms and consultation needs to be guided by the leadership and participation of people with disability and their community. The DDA, in its current form, often falls short of providing the protections people with disabilities need

to access justice equitably. Justice must be accessible to everyone. For people with disabilities, this means having legal safeguards that actively uphold their rights and dignity. A stronger framework will help ensure that people with disabilities can participate fully and equally in all aspects of life.

- Invest in legal assistance: The Government must invest in legal assistance such as community legal centres so that people with disability can access their rights, to ensure the laws achieve their aim. Without targeted change and investment in both legal assistance and education, the protections offered by the DDA are at risk of remaining largely theoretical. Accessible, well-resourced legal and advocacy services are essential to bridging the gap between legal frameworks and meaningful outcomes for people with disability.
- Restrictions on non-disclosure agreements: The DDA should be amended to restrict the use of non-disclosure agreements (NDAs). The use of non-disclosure agreements contributes to a culture of concealment and silence, by restricting the way those who have experienced discrimination can speak about their experience, both in public and private settings. NDAs have the affect of restricting people with disability who have experienced discrimination from freedom to choose how to resolve their disputes, from telling their story, and sharing their experiences. Amendments should be in line with the Victorian NDA legislation which has recently been introduced into Parliament.
- Extend time limits for making complaints: It can be difficult for people with disability to obtain legal advice and take legal action within existing time limits. Due to the complexity of discrimination law and the various options for legal redress, it is also common for people to delay seeking legal advice. Extending the time limit for making complaints would therefore improve access to justice for people with disability. We recommend extending the time limit to six (6) years to be better in line with the FWA general protection provisions.

Please contact us by email (workersrights@westjustice.org.au) if you have any questions about this submission.

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END NOTES

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[3] *Fair Work Act 2009* (Cth), ss 81, 81A, 82A.
[4] Belinda Smith, Rosemary Kayess, Domnique Allen, and Adriana Orifici, 'Bearers of Rights, not just babies: Pondering pregnancy as an impairment to explore pathways to equality', *Alternative Law Journal,* 2024, Vol 49(3), 192-197, 195.
[5] *Bevilacqua v Telco Business Solutions (Watergardens) PL (Human Rights*) [2015] VCAT 269 [192]
[6] Ibid*,* [192]-[199].
[7] *Disability Inclusion Act 2024* (ACT), Dictionary (Schedule).
[8] See paras (e) and (f) of current definition in section 4 of the DDA.
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[14] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free and Equal Final Report 2023*, Recommendations 3 and 4 and Appendix 2: Model Human Rights Act for Australia.
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[17] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
[18] *Respect@Work Report,* above n15, p 479
[19] Australian Human Rights Commission, ***Speaking from Experience Report****: What needs to change to address workplace sexual harassment*, June 2025 (the AHRC has also called for legislative reform to introduce civil penalties for breaches of the positive duty), p 67 - 68.
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[21] Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 2.
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