Disability Discrimination Act 1992 Review

National Legal Aid Submission

7 November 2025

Acknowledgement of country

National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders both past and present.

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www.nationallegalaid.org

Executive Summary

Every day, Legal Aid Commissions assist people with disability who have experienced discrimination in workplaces, schools, housing, services, policing, prisons and other areas of public life. We see how gaps in the law and enforcement frequently leave people continuing to face barriers and unable to access real remedies.

National Legal Aid (NLA) welcomes the Australian Government's review of the *Disability Discrimination Act 1992 (Cth)* (DDA). We strongly support legislative reforms that implement and build on the Disability Royal Commission (DRC) recommendations and align with the UN Convention on the Rights of Persons with Disabilities (CPRD).

There is significant scope to improve the way the DDA is operating to protect against discrimination for people with disability. Reform must shift the DDA from a complaints-driven system that relies on individuals - often without resources and against well-resourced respondents - to carry the weight of systemic problems, towards proactive prevention of discrimination, systemic compliance and access to justice. We are calling for 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, clear legal tests that do not unfairly burden complainants, stronger Disability Standards and effective remedies - so that inclusion is planned for, measured and enforced.

While reform of the DDA is welcome, Australia needs a modern, proactive and rights-affirming equality framework. We urge the Australian Government to consolidate and streamline federal discrimination laws into a single, coherent statute, and adopt a Federal Human Rights Act, to ensure that the DDA operates within a broader human rights framework that protects equality and dignity for all people, including people with disability.

We call for any reforms to the DDA to centre the voices and rights of people with disability, and to prioritise prevention and systemic change. We welcome the opportunity to work with government to ensure DDA reforms make a real difference in the daily lives of people with disability.

Summary of recommendations

National Legal Aid makes the following recommendations:

A more equitable, accessible and proactive discrimination framework

1. That government streamline, consolidate and update Australia's federal discrimination laws into a single statute to build a more equitable, accessible and proactive discrimination framework.
2. That government commit to progressing a federal Human Rights Act to provide for a more complete and streamlined equality framework that safeguards and promotes fundamental human rights, including for people with disability.

Definition of disability

3. That the definition of disability be modernised to move away from medicalised and deficit-based language.
4. That disability should be broadly defined in the DDA, 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.
5. That any reforms to the definition of disability be undertaken in close consultation with the disability community.
6. 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

7. That the DDA be amended to expressly recognise intersecting discrimination and allow complaints to be brought for multiple or combined protected attributes.
8. The definitions of direct and indirect discrimination in the DDA should be amended to allow a persons' attributes and characteristics to be considered as part of the legal test by including the following: *For the purpose of this section, in determining if a person has experienced a detriment because of their disability, this may be a cumulative detriment which is because of a combination of their disability and one or more of the following other characteristics of the person including; race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin*.
9. That the government undertake further consultation in relation to whether section 351 of the *Fair Work Act 2009 (Cth)* should be amended to clarify that tests of direct and indirect discrimination for all attributes in federal equality laws are able to be imported to a *Fair Work Act 2009 (Cth)* claim.

Definition of direct discrimination

10. That the DDA be amended to remove the comparator test.

11. That the DDA adopt the definition of direct discrimination in section 8 of the *Equal Opportunity Act 2010 (Vic)* including the unfavourable treatment test.
12. That the DDA adopt sections 9(4) and 10 of the *Equal Opportunity Act 2010 (Vic)* to confirm that motive or awareness is not relevant when considering whether a person discriminates.
13. That the DDA objectives be strengthened and broadened in line with the *Equal Opportunity Act 2010 (Vic)* – for example to include that an object of the DDA is to encourage the identification and elimination of systemic causes of discrimination.
14. That the burden of proof should be rebalanced by adopting provisions based on section 47A of the *Respect at Work and Other Matters Amendment Act 2024 (QLD)*.

Definition of indirect discrimination

15. That the DDA definition of indirect discrimination be amended to: remove the comparator test; adopt the detriment test; and replace the reasonableness element and unjustifiable hardship defence with a legitimate and proportionate test.
16. That the DDA definition of indirect discrimination be amended to clarify that policies or practices that disproportionately disadvantage people with disability may constitute discrimination, even if unintentional, and include that 'creating an environment in which a person with a disability is disadvantaged is taken to be imposing a condition or requirement'.
17. That DDA amendments to the definition of indirect discrimination be accompanied by clear, plain language guidance and that examples be developed and included to support understanding and implementation by people with disability and duty holders.
18. That the DDA be amended to remove subsection 6(1)(b) in relation to a person's ability to comply.

Interpreting the DDA in line with the CPRD

19. That the DDA should be amended to clarify that one of its aims is to give effect to the Convention on the Rights of People with Disabilities.

Positive duty for duty holders to prevent discrimination

20. That the DDA definition of indirect discrimination should be amended to: remove the comparator test; adopt the detriment test; and replace the reasonableness element and unjustifiable hardship defence with a legitimate and proportionate test.
21. That the DDA should be amended to include a positive duty for duty holders to eliminate discrimination.
22. That the positive duty should have broad application to all duty holders.
23. That the AHRC should be granted the power and resourced to: conduct own motion investigations; compel evidence; agree to enforceable undertaking; issue compliance notices, and issue administrative penalties.
24. That the AHRC should be required to publish reports on its investigations into organisations.

25. That Guidelines should be given greater regulatory force.
26. That affected individuals and registered organisations or unions should be able to bring their own claims for breach of the positive duty.
27. That government implement Recommendation 50 of the Australian Law Reform Commission's Report 'Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence', that section 46PO of the *Australian Human Rights Commission Act 1986 (Cth)* 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.
28. That the *Australian Human Rights Commission Act 1986 (Cth)* be amended such that a person found to have contravened the positive duty in the DDA may be ordered to pay a civil penalty.
29. That government consider how models of liability (including accessorial and vicarious liability) could be utilised in conjunction with a positive duty in the DDA to place a clearer obligation on duty holders to proactively prevent and address disability discrimination including in complex labour hire and other precarious work arrangements.
30. That liability for unlawful conduct under the DDA be attributed to duty holders in circumstances where they have failed to comply with the duty, as well as when they have failed to take all reasonable steps to prevent the contravention.
31. That government commit adequate resources to the development of educational and guidance materials to support the implementation of the positive duty.

Strengthening the duty to provide adjustments

32. That the DDA be amended to insert a new section 6A, modelled on section 20 of the *Equal Opportunity Act 2010 (Vic)*, making it unlawful to fail to provide adjustments. The duty should be stand-alone and enforceable, not contingent on proving causation.
33. The duty to make adjustments should apply consistently across all areas of public life.
34. That the word 'reasonable' should be removed from the duty to provide adjustments
35. Reforms should include a requirement for duty holders to consult about adjustments with the person requesting them, require transparent decision-making including timely written reasons, and review rights for refusals.
36. The duty to make adjustments should include an obligation on duty holders to undertake an assessment to identify the scope of and need for the adjustment.
37. The DDA duty to provide adjustments should be accompanied by guidance for duty holders and people with disability, as well as clear examples.
38. In designing the standalone duty, the interoperability of DDA 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 Disabiity Insurance Agency on the basis that they should instead be provided by way of an adjustment under the DDA.

Definition of and considerations for unjustifiable hardship

39. That the DDA be amended to implement Recommendation 4.32 of the DRC.
40. That the DDA amendments in relation to unjustifiable hardship provisions should clarify that mere inconvenience, or the expenditure or resources, should not in and of itself constitute unjustifiable hardship.
41. That, if a respondent is seeking to rely on the 'unjustifiable hardship' exemption, the DDA should compel disclosure by the respondent of financial documentation regarding the proposed cost of special services and facilities/adjustments or other relevant information.

Inherent requirements of work

42. That the DDA be amended to require consultation with the employee before making employment decisions, to ensure transparency and support informed, fair outcomes, and that "consultation" be defined to require meaningful engagement with the employee.
43. That the DDA be amended to clarify the concept of inherent requirements, including through practical examples, to assist both employers and employees in understanding their rights and obligations.
44. That the DDA be amended to encourage flexible work arrangements and inclusive recruitment practices, to promote equal participation and reduce barriers for people with disability, including by amending subsection 15(2)(b) of the DDA to include reference to denying opportunities for reduced hours or part-time work.
45. That section 351 of the *Fair Work Act 2009 (Cth)* be amended to ensure consistency with the DDA.
46. That the DDA be amended to make it clear that duty holders must limit requests for information to that which is necessary to assess whether the person can perform the inherent requirements of the role and/or identify the adjustments required.

Exclusionary discipline and suspension

47. That concepts of exclusion and exclusionary discipline be defined in the DDA to include expulsion, formal and informal suspensions, seclusion and restricted attendance.
48. That DDA amendments adopt the principle that exclusionary discipline must be avoided unless necessary as a last resort to avert the risk of serious harm to the student, other students or staff when all other measures, interventions, supports and options have been exhausted and documented.
49. That guidelines be developed to ensure adjustments are available and appropriately used in schools, that schools comply with their obligations under the Disability Standards for Education. Reforms, to require transparency around the provision of adjustments in schools and to require streamlined complaint processes for when requests for adjustments are refused.

Offensive behaviour and vilification protections

50. That the DDA be amended to give effect to the DRC's Recommendations 4.29 and 4.30 to implement clear civil prohibitions on offensive conduct and vilification based on disability.
51. That any exemptions to prohibitions on offensive, harassing and vilifying behaviour should be considered only where necessary and narrowly framed, such as to protect legitimate freedom of expression - consistent with exemptions in the *Racial Discrimination Act 1975 (Cth*).
52. That the AHRC be resourced to provide clear guidance on conduct likely to fall within and outside of exemptions in the DDA.
53. That 'public act' be defined to include online spaces.
54. That 'conduct' be defined to include conduct that is seen or heard by the public in addition to conduct that is intentionally directed to the public.

Services provided by police

55. That section 29 of the DDA be amended to make it unlawful for a person who performs any function or exercises any power or responsibility under the authority of government 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.
56. That the Commonwealth 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

57. That government ensure the DDA, *Migration Act 1958 (Cth),* and Migration Regulations are consistent with its obligations at international law and in particular Article 5 of the CRPD.
58. That the DDA (and the *Insurance Contracts Act 1984 (Cth))* be amended to ensure that the statistical and actuarial evidence and other material relied upon by an insurer under the exemption in section 46 of the DDA be made available on request, and that this evidence be regularly reviewed for currency.
59. That the AHRC be given the power to officially approve special programs that help people with disability – like targeted jobs or housing initiatives – by giving out certificates that confirm these programs are lawful, accompanied by clear rules and oversight.
60. That the DDA be amended to include clear definitions for special measures and temporary exemptions.
61. That the legislative process for granting temporary exemptions should be streamlined by establishing clear, transparent criteria to guide decision-making, and reforms should clarify that temporary exemptions should only be provided in genuinely exceptional cases where compliance is not practically achievable in the immediate future.

Assistance animals

62. That the requirement for evidence of "standards of hygiene and behaviour that are appropriate for a public place" should be removed.
63. Legislative amendments should broaden the definition of assistance animals to better reflect lived experience and evolving case law, including recognising assistance animals that support psychosocial disabilities and are trained by their owners.
64. Guidance materials should: outline acceptable forms of evidence that an animal meets the criteria of an assistance animal, including behavioural reliability and the nature of support provided—not just formal training credentials; provide practical examples of assistance animals across a range of disability types; clarify evidentiary expectations for entry into public spaces; and offer duty holders clear protocols for assessing compliance without infringing on individual rights.
65. Duty holders should be educated on the broader scope of assistance animals to avoid unlawful exclusion based on assumptions about certification.
66. Specific training organisations should be prescribed under the Disability Discrimination Regulations, however regulations should allow for multiple pathways to recognition, including owner-led training.
67. The prescription of training organisations must ensure that these services are accessible, affordable, and available to people in regional and rural areas

Disability Standards

68. That the AHRC be granted investigation and compliance powers, power to issue enforceable undertakings, and the ability to seek penalties.
69. That the AHRC be resourced to issue compliance guidelines and systemic recommendations.

Other options for reform

70. That subsection 13(4) of the DDA be removed.
71. That the AHRC be provided with discretion to accept a complaint that has previously been lodged in a state jurisdiction.
72. That the DDA be amended to restrict the use of non-disclosure agreements (NDAs), modelled on the best practice components of section 14B of Ireland's *Employment Equality Act 1998*.
73. Time limits for making complaints under the DDA be extended to six years.

Implementation

74. That in preparing for the implementation of any reforms as a result of the review of the DDA, the government commit to:
    a. Resourcing and support: A critical component of any reforms will be funding the AHRC to educate, audit and enforce; investing in accessible information; and ensuring dedicated funding for specialist advocacy and legal assistance.

b. Practical measures to support compliance: For example, clear statutory guidance on what "reasonable and proportionate" looks like in common settings, and examples of reasonable adjustments.

c. First Nations leadership: Government must partner with and fund First Nations organisations to ensure reforms centre culture, community control and on-Country accessibility, and commit funding for ACCOs to provide legal assistance for Aboriginal and Torres Strait Islander people with disability to access civil justice remedies including for disability discrimination.

d. Government leadership: Government should lead the way by embedding accessibility in procurement, ensuring agency compliance and strengthening Model Litigant obligations in disability matters.

e. Evaluation: Government must resource an independent evaluation framework so both government and the community can see whether reforms are working.

About National legal Aid

Who are we?

National Legal Aid represents the eight independent Legal Aid Commissions in each state and territory of Australia. These Commissions work collaboratively to deliver essential legal services, making sure that justice is accessible to all Australians. We strive to support those who are most in need, ensuring fair and equitable legal outcomes. Legal Aid Commissions are independent, statutory bodies established by respective state or territory enabling legislation and funded by Commonwealth and State or Territory governments to provide legal assistance to people.

What do we do?

Legal Aid Commissions are the largest providers of legal services to people with disability across Australia, including grants of aid for ongoing legal representation, duty lawyer services at courts and tribunals, legal advice, family dispute resolution conferences, community legal education, and information and referrals. Each year, we provide 1.7 million legal assistances. 25 percent of our clients receiving legal representation have a disability.[1] The Australian Government also funds legal aid commissions in each state and territory to provide specialist legal advice and representation for NDIS appeals to the Administrative Review Tribunal (ART).

Legal Aid Commissions create resources, in consultation with clients with disability lived experience, which address specific legal issues that impact on people with disability in a range of formats that address different communication needs, including audio description, Auslan, easy read, videos with closed captions and website-based audio functions. Legal aid commissions run legal education sessions for disability organisations and community members to help people identify, understand and access legal services.

Why do we do it?

Our shared vision is that all people experiencing disadvantage have access to legal assistance and fair justice outcomes that contribute to safe, thriving families and communities. We are the 'safety net' of the legal system – there to assist families and individuals in times when they are in highest need. Our clients include people most in need of legal assistance including First Nations peoples, victim-survivors of domestic and sexual violence, and people with disabilities.

[1] National Legal Aid, Strategic Plan 2025-2030.

Our response to the consultation questions

We welcome the Australian Government's review of the *Disability Discrimination Act 1992* (Cth) (DDA). We strongly support legislative reforms that implement and build on the Disability Royal Commission (DRC) and align with the UN Convention on the Rights of Persons with Disabilities (CRPD). However, we emphasise the highest priority for reform of Australia's discrimination laws is the need to streamline, consolidate and update federal discrimination laws into a single statute to build a more equitable, accessible and proactive discrimination framework. Alongside this, Australia needs a federal Human Rights Act to provide for a more complete and streamlined equality framework that safeguards and promotes fundamental human rights, including for people with disability. We urge the Australian government to commit to progressing these necessary and important reforms.

In the interim, there is significant scope to improve the way the DDA is operating to protect against discrimination for people with disability. Reform must shift the DDA from a complaints-driven system that relies on individuals- often without resources- to carry the weight of systemic problems, towards proactive prevention of discrimination, systemic compliance and access to justice.

Recommendations

1. That government streamline, consolidate and update Australia's federal discrimination laws into a single statute to build a more equitable, accessible and proactive discrimination framework.
2. That government commit to progressing a federal Human Rights Act to provide for a more complete and streamlined equality framework that safeguards and promotes fundamental human rights, including for people with disability.

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?

We support strengthening and modernising the definition of disability in the DDA to remove deficit-based language.

Disability should be defined in line with the *Convention on the Rights of Persons with Disabilities (CRPD)*. The definition should move away from medicalised or deficit-based language (such as "malfunction") and reflect a social and human rights model.

We agree that some of the language used in the DDA to describe disability—such as "malfunction," "malformation," and "disfigurement"—is outdated and problematic. We support the adoption of more inclusive language in alignment with contemporary understandings of disability.

Any changes must ensure that the definition remains broad and accessible to complainants. It is critical to ensure that any amended definition does not inadvertently create additional barriers, steps or difficulties that might:

- Make it harder to prove that a person has a disability (for example, by needing to establish a 'barrier' in addition to providing medical evidence to support a claim)
- Permit claims by people who don't in fact have a disability, and/or
- Prevent clarity around what constitutes a credible claim.

In developing a definition of disability, we recommend consideration of the following factors:

- Alignment with the CRPD
- Inclusivity of psychosocial, episodic, and invisible disabilities
- Avoidance of outdated or stigmatising terminology
- Flexibility to accommodate evolving understandings of disability (for example, the definition should be non-exhaustive and should explicitly include addiction, adequate inclusion of neurodiversity, people living with HIV and other blood borne diseases, and people with genetic pre-dispositions)
- The need to recognise that people may be living with multiple disabilities
- The views of people with disability and representative organisations.

Our suggested approach is to amend the definition of disability to acknowledge the social model of disability, accompanied by a detailed and precise definition that includes updated language, an inclusive list of examples, and clear mechanisms to establish evidentiary thresholds to progress claims easily.

We recommend that any reforms to the definition of disability be undertaken in close consultation with the disability community.

Definition of disability in the *Fair Work Act 2009 (Cth)*

We recommend 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, to ensure consistency.

Recommendations

3. That the definition of disability be modernised to move away from medicalised and deficit-based language.
4. That disability should be broadly defined in the DDA, 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.
5. That any reforms to the definition of disability be undertaken in close consultation with the disability community.

6. 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

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?

We consider that consolidation and harmonisation of federal anti-discrimination laws is required to address intersecting and compounding discrimination.

In the absence of this important reform, it is our view that the DDA should expressly recognise intersectional discrimination and we support the introduction of a clear ground in the DDA that provides for complaints about discrimination on the basis of combined (intersectional) attributes and characteristics.

Many legally aided clients experience multiple forms of disadvantage and discrimination. For example, a person may experience discrimination on the ground of disability, as well as their gender or cultural background. This discrimination can be compounded by geographic location, language barriers, different cultural understandings of work entitlements, the impacts of being subjected to domestic violence, and a lack of awareness of legal rights and support services. It is our experience that anti-discrimination law often fails to acknowledge these compounding impacts and that the current law is inconsistent with how discrimination is experienced in practice by many people with intersecting identities and across protected attributes with uniquely harmful consequences.[2]

Natalie's story* - CALD and disability

Natalie is deaf and her primary means of communication is the sign language used in her birth country. She has limited knowledge of American sign language and does not know Auslan (Australian Sign language). She has limited English literacy, because English is not the main language used in her birth country.

Natalie is married to an Australian citizen with whom she has two children. Natalie holds an Australian tourist visa which expires in less than a year. She has recently separated from her husband and both children remain with her. Before their separation, Natalie was supported by her husband who received Centrelink payments for himself and their children. Now that Natalie is separated she is not entitled to a Centrelink payment in her own right, because she

[2] This is also discussed in Blackham, Alysia; Temple, Jeromey --- "Intersectional Discrimination in Australia: an Empirical Critique of the Legal Framework" [2020] UNSWLawJl 28; (2020) 43(3) UNSW Law Journal 773.

does not meet the residence test. Natalie came to legal aid for help to apply for child support from her husband.

Legal Aid NSW advised Natalie that she could make an online child support application using the form on the Services Australia website. Several weeks after Natalie lodge her

application, she received a text message on her mobile phone telling her that Services Australia would be calling her about her application. She could not reply to the text message and when the call came through she could not communicate with the child support officer, and they ended the call. This happened several times. Natalie's primary school aged daughter tried calling Services Australia after school, but she was not able to get through. Natalie could not contact Services Australia using the National Relay Services because this is a service for people who use Auslan, and does not provide interpreters for other sign languages. Natalie tried making an online complaint to Services Australia, but she could not use the form without including her reference number. As this was a new child support application, she did not know her reference number.

Legal Aid NSW contacted Services Australia on Natalie's behalf. We were advised that Natalie's application had been "proactively withdrawn" because they had not been able to talk to her about her application. No letter had been sent to Natalie because she had indicated in her application that she had safety concerns, and Services Australia did not know the exact nature of her safety concerns or her communication challenges because they had not been able to speak to her on the telephone. Natalie had no way to find this out herself.

Services Australia agree to reactivate and consider Natalie's application after we explained her circumstances and indicated our view that by not providing her with a suitable way to access their service, they had subjected her to discrimination on the basis of her disability. Services Australia do not usually provide face to face services for child support clients, but have now offered Natalie a video conference at her local Centrelink office, using her preferred interpreter. This possibility is not mentioned anywhere on the Services Australia website.

*This case study has been de-identified

Gloria's story – intersectional discrimination in employment

Gloria was a client of Victoria Legal Aid whose experience illustrates how discrimination on the ground of disability can be compounded by language barriers, a different cultural understanding of work entitlements, and a lack of awareness of legal rights and support services.

Gloria was experiencing stress at work, which culminated in her being performance managed for alleged underperformance. This included imposing new morning shifts on her, which she felt she could not do. Gloria – an older woman – contacted us with concerns that the performance management was unlawful discrimination based on her age, as her colleagues had allegedly made comments about her age.

Once Gloria started talking with our lawyer, with the assistance of an interpreter, she shared that the issues at work had caused her to suffer serious anxiety and she had been hospitalised as a result. She also clarified that the reason she felt unable to work the new morning shifts was because she was currently experiencing insomnia due to workplace stress, which meant the early morning roster was unsuitable.

Once the lawyer assisting Gloria knew this, they were able to negotiate an outcome with the employer that responded to her needs, referring to Gloria's rights to reasonable adjustments and accommodation due to her disabilities (anxiety and insomnia), as well as her claims of age discrimination. Gloria's complaint was resolved successfully, with the employer apologising for the impact of their treatment on her and agreeing to a more suitable roster.

Gloria said that her cultural background affected her experience because she had been educated that she should follow the instructions of her employer. Gloria said "even when I face this issue, I do not know how and what can I do until my previous colleague told me, maybe I can get help from Legal Aid".

Gloria also thinks that the language barrier meant that it was harder for her to get help from others.

*This client story has been deidentified

Presently, a claim of discrimination on intersecting attributes is not expressly provided for in the DDA. It is difficult to make complaints of discrimination based on multiple attributes because:

- A complainant may not be able to identify exactly why they experienced the conduct, based on their intersecting identities and attributes.
- A complaint would need to be made under a number of separate statutes, each with differing definitions, defences, and liability provisions.
- Where complaints are made on the basis of more than one attribute, procedural difficulties can arise in prosecuting these claims.

These difficulties add further barriers to obtaining redress for people with disability and this is particularly pronounced for those experiencing the most marginalisation and disadvantage in our communities. Explicit acknowledgement of intersectional discrimination in the DDA is an important step in more effectively preventing and responding to the discrimination experienced by people with a disability. Ensuring individuals can make a complaint on the basis of more than one attribute allows the compounding effects of discrimination or vilification on the basis of multiple protected attributes, such as disability, gender and race, to be recognised.

Ibrahim's story - CALD and disability

Ibrahim* is a migrant on a temporary visa with no written or spoken English. Due to an injury for which he was hospitalised for several months, Ibrahim has several serious ongoing health conditions and is now mute. His primary means of communication is in writing in his native language. Ibrahim's support worker, Justine, sought assistance from Legal Aid on Ibrahim's behalf when he became aware of Ibrahim's child support debt.

In order to communicate with Ibrahim, meetings needed to be in person and they were attended by Justine and a translator. During the meeting, information from Legal Aid would be translated verbally into Ibrahim's native language, he would then write his responses in his native language, and the translator would read that text and translate it for us.

Ibrahim had no way of communicating his circumstances to Child Support because:

- Child Support do not have a physical office that a person can attend, and they do not facilitate of face-to-face meetings.
- Child Support clients are only able to communicate with Child Support by phone. Ibrahim was unable to call them on the phone to request a translator as he could not speak.
- All Child Support correspondence is in English. Ibrahim was unable to write to Child Support as he cannot write in English. He was also unable to read any of the correspondence sent to him by Child Support, as the correspondence was in English.
- There is no Child Support information in his language on the Services Australia website.

As a result of not being able to communicate with Child Support due to his disability and the language barrier, Ibrahim had a substantial Child Support debt that had been incurring late payment penalties.

*This case study has been deidentified.

Amendments to the DDA should reflect:

- That a person may experience discrimination on the grounds of one or more disabilities, and/or on the grounds of disability and one or more other attribute or characteristic.
- The unique and compounding harm that can result from intersectional discrimination.

Amendments to the DDA to recognise additional attributes and characteristics for the purposes of intersectional discrimination should be non-exhaustive to enable additional attributes to be included as laws progress and expand.

We recommend that DDA protections for people with intersecting identities be strengthened by including a provision/s modelled on sexual harassment definitions[3] which allow for consideration of a person's other attributes and characteristics as part of the legal tests, for example:

In determining if a person has experienced a detriment because of their disability, this may be a cumulative detriment which is because of a combination of their disability and one or more of the following other characteristics of the person including; race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

[3] Section 28A, *Sex Discrimination Act 1984 (Cth)*.

We agree that removing the comparator test will assist to improve protections for people with disability. This is discussed in further detail below.

Other reforms that could strengthen protections for people with disabilities who have intersecting identities and to address compounding discrimination could include:

- Expanding protected attributes, for example to include physical features, lawful sexual activity, parental/carer/kinship status, socio-economic status, geographic location, homelessness, irrelevant criminal record, family violence victimisation.
- Development of judicial guidance that explicitly includes information on intersectional discrimination.
- Development of guidance materials and training for duty holders.
- Extending current anti-vilification protections (discussed further below) and introducing express provision allowing vilification complaints based on one or more attributes.
- Stronger protections in complaint-handling processes.

We recommend further consultation in relation to whether section 351 of the *Fair Work Act 2009 (Cth)* should also be amended to clarify that tests of direct and indirect discrimination for all attributes in federal equality laws are able to be imported to a *Fair Work Act 2009 (Cth)* claim.

Recommendations

7. That the DDA should be amended to expressly recognise intersecting discrimination and allow complaints to be brought for multiple or combined protected attributes.
8. That the definitions of direct and indirect discrimination in the DDA be amended to allow a persons' attributes and characteristics to be considered as part of the legal test by including the following: *For the purpose of this section, in determining if a person has experienced a detriment because of their disability, this may be a cumulative detriment which is because of a combination of their disability and one or more of the following other characteristics of the person including; race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.*
9. That government undertake further consultation in relation to whether section 351 of the *Fair Work Act 2009 (Cth)* should also be amended to clarify that tests of direct and indirect discrimination for all attributes in federal equality laws are able to be imported to a *Fair Work Act 2009 (Cth)* claim.

Amending the definition of direct discrimination

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?

Comparator test

We recommend the definitions of discrimination in the DDA should be simplified by removing the comparator test and replacing this with a simplified test that focuses on differential treatment due to disability. The comparator test is narrowly applied and highly technical. The requirement to identify a comparator in order to establish direct discrimination is a barrier to bringing a claim, particularly for self-represented litigants.

Based on experience in state and territory jurisdictions, NLA considers that removing the comparator test will:

- Result in a clearer test and a more accessible definition
- Simplify processes for both complainants and respondents, and
- Improve the ability for complainants to prove direct discrimination.[4]

Removing the comparator test may also improve protections for people with intersecting identities and attributes.

Adoption of the unfavourable treatment test

To improve clarity for duty holders and people with disability, the DDA definition of direct discrimination should be amended to adopt the definition in section 8 of the *Equal Opportunity Act 2010 (Vic)* (Victorian EOA), including the 'unfavourable treatment' test:

> **Section 8 – Direct discrimination**
>
> (1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.
>
> Examples
>
> 1 An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.
>
> 2 A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.
>
> (2) In determining whether a person directly discriminates it is irrelevant—
>
> (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;
>
> (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason

[4] See, for example Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2021) 44(2) Melbourne University Law Review 459.

The unfavourable treatment test in place in Victoria does not require consideration of the treatment afforded to other people who do not have a disability, in the same situation; instead what is required "is an analysis of the impact of the treatment on the person complaining of it."[5]

Victoria Legal Aid's Equality Law Program regularly advises clients that the test in the DDA is overly technical compared to the Victorian law. The absence of the "comparator" test in the prohibition on direct discrimination in the Victorian EOA means that claims of direct discrimination are more straightforward to articulate than those made under the DDA. The flow on effect of this is that advising clients, preparing legal claims and negotiating outcomes is also more straightforward. Given this, Victoria Legal Aid rarely advises individuals to pursue complaints of direct disability discrimination under the DDA, although advises individuals about this option when it is available to them.[6]

Mr Slattery's story - Direct discrimination – removal of comparator test – Victorian example

Mr Slattery was diagnosed with bipolar disorder, post-traumatic stress disorder, a compulsive disorder, a hearing impairment, and an acquired brain injury. Medical evidence before the Tribunal established that manifestations of Mr Slattery's disabilities included a compulsion to complain, irrational and anti-social behaviours, and aggressiveness. As a result, Mr Slattery made many written and verbal complaints to his local council, Manningham City Council, about what he identified as safety issues in the community and issues of corruption in the Council, and occasionally engaged with Council staff in an aggressive way. Manningham City Council banned Mr Slattery from attending all buildings owned, operated or managed by the Council (including public toilets, libraries and swimming pools) because of this conduct.

Victoria Legal Aid assisted Mr Slattery with a claim of direct disability discrimination under the Victorian Equal Opportunity Act. The Victorian Civil and Administrative Tribunal found that Manningham City Council directly discriminated against Mr Slattery because the ban was not a 'proportionate and tailored' response.[7]

As is seen in Mr Slattery's case, it is often a person's disability which causes the relevant circumstances to arise. Forcing applicants to prove that someone else in those circumstances would have been treated better if they did not have a disability is artificial and fails to adequately address the cause of the discrimination. If Mr Slattery had brought his claim under the DDA, the comparator test would have created significantly more uncertainty, and therefore risk, about the outcome of his case compared to a claim under the Victorian EOA. It would be a complicated exercise to identify an appropriate person without a disability with whom a comparison could be made given the intricately interwoven nature of Mr Slattery's disabilities, his behaviour and the discriminatory conduct.

Clarifying that motive or awareness of discrimination is irrelevant

[5] *Slattery v Manningham City Council* [2013] VCAT 1869, 53.

[6] Melanie Schlieger (Victoria Legal Aid), Witness Statement to Disability Royal Commission, 2021.

[7] *Slattery v Manningham City Council* [2013] VCAT 1869.

In addition to the adoption of section 8, we recommend that the following additional sections of the Victoria EOA also be adopted in the DDA to confirm that motive or awareness is irrelevant when considering whether a person discriminates:

- Subsection 9(4), which provides that in determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination, and
- Section 10, which provides that in determining whether or not a person discriminates, the person's motive is irrelevant.

These provisions are necessary to ensure that unconscious bias is clearly recognised as a form of unlawful conduct under the DDA (allowing the legislation to play a key role in addressing systemic discrimination); and that shifting the burden of proof as proposed below is focused more broadly on objective considerations, rather than just the subjective intent of the decision maker.

These Victorian EOA provisions, in conjunction with the objectives of the Act, have been interpreted in case law to support findings that unconscious bias constitutes unlawful discrimination. Victoria Legal Aid has also relied on these provisions to assert that respondents have acted unlawfully in relation to other protected attributes, and they provide an important advocacy tool for clients. We therefore recommend the DDA objectives be strengthened and broadened in line with the Victorian EOA[8] – for example to include that an object of the DDA is to encourage the identification and elimination of systemic causes of discrimination.

Burden of proof

We recommend that the burden of proof should be rebalanced to the respondent once the complainant has established a prima facie case. Currently, the burden rests on the complainant to prove all elements of discrimination, despite respondents (such as employers, service providers and government agencies) holding the relevant information, documents and witnesses. Shifting the burden to duty holders once a prima facie case is established aligns with other anti-discrimination frameworks (such as the UK) and will reduce barriers for complainants.

In order to rebalance the burden of proof, Legal Aids support the adoption of the provisions set out in section 47A of the *Respect at Work and Other Matters Amendment Act 2024 (QLD)*[9] (and in line with the *Equality Act 2010 (UK)*).

> **Burden of proof—general**
>
> (1) In a complaint proceeding, if there are facts from which it could be decided, in the absence of any other explanation, that the respondent contravened the provision of the Act the subject of the alleged contravention, the respondent is taken to have contravened the provision.
>
> (2) Subsection (1) does not apply if the respondent proves, on the balance of probabilities, that the respondent did not contravene the provision.

[8] See subsection 3(c), *Equal Opportunity Act 2010* (Vic)

[9] Note: this legislation has not commenced.

(3) Subsection (1) and (2) apply in addition to any other provision of the Act that provides for who has the onus of proving a particular matter.

Burden of proof—exemption

(1) An exemption is a defence to discrimination, and the person seeking to rely on the exemption has the onus of proving, on the balance of probabilities, that the exemption applies.

Legal Aids hold concerns about adopting provisions from the *Fair Work Act 2009 (Cth)* in relation to reversing the onus of proof. Judicial interpretation of the relevant *Fair Work Act 2009 (Cth)* provisions has been that evidence of the subjective state of mind, intent, or purpose of the decision-maker at the time the action was taken has been sufficient to satisfy the reverse onus of proof – i.e. if the decision-maker gives credible evidence that there was another reason for their action,[10] causation will not be established. Given this precedent, there is a risk that DDA amendments adopted from the *Fair Work Act 2009 (Cth)* provisions will not ultimately achieve sufficiently strong protections for people who have experienced discrimination on the basis of disability. This reinforces the need for DDA amendments to confirm that motive or awareness is not relevant when considering whether a person discriminates.

Recommendations

10. That the DDA be amended to remove the comparator test.

11. That the DDA be amended to adopt the definition of direct discrimination in section 8 of the *Equal Opportunity Act 2010 (Vic)* including the unfavourable treatment test.

12. That the DDA be amended to adopt sections 9(4) and 10 of the Victoria EOA to confirm that motive or awareness is not relevant when considering whether a person discriminates.

13. That the DDA objectives be strengthened and broadened in line with the Victorian EOA – for example to include that an object of the DDA is to encourage the identification and elimination of systemic causes of discrimination.

14. That the burden of proof in the DDA be rebalanced by adopting provisions based on section 47A of the *Respect at Work and Other Matters Amendment Act 2024 (QLD).*

[10] See, for example *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 676.

Amending the definition of indirect discrimination

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

Please expand on your response.

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?

The DDA definition of indirect discrimination should be amended to remove the comparator test. We recommend the DDA definition of indirect discrimination should adopt the detriment test, for example based on relevant provisions from Victoria's EOA. The definition should also clarify that policies or practices that disproportionately disadvantage people with disability may constitute discrimination, even if unintentional, and include that 'creating an environment in which a person with a disability is disadvantaged is taken to be imposing a condition or requirement'.[11]

We support replacing the reasonableness element and unjustifiable hardship defence with a legitimate and proportionate test (Option C). This approach is consistent with the DRC's recommendation to remove the reasonableness element, while ensuring that liability remains subject to an appropriate balancing mechanism.

A legitimate and proportionate test is well established internationally, including in Canada and the United Kingdom, and would align Australia's approach with these jurisdictions and with international human rights law including the CRPD. The benefits of adopting a legitimate and proportionate test include that this would:

- Provide a clearer and more principled framework than the current combination of reasonableness and unjustifiable hardship,
- Require that any discriminatory effect be justified by a legitimate aim, and
- Demand that the means used to achieve that aim be proportionate and necessary, offering a clearer and more structured framework.

To ensure any DDA amendments to adopt a legitimate and proportionate test achieve the intended impact, we recommend that clear, plain language guidance and examples be developed and included to support understanding and implementation by people with disability and duty holders.

[11] For example based on subsection 11(2) of the *Respect at Work and Other Matters Amendment Act 2024 (QLD)*.

We suggest including a non-exhaustive list of factors to be considered when assessing legitimate and proportionate,[12] including "any other relevant circumstances" and consideration of whether there were less discriminatory means available.[13]

Ability to comply

We support removing language in subsection 6(1)(b) of the DDA in relation a person's ability to comply to simplify and clarify the definition of indirect discrimination, in line with AHRC and QHRC recommendations. The language in the provision as currently drafted including 'does not or would not comply, or 'is not able or would not be able to comply' is confusing and potentially a deterrent to legitimate claims. A clearer formulation should focus on actual disadvantage or exclusion.

Recommendations

15. That the DDA definition of indirect discrimination be amended to: remove the comparator test; adopt the detriment test; and replace the reasonableness element and unjustifiable hardship defence with a legitimate and proportionate test.

16. That the DDA definition of indirect discrimination be amended to clarify that policies or practices that disproportionately disadvantage people with disability may constitute discrimination, even if unintentional, and include that 'creating an environment in which a person with a disability is disadvantaged is taken to be imposing a condition or requirement'.

17. That DDA amendments to the definition of indirect discrimination be accompanied by clear, plain language guidance and examples be developed and included to support understanding and implementation by people with disability and duty holders.

18. That the DDA should be amended to remove subsection 6(1)(b) in relation to a person's ability to comply.

Interpreting the DDA in line with the CRPD

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?

[12] See, for example, section 13 *Human Rights Act 2019* (QLD).

[13] Ibid.

NLA considers that a federal Human Rights Act and streamlined and consolidated federal discrimination laws would be the most effective reform to give effect to Australia's international obligations.

The DDA should make it clear that one of its aims is to give effect to the CRPD so that when courts and tribunals are applying the DDA they do so in a manner consistent with international human rights obligations. A beneficial interpretation clause would ensure the Act is applied in a rights-affirming manner

Recommendations

19. That the DDA be amended to clarify that one of its aims is to give effect to the Convention on the Rights of People with Disabilities.

Positive duty for duty holders to eliminate discrimination

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?

Legal Aids strongly support the introduction of a positive duty for duty holders to eliminate discrimination. Reform must shift the DDA from a complaints-driven system that relies on individuals- often without resources- to carry the weight of systemic problems, towards proactive prevention of discrimination.

Any positive duty provisions should be drafted in a manner that means they straightforward and easy to understand and apply.

The positive duty should include a requirement that duty holders consult with affected persons about steps being taken to comply with the positive duty.

Application

The positive duty should have broad application to all duty holders under the DDA, including public and private sector entities including education providers, employers, persons conducting a business or undertaking, and service providers.

Costs and benefits

Reforming the DDA to include a positive duty will have significant benefits for individuals and communities, for example through improving inclusion, respect, social cohesion and supporting better public health outcomes. Introducing a positive duty will also reduce complaints, and lead to stronger reputational outcomes for duty holders.

Potential costs include training and policy updates. We consider these to be outweighed by long-term gains of a positive duty, including more inclusive communities and less discrimination experienced by people with disability.

Exceptions

We consider that there should be exceptions or limits to the application of a positive duty, but these should be narrowly defined. Any exception should be carefully framed to prevent misuse and maintain the integrity of the positive duty.

Compliance and enforcement

To ensure the benefits of this reform are realised for people with disability, the introduction of a positive duty must be paired with appropriate powers of compliance and enforcement for the AHRC. Ensuring the AHRC is empowered and properly resourced to investigate and act on breaches of discrimination law will be critical to ensuring the reforms achieve the desired systemic impact. Allowing for enforceability would incentivise duty holders to take proactive steps to meet their obligations.

The AHRC should be empowered and resourced to:

- Commence an investigation regarding an alleged breach of the law without requiring an individual to lodge a complaint (an "own-motion investigation" function)
- Compel evidence
- To agree to enforceable undertakings
- To issue compliance notices, and
- To issue administrative penalties.

Empowering the AHRC to enforce compliance with discrimination laws would recognise the significance of disability discrimination as unlawful behaviour that can result in substantial harm to a person's health, safety and future successes, as well as on the broader community. The introduction of these compliance functions would remove the burden of enforcing discrimination laws from a person with disability and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation.

We recommend that the following also be considered in relation to compliance and enforcement:

- There is a clear need for greater transparency and visibility of enforcement. We recommend the reforms require the AHRC to publish reports on its investigations into organisations. This would

be consistent with approaches in other jurisdictions such as the VEOHRC and the UK Equality and Human Rights Commission.
- Consideration should also be given to giving guidelines greater regulatory force, through a requirement for guidelines for compliance to be taken into account in any application under the DDA.
- Education and guidance (including for duty holders and people with disability) will be critical to support the implementation of a positive duty.

Empowering individuals to bring claims for breach of the positive duty

We recommend that affected individuals and registered organisations or unions should be able to bring their own claims for breach of the positive duty. Experience from the *Sex Discrimination Act 1984 (Cth)* reforms indicates that without such a cause of action, enforcement is limited.

While the introduction of a positive duty will shift the enforcement burden off individuals, the DDA should recognize that there are circumstances in which individuals or organisations are able to bring a claim for a breach of the duty, for example:

- Allowing individuals or organisations with a 'sufficient interest' to pursue a claim for breach of the positive duty (drawing on the public sector equality duty under section149 of the *Equality Act 2010* in the United Kingdom).
- Allowing a person or organisation to bring a claim for breach of the positive duty, where they are also bringing a claim of discrimination, sexual harassment, victimisation, vilification or some other unlawful conduct under the DDA.
- Expanding the vicarious and accessorial liability provisions such that a duty holder will be liable for any breaches of the DDA, unless they can show they have complied with the positive duty (with the burden placed on the duty holder to establish this).

Systemic remedies and civil penalties

In addition to enhanced regulator powers and resources, and an enforceable positive duty, it is also important to empower courts to order systemic remedies and issue civil penalties to maximise outcomes and ensure consistency across federal jurisdictions.

Systemic remedies

The primary remedy ordered by the federal courts for unlawful discrimination is compensation. As Dominique Allen states, '[a]lthough compensation may address the victim's experience – though possibly not their legal costs – it is an ineffective means of remedying discrimination in society'.[14]

Systemic remedies have significant potential benefit for both individuals and society. For example, Victoria Legal Aid routinely seeks and obtains remedies requiring specific performance, and/or remedies that have a systemic impact for clients before matters get to hearing. These remedies include:

- Apologies
- Statements of service or references

[14] Dominque Allen, 'Remedying Discrimination: the Limits of the Law and the Need for a Systemic Approach' 29(2) March 2010 *The University of Tasmania Law Review* 83, 84.

- Agreement to undertake organisation-wide training
- Agreement to review and update internal policies or processes, and
- Independent audits.

These remedies are essential components of the overall framework to prevent further discrimination and harassment – either by the same perpetrator or another person in a permissive environment. They also play a critical role in enabling victim-survivors to move forward with their lives. However, courts are often reluctant to order such remedies.

The federal courts have broad power to make mandatory orders for remedies, including systemic remedies, under subsection 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). Examples of mandatory orders made in federal anti-discrimination cases include requiring modifications to premises,[15] orders to remove offending content from online,[16] and directions to apologise or communicate a correction.[17] State tribunals have also made orders for respondents to complete training.[18]

In its recent inquiry into justice responses to sexual violence in Australia, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (January 2025), the Australian Law Reform Commission (ALRC) observed that "the power given to courts by the Australian Human Rights Commission Act to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct."

However, the ALRC found that the availability of such orders "would be better understood by both litigants, their legal representatives, and the court if the availability of those kind of orders was made clearer by including them as examples of orders that can be made under s 46PO." To that end, the ALRC recommended that the remedies available under section 46PO be clarified to include the capacity for the court to make orders where appropriate:

a. restraining a respondent from engaging in particular conduct (such as approaching the applicant, or attending a particular place);

b. requiring a respondent to take part in a program of counselling, training, mediation, rehabilitation, or assessment;

c. requiring a respondent, conducting the business or undertaking in which the sexual harassment has occurred, to take corrective action to prevent further sexual harassment in the business or undertaking; and

d. requiring a respondent to pay a civil penalty in relation to a breach of a prohibition on sexual harassment in the *Sex Discrimination Act 1984 (Cth)*.[19]

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[15] *Haraksin v Murrays Australia Limited (No 2)* [2013] FCA 217, *Access for All Alliance Inc v Hervey Bay City Council* [2004] FMCA 915.
[16] *Faruqi v Hanson* [2024] FCA 1264, *Jones v Toben* [2002] FCA 1150.
[17] *Kaplan v State of Victoria* (No 8) [2023] FCA 1092 and *Eatock v Bolt* [2011] FCA 1103.
[18] *Slattery v Manningham City Council* [2014] VCAT 1442 and *Zareski v Hannanprint Pty Ltd* [2011] NSWADT 283 (5 December 2011).
[19] Australian Law Reform Commission, *Report 143: Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, January 2025, Recommendation 50.

We support this recommendation.

Civil penalties

We recommend introduction of a civil penalty regime, aligned with the *Fair Work Act 2009 (Cth)* to enable courts to not only order individual compensation for unlawful conduct, but also to order a 'penalty' for relevant breaches of the DDA with the objective of deterring and preventing further contraventions. This is consistent with the ALRC's Recommendation 51 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. The ALRC's reasoning for this recommendation can be extended to compliance and enforcement of a positive duty in the DDA.

Ensuring the DDA applies to all workers and holds duty holders to account

Vicarious and accessorial liability

Vicarious and accessorial liability provisions present important opportunities to drive proactive behaviour by duty holders to ensure compliance and prevent harm. If used correctly, these laws can incentivise those with power to take proactive steps to prevent discrimination from ever occurring. By attributing legal liability to entities and individuals with power to prevent, the law can truly drive behaviour change. This is an area where reform could bring about significant impact.

Accessorial liability contemplates the legal responsibility that persons with power and control should bear. It may cover legal directors, holding companies, franchisors and others in a supply chain. Relevantly, under section 122 the DDA, a person will be 'involved' in a contravention if they cause, instruct, induce, aid or permit another person to do an act that is unlawful under the DDA. This test focuses on the state of mind of the duty holder, and may reward individuals who ignore, disregard or look the other way in relation to discrimination or harassment.

Vicarious liability generally refers to an outcome where more than one respondent is held jointly liable for harm caused. Under section 123 the DDA, an employer will be liable for the acts of their employee acting within the scope of his or her actual authority, unless they can show they took reasonable precautions and exercised due diligence to avoid the conduct.

We note that there are stricter models of both vicarious and accessorial liability available in other comparable jurisdictions, including the *Fair Work Act 2009* (Cth) and occupational health and safety laws. Some models include:

- Attributing legal liability broadly to all persons conducting a business or undertaking;
- Attributing strict legal liability to multiple parties in a supply chain ('indirectly responsible entitles');[20]

[20] See section 17A, Part 6-4A, *Fair Work Act 2009 (Cth)*.

- Attributing legal liability to persons and entities (other than the employer) that have power and control over another entity if:[21]
    - They knew, or could reasonably be expected to have known that a contravention of the same or similar nature was likely to occur; and
    - They cannot demonstrate that they took reasonable steps to prevent a contravention.

These models may result in greater compliance with the law. We recommend that government consider ways that these differing models of liability could be utilised, in conjunction with the positive duty, to place a clearer obligation on duty holders to proactively prevent and address disability discrimination.

Coverage

In addition to strengthened liability provisions, section 123 of the DDA should also be simplified and amended to clearly protect all workers. Section 123, which attributes liability for the unlawful conduct of directors, employees and agents to bodies corporate, fails to reflect the complex nature of modern work arrangements, which includes gig workers, labour hire workers, and other contract workers. A high proportion of legal aid clients are employed in precarious work arrangements where responsibilities for their working conditions are blurred and unclear. This should not be the case when it comes to protecting them from disability discrimination at work. Instead of referring to potentially narrow terms like employee and agent, the DDA should refer to broader work, health and safety concepts such as worker, persons conducting a business or undertaking, and effective control (of work, workers and work conditions).

Section 123 should also be simplified, noting that it is drafted in more complex terms than comparable provisions in other anti-discrimination legislation, such as section 106 of the *Sex Discrimination Act 1984 (Cth)*.

If a positive duty is enacted, we recommend that liability for unlawful conduct be attributed to duty holders in circumstances where they have failed to comply with the duty, as well as when they have failed to take all reasonable steps to prevent the contravention. This will be an important mechanism to hold duty holders to account for compliance with the positive duty.

Recommendations

20. That the DDA definition of indirect discrimination should be amended to: remove the comparator test; adopt the detriment test; and replace the reasonableness element and unjustifiable hardship defence with a legitimate and proportionate test.

21. That the DDA should be amended to include a positive duty for duty holders to eliminate discrimination.

22. That the positive duty should have broad application to all duty holders.

[21] See, for example the responsible franchisor provisions, Part 4-1, Division 4A, *Fair Work Act 2009 (Cth)*.

23. That the AHRC should be granted the power and be resourced to: conduct own motion investigations; compel evidence; agree to enforceable undertaking; issue compliance notices, and issue administrative penalties.

24. That the AHRC should be required to publish reports on its investigations into organisations.

25. That Guidelines should be given greater regulatory force.

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

27. That government implement Recommendation 50 of the Australian Law Reform Commission's Report *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, that section 46PO of the *Australian Human Rights Commission Act 1986 (Cth)* should 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.

28. That the *Australian Human Rights Commission Act 1986 (Cth)* be amended such that a person found to have contravened the positive duty in the DDA may be ordered to pay a civil penalty.

29. That government consider how models of liability (including accessorial and vicarious liability) could be utilised in conjunction with a positive duty in the DDA, to place a clearer obligation on duty holders to proactively prevent and address disability discrimination including in complex labour hire and other precarious work arrangements.

30. That liability for unlawful conduct under the DDA be attributed to duty holders in circumstances where they have failed to comply with the duty, as well as when they have failed to take all reasonable steps to prevent the contravention.

31. That government commit adequate resources to the development of educational and guidance materials to support the implementation of the positive duty.

Strengthening the duty to provide adjustments

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?

We support the introduction of a stand-alone duty to provide adjustments, modelled on the Victorian EOA[22]. We recommend that the DDA be amended to insert a new section 6A making it unlawful to fail to provide adjustments. The duty should be stand-alone and enforceable, not contingent on proving causation (as required under *Sklavos*[23]).

The existing DDA provisions result in confusion for people with disability and duty holders about what constitutes a reasonable adjustment in a given set of circumstances – for example, what might be reasonable flexible work arrangements in the office, or additional teaching support in the classroom.

Adjustments are often essential for securing access to educational and financial opportunities for people with disability, for ensuring they are not neglected in their learning and to reduce the risk of exploitation caused by workplace discrimination. The DDA provides that discrimination includes a failure of an employer or an education provider to make reasonable adjustments for a person with disability which would have prevented them being treated less favourably. The *Sklavos*[24] decision confirmed that, under the DDA's current drafting, failure to provide a reasonable adjustment meets the test for discrimination only if the failure was because of the person's disability, creating an onerous causation hurdle and a barrier to bringing complaints. This in effect negates the beneficial impact of the reasonable adjustments duty in the DDA for people with disability who are treated unfavourably at school or work by a failure to make reasonable adjustments.

The Victorian EOA includes a standalone section requiring reasonable adjustments, and there is no causation element required in order to prove a breach of the law.[25] Victoria Legal Aid sees the significant positive impact this protection has on the lives of people with disability in Victoria, enabling them to remain engaged with their employer or school. Failure to comply with this protection has a significant detrimental impact on the lives of people with disabilities, exposing them to abuse and neglect and excluding them from employment and education.

Application

The duty to make adjustments should apply consistently across all areas of public life, with application of the duty clearly defined in the DDA to ensure certainty for people with disability and duty holders.

Consultation and transparency

Reforms should include a requirement for duty holders to consult about adjustments with the person requesting them, and require transparent decision-making including timely written reasons and review rights for refusals, especially in education, employment and essential services.

The DDA should also make it clear that duty holders must consider requests in relation to adjustments in a timely manner, and clarify that duty holders can ask for reasonable additional information from the person who has made the request, as part of the consultation.

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[22] Section 20, *Equal Opportunity Act 2010 (Vic)*.

[23] *Sklavos v Australiasian College of Dermatologists* [2017] FCAFC 128

[24] *Sklavos v Australiasian College of Dermatologists* [2017] FCAFC 128

[25] Section 20, *Equal Opportunity Act 2010 (Vic)*.

Removing the word 'reasonable' from 'reasonable adjustments'

We support the DRC recommendation to remove the word reasonable from 'reasonable adjustments' to remove the misconception that reasonableness is an element in deciding whether an adjustment is required.

We consider that removing the qualifier 'reasonable' but maintaining an unjustifiable hardship defence is a practical way to shift the focus from, and remove confusion about, people with disability and others that need adjustments having to show the reasonableness of any adjustment requests.

The duty to make adjustments should include an obligation on duty holders to undertake an assessment to identify the scope of and need for the reasonable adjustment.[26] Consideration should be given to including a definition of 'adjustments' in the DDA which clarifies that steps needed to identify an ultimate adjustment can be considered a reasonable adjustment in and of itself, for example by obtaining an expert report.

The need for clear guidance and education

The DDA duty to provide adjustments should be accompanied by guidance for duty holders and people with disability, including clear examples. Clear, sector-specific guidance will provide people with disability and duty holders greater clarity about the types of adjustments that can/should be made in a given set of circumstances – for example, flexible work arrangements in the office, or additional teaching support in the classroom.

Funding for education and training (for example in schools and workplace settings) about providing adjustments for people with disability would help ensure reforms achieve their aim.

Interoperability with the National Disability Insurance Scheme (NDIS)

In designing the standalone duty, the interoperability of DDA requirements with the NDIS should be considered – in particular in relation to 'reasonable and necessary supports' under the NDIS.

In our experience, the National Disability Insurance Agency (NDIA) commonly refuses to provide funding for a support on the basis that it considers the support should be provided by way of a reasonable adjustment under discrimination laws. However, the body potentially responsible for reasonable adjustments under the DDA may not provide these.

While there are options for review of NDIA decisions (including ART appeal), or discrimination claims for failure to provide reasonable adjustments, people with disability can be left without necessary supports while they pursue these options.

Consideration should be given to empowering the AHRC with a non-binding advisory function to provide guidance on whether a reasonable adjustment under the DDA should or should not have been provided to the NDIS participant.[27] The consideration under the DDA should take into account the potential

[26] As identified by Moshinsky J in Izzo v State of Victoria (Department of Education and Training) [2020] FCA 770 at [50]-[52]

[27] We note the need to ensure reforms do not create any dual jurisdiction, and therefore do not recommend this be accompanied by any right to refer to Federal Courts given review rights under NDIS Act.

availability of the NDIS to provide these supports. This opinion could then support the person with disability to:

1. Have the reasonable adjustment, or
2. Have the evidence they need to challenge the NDIA that the support cannot be provided as an adjustment, and therefore funding of the support falls to the NDIS (assuming reasonable and necessary supports criteria are met).[28]

Recommendations

32. That the DDA be amended to insert a new section 6A, modelled on section 20 of the Victorian EOA, making it unlawful to fail to provide adjustments. The duty should be stand-alone and enforceable, not contingent on proving causation.

33. That the duty to make adjustments should apply consistently across all areas of public life.

34. That the word 'reasonable' should be removed from the duty to provide adjustments

35. That reforms should include a requirement for duty holders to consult about adjustments with the person requesting them, require transparent decision-making including timely written reasons, and review rights for refusals.

36. That the duty to make adjustments should include an obligation on duty holders to undertake an assessment to identify the scope of and need for the reasonable adjustment.

37. That the DDA duty to make adjustments should be accompanied with guidance for duty holders and people with disability, including clear examples.

38. That 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.

Definition of and considerations for unjustifiable hardship

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

[28] This process could be limited to NDIS participants.

Please expand on your response.

In order to achieve greater fairness and transparency in claims of unjustifiable hardship, we recommend the DDA be amended as proposed by the DRC (Option A).

The factors relevant to determining unjustifiable hardship should place less emphasis on financial cost, and have regard to broader public interest considerations as in the Victorian EOA. Amendments should clarify that mere inconvenience, or the expenditure or resources, should not in and of itself constitute unjustifiable hardship.

In addition to requiring reasons to be provided to the person requesting the adjustment, if a respondent is seeking to rely on the 'unjustifiable hardship' exemption, the DDA should compel disclosure by the respondent of financial documentation regarding the proposed cost of special services and facilities/adjustments or other relevant information.

Recommendations

39. That the DDA be amended to implement Recommendation 4.32 of the DRC.

40. That the DDA amendments in relation to unjustifiable hardship provisions should clarify that mere inconvenience, or the expenditure or resources, should not in and of itself constitute unjustifiable hardship.

41. That if a respondent is seeking to rely on the 'unjustifiable hardship' exemption, the DDA should compel disclosure by the respondent of financial documentation regarding the proposed cost of special services and facilities/adjustments or other relevant information.

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

Consultation requirements

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?

We support employment-related amendments that expand the factors considered by employers when determining whether an employee can carry out the inherent requirements of particular work.

Specifically, we recommend:

- Requiring consultation with the employee before making employment decisions, to ensure transparency and support informed, fair outcomes. "Consultation" should be defined to require meaningful engagement with the employee.
- Clarifying the concept of inherent requirements, including through practical examples, to assist both employers and employees in understanding their rights and obligations.
- Encouraging flexible work arrangements and inclusive recruitment practices, to promote equal participation and reduce barriers for people with disability, including by amending subsection 15(2)(b) of the DDA to include reference to denying opportunities for reduced hours or part-time work.

These amendments would support more inclusive workplaces and help ensure that employment decisions are made fairly and consistently. Section 351 of the *Fair Work Act 2009* (Cth) should also be amended to ensure consistent protection against discrimination for people with disability.

We also recommend that careful consideration is given to the privacy risks and imbalance of power between workers and employers/persons conducting a business or undertaking (PCBU). In particular, we have observed a practice by some employers/PCBUs of requiring workers to attend the company doctor for examination and assessment, even in circumstances where the worker has been willing to share medical information from their own treating doctor. The DDA should make it clear that duty holders must limit requests for information to that which is necessary to assess whether the person can perform the inherent requirements of the role and/or identify the adjustments required.

Recommendations

42. That the DDA be amended to require consultation with the employee before making employment decisions, to ensure transparency and support informed, fair outcomes. That "consultation" be defined to require meaningful engagement with the employee.

43. That the DDA be amended to clarify the concept of inherent requirements, including through practical examples, to assist both employers and employees in understanding their rights and obligations.

44. That the DDA be amended to encourage flexible work arrangements and inclusive recruitment practices, to promote equal participation and reduce barriers for people with disability, including by amending subsection 15(2)(b) of the DDA to include reference to denying opportunities for reduced hours or part-time work.

45. That section 351 of the *Fair Work Act 2009 (Cth)* be amended to ensure consistency with the DDA.

46. That the DDA be amended to make it clear that duty holders must limit requests for information to that which is necessary to assess whether the person can perform the inherent requirements of the role and/or identify the adjustments required.

Exclusionary discipline and suspension

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?

25. Should any of the state and territory provisions relating to exclusionary discipline be adopted in the Disability Discrimination Act?

26. Would a different approach to exclusionary discipline be more appropriate in the higher education and vocational education and training sectors?

We recommend that the concepts of exclusion and exclusionary discipline be defined in the DDA to include expulsion, formal and informal suspensions, seclusion and restricted attendance.

The use of informal suspensions and exclusions should be included in the definition as there is evidence that children are often subject to informal suspensions and 'soft' expulsions, which contributes to their disengagement from education. However, due to the informal and unauthorised nature of these practices, they are unregulated and difficult to measure.[29]

A failure to appropriately support students with disability may create or exacerbate challenging behaviours, and lead to students being excluded from school. Disability can be inappropriately interpreted by schools as problematic behaviour and dealt with through discipline rather than appropriate adjustments and supports. The behaviour of students with disabilities such as autism spectrum disorder (ASD) or attention deficit hyperactivity disorder (ADHD) can be framed as 'bad behaviour' with suspensions and exclusion often seen as the only option, even though more appropriate and less restrictive alternatives may be available.

In our experience, the exclusion of children with disabilities from schools due to perceived bad behaviour is worse in rural areas where there are fewer schooling options, schools have less experienced staff and are generally less resourced than those in major cities. Suspending children breaches the trust between them and the school and disrupts the child's routine, making it more likely they will disengage in the future. This trust and routine is particularly important for children with disabilities.

For children who come from disadvantaged backgrounds, education is fundamentally important to breaking the cycle of disadvantage and improving future outcomes. Conversely, exclusion from education can be a precursor to poor future outcomes including unemployment and criminalisation.[30] A lack of engagement with education (sometimes for many years) is a common characteristic of children who end up involved in the criminal justice system. We regularly assist children charged with criminal

[29] For example see Victoria's Commission for Child and Young People, 'Let us learn, Systemic Inquiry into the experience of children and young people in out of home care', November 2023, available at CCYP-Education-inquiry-report-FINAL.pdf

[30] The Victoria Institute, Education at the Heart of the Children's Court Evaluation of the Education Justice Initiative (Final Report, December 2015) p2; Victoria Legal Aid, 'Feeling Supported, Not Stuck: Rethinking Intervention Orders for Children and Young People', 2025, p26.

offences who have been regularly excluded from school due to suspensions for behavioural problems that stem from complex trauma, mental health conditions and/or intellectual disabilities.

The below case study is an example of a school misusing exclusionary discipline on a child with disabilities. Fortunately in this case the child successfully appealed against their exclusion.

Clay's Story*

Legal Aid NSW assisted Clay, an Aboriginal teenager with a diagnosed disability and an agreed behaviour support plan in place. Clay was suspended for misbehaviour on an occasion when his school was not following the agreed behaviour support plan.

After the period of suspension, the school insisted on a proposed partial attendance plan for several months. Clay preferred a full-time attendance plan because he did not want the other students to think of him as 'different'. Clay's Legal Aid NSW solicitor wrote to the school, arguing the suspension and partial attendance plan was unfair due to the school's non-compliance with Clay's behaviour support plan. We sought that the suspension be removed. The school declined to remove the suspension. Clay appealed the suspension and partial attendance plan and the Education Department upheld the appeal.

*This case study has been de-identified

The disability discrimination framework should support strategies to prevent and reduce student exclusion from schools for children with disability, and for education institutions to prioritise a supportive rather than punitive approach. We support the DRC recommendation that exclusionary discipline be used only as a last resort, when necessary to avert risk of serious harm to the student, other students or staff. This should only be when all other measures, interventions, supports and options have been documented and exhausted. We recommend that the DDA should specify requirements to be undertaken prior to and after exclusionary discipline such as consultation with the student and their supports, consideration of all available and appropriate alternative adjustments; consideration of the right to education and the creation of documentation and reasoning.

We also support strengthening reporting requirements for schools for the repeated use of exclusionary discipline involving a student with disability, robust escalation points within education authorities, review and appeals processes for students with disability and their families/carers, measures to ensure students subjected to exclusionary discipline can stay engaged with their education and to re-engage post-exclusion.

Existing state or territory provisions relating to exclusionary discipline should not be adopted in the DDA as none provide adequate protection.

Failure to make adjustments in schools

Legal Aids assist clients with matters arising from the treatment of students with disability by schools, including schools failing to make adjustments to assist students with disability to fully participate in their education. We consider this is often due to factors including:

- A lack of consultation with parents and carers of children with disability in order to identify adjustments that could be made under the DDA and the Disability Standards for Education 2005 (Cth) (Education Standards)
- A lack of clarity in the Education Standards regarding what is required to identify and implement adjustments for students with disability
- Need for improved understanding of specific disabilities, and obligations under discrimination law and the Education Standards
- Inadequate resourcing to support schools to comply with their obligations under discrimination law and the Education Standards
- A lack of clear guidance for schools, parents or students regarding when discrimination is lawful under exceptions in anti-discrimination laws and the DDA, and
- Assumptions that certain conduct is exempt under anti-discrimination laws such that further efforts are not made to explore adjustments.

Legal Aids assist clients with legal proceedings for non-compliance with the DDA and the Education Standards. The below case study highlights some of the barriers families face when requesting adjustments.

Margaret's Story*

A Legal Aid assisted Margaret and her teenage son Edward who was experiencing challenges at school. Edward had numerous diagnosed disabilities and was well supported by his family and a team of specialists. Edward's team of specialists recommended that his school make adjustments to assist him with learning and practising appropriate social interactions.

Edward's school did not follow the recommendations of his treating specialists which meant Edward did not receive the support needed to ensure full participation in the school setting. Instead, the school took a punitive approach to Edward's behaviour, restricted his social interactions with other students, and pressured Margaret to agree to enrol Edward in a specialist educational setting, despite Margaret's clearly stated preference that Edward remain in mainstream schooling.

While Edward had a Personalised Learning Support Plan in place, the adjustments were not being implemented consistently by the school and the school showed no desire to work with Edward's treating team to ensure his needs were being met and he had access to education.

The relationship between the school and Margaret broke down and the school began limiting the input Margaret and the treating specialists had in discussing Edward's needs in the school environment.

*This case study has been de-identified

Adjustments are a crucial tool to enable many children with disability to comfortably and meaningfully engage in education. We recommend the development of guidelines to ensure adjustments are available and appropriately used, and that schools comply with their obligations under the Education Standards. We also encourage greater transparency around the provision of adjustments and more streamlined complaint processes for when requests for adjustments are refused.

Barriers faced by children with disability can have significant impacts on school attendance. Often, by the time they are resolved, students have lost many months of education. This can lead to social isolation and adversely impact the young person's ability to fully participate in social and economic opportunities as an adult. The below case study highlights how out of home care (OOHC) can contribute to instability and disengagement from education (discussed below). However, it is also an example of a school applying a discretionary policy in an inflexible way, resulting in exclusion from school.

Mohamed's Story*

Legal Aid NSW assisted Mohamed, an Aboriginal teenager residing in residential OOHC who had been diagnosed with a neurodevelopment disorder. Mohamed had been disengaged from school for the previous few years due to family/care instability but was trying to enrol in a regional public primary school again. The school asked to see various documents before accepting the enrolment. This included a Behaviour Support Plan, to enable them to complete a risk assessment. Mohamed's carer failed to provide the paperwork for several months, resulting in Mohamed being unable to attend school during this time.

*This case study has been de-identified

Recommendations

47. That concepts of exclusion and exclusionary discipline be defined in the DDA to include expulsion, formal and informal suspensions, seclusion and restricted attendance.

48. That DDA amendments adopt the principle that exclusionary discipline must be avoided unless necessary as a last resort to avert the risk of serious harm to the student, other students or staff, when all other measures, interventions, supports and options have been exhausted and documented.

49. That guidelines be developed to ensure adjustments are available and appropriately used in schools, that schools comply with their obligations under the Disability Standards for Education. Reforms, to require transparency around the provision of adjustments in schools and to require streamlined complaint processes for when requests for adjustments are refused.

Offensive behaviour and vilification protections

Consultation questions

Harassment and offensive behaviour

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?

Vilification

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?

Offensive behaviour

Legal Aids support the implementation of the DRC's recommendation to amend the DDA to better protect people with disability from offensive behaviour by including provisions modelled on section 18C of the *Racial Discrimination Act*.

Legal Aid clients who experience offensive and harassing behaviour generally experience serious distress, feelings of humiliation and worthlessness and mental health deterioration. This can impact on their ability to participate in the workforce and our communities more broadly, undermining their feelings of safety and inclusion in society. Clarifying and strengthening protections in the DDA is also an opportunity to improve cross-jurisdictional consistency, given the current 'patchwork' nature of protections nationally.

Definitions of harassment and offensive behaviour should be based on both impact (how the conduct affects the person) and intent (whether the conduct was deliberate or reckless). This dual approach ensures that serious harm is captured, even if the behaviour was not overtly malicious. The DDA should also clarify that single incidents can meet the threshold for disability harassment to address narrow interpretations in the case law that require disability harassment to be persistent and haranguing – which is inconsistent with other forms of harassment (for example sexual harassment).

The DDA prohibitions on harassment[31] are currently too narrow. This is a barrier to successful harassment claims and means people with disability who experience harassing conduct and vilification are left without recourse. DDA amendments making it unlawful to do a public act (including in online spaces) that are reasonably likely to offend, insult, humiliate or intimidate a person or group because of disability would strengthen protections and ability to seek recourse.

We recommend that the definition of public act extend to online spaces and encompass conduct that can be 'seen or heard' by the public, as well conduct that is intentionally directed to the public. Reforms should require persons conducting a business or undertaking in Australia to take proactive steps to prevent this kind of conduct.

Vilification

Legal Aids support implementation of the DRC recommendation to make it unlawful to vilify a person or group of people with disability on the ground of their disability or perceived disability, including public incitement of hatred or contempt - including online abuse. This would close a significant gap in the

[31] Sections 35 – 39, *Disability Discrimination Act 1998 (Cth)*

current legislative framework and bring disability protections in line with those available under the *Racial Discrimination Act*.

We recommend that DDA reforms expressly extend liability for authorising or assisting vilification or victimisation to corporations to ensure social media platforms play an active role as intermediaries to identify, monitor and respond to online vilification.

Exemptions

While we agree there is a role for exemptions in line with the *Racial Discrimination Act* to ensure proper application of the DDA provisions. These must be clearly and narrowly defined. Exemptions should be considered only where necessary, such as to protect legitimate freedom of expression. Any exemptions should be narrowly framed and consistent with those in the *Racial Discrimination Act*, ensuring they do not undermine the core protections.

We recommend the AHRC be resourced to provide clear guidance on conduct likely to fall within and outside of exemptions in the DDA.

Recommendations

50. That the DDA be amended to give effect to the DRC's Recommendations 4.29 and 4.30 to implement clear civil prohibitions on offensive conduct and vilification based on disability.

51. That any exemptions to prohibitions on offensive, harassing and vilifying behaviour should be considered only where necessary and narrowly framed, such as to protect legitimate freedom of expression - consistent with exemptions in the *Racial Discrimination Act 1975 (Cth)*.

52. That the AHRC be resourced to provide clear guidance on conduct likely to fall within and outside of exemptions in the DDA.

53. That 'public act' should be defined to include online spaces.

54. That 'conduct' should be defined to include conduct that is seen or heard by the public in addition to conduct that is intentionally directed to the public.

Services provided by police officers

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?

Legal Aids support DDA amendments to ensure the legislation protects people with disability from discrimination in their interactions with all government agencies, authorities and functions including policing, corrections (both prisons and non-custodial) and child protection. We recommend that the DDA be amended to ensure that people with disability are protected from discrimination in relation to all

aspects of policing (including interactions with suspects), as well as all other functions of government, including prisons and other forms of corrections and child protection. We recommend that this extend to private operators undertaking government functions.

We see many Legal Aid clients with disability who have experienced discrimination, abuse and mistreatment by police, including excessive use of force resulting in injury during the arrest process. Frequently, police treat the characteristics of a disability as suspect behaviour grounding a reasonable suspicion for search and police interaction. In many cases, these interactions with police have exacerbated existing trauma, and led to a deterioration of our clients' mental health.

Nick's* story

Nick lives with disabilities including a mild intellectual disability. He is currently supervised by Corrective Services NSW.

Nick has a support worker who attends meetings with him. His support worker helps him understand everything and translates meetings into plain English. Nick's support worker can read his body language and knows when things are getting too much for him.

Nick came to Legal Aid NSW for assistance because on multiple occasions, Corrective Services NSW officers did not let his support workers speak to him at meetings.

Nick told us that "every time I went in to do my meetings with parole, I'd come out in the foulest of moods. I wanted to kill myself [due to] the attitude, the ridicule and the destructive comments. They didn't listen to what I had to say. I felt like I was just existing. I felt so upset and fell into depression."

Legal Aid NSW supported Nick to make a complaint about the actions of the Corrective Services NSW officers. However, Legal Aid NSW had to advise Nick that the Disability Discrimination Act does not clearly cover the actions of Corrective Services NSW officers because they are not defined as a service.

Nick told us when he found out that the Disability Discrimination Act may not apply to the actions of Corrective Services "I felt like my voice was taken away from me. Something horrible and demeaning happened to me and no-one wanted to hear it. [I felt] disbelief that something like that could happen to someone with a disability."

Nick wants the Disability Discrimination Act to apply to Corrective Services NSW so other people with disabilities do not have the same experience he did.

*This case study has been de-identified

In its recent report, Feeling Supported, Not Stuck[32], Victoria Legal Aid analysed the experiences of children and young people who are respondents to intervention orders. Victoria Legal Aid found that '[f]ar too many children with disabilities, notably neurodiversity and mental health issues, are being put

[32] Victoria Legal Aid, 'Feeling supported, not stuck: rethinking intervention orders for children and young people,' 2025.

through the intervention order process'[33]. In Ben's case, outlined below, the police misidentified him as the predominant aggressor in circumstances where his young age and disability are very likely to have contributed to this. However it would be difficult for Ben to prove that the police were providing him with a beneficial service at the time of the discriminatory conduct and succeed with a claim of disability discrimination.

Ben's* story

16-year-old Ben lives with multiple disabilities including autism spectrum disorder and mental health issues. Ben currently lives with his mum, because of concerns about his dad's use of family violence. Ben has been named as the affected family member on a number of previous intervention orders, with both of his parents named as respondents at different times.

Ben's mum called the police after she and Ben had a fight about getting him to clean his bedroom. Because of Ben's disabilities, he struggles to regulate his emotions. Ben told police that he pushed his mum, after she pushed him first, and he hit her in self-defence. Despite this, Police charged Ben with unlawful assault.

Police also applied for an intervention order against Ben on behalf of his mum. The court made an interim FVIO, but Ben struggled to understand the terms of the order. Police charged Ben with breaching the order on three separate occasions. Sometimes Ben himself called the Police for help, but he would end up being charged with a breach.

Victoria Legal Aid lawyers helped Ben fight the criminal charge and breaches of the intervention order. Ben's lawyer told police that Ben had been mistakenly identified as the primary aggressor in this matter. After negotiations by Ben's lawyer, police agreed to withdraw the criminal charges and intervention order. Ben was still required to give an undertaking to the court that he would not use family violence in the future.

*This case study has been de-identified

We note the Yoorook Justice Commission recognised the need for urgent reform to prohibit discrimination in the administration of Victorian laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child protection authorities.[34]

We recommend that the DDA be amended to make it unlawful for a person who performs any function or exercises any power or responsibility under the authority of government 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. Consideration should be given to expanding existing section 29 of the DDA beyond Commonwealth laws and programs as a preferable approach to redefining "services" to be more inclusive of interactions with all who perform any function or exercise any power or responsibility under the authority of government.

[33] Ibid. p. 4.

[34] Recommendation 29, Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023).

Given that the DDA already contains an unjustifiable hardship defence, we consider that any additional exemptions are unnecessary, and if included should be limited to cases of genuine operational necessity.

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.

Recommendations

55. That section 29 of the DDA be amended to make it unlawful for a person who performs any function or exercises any power or responsibility under the authority of government 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.

56. That the Commonwealth 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

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?

37. Would you recommend any changes to the legislative process of granting temporary exemptions?

Permanent exemptions

We recommend that several of the permanent exemptions should be narrowed and updated – particularly in relation to migration and insurance.

In relation to migration, we recommend reforms should ensure the DDA, *Migration Act 1958 (Cth),* and *Migration Regulations* are consistent with the Government's obligations at international law and in particular Article 5 of the CRPD, including by amending section 52 of the DDA and reviewing its

Interpretative Declaration to Article 18, Liberty of Movement and Nationality. We support the Welcoming Disability Position Statement on Migration and Disability.[35]

In relation to insurance, section 46 of the DDA provides that it is not unlawful discrimination to refuse a person with disability an annuity, insurance policy, superannuation or provident fund/ scheme if the discrimination is reasonably based upon data and other relevant factors. It is also not unlawful to discriminate in such a way in relation to the terms and conditions on which those products are offered. There is currently no requirement for an insurer to provide statistical and actuarial evidence relied on by the insurer when deciding to refuse a person with a disability an insurance policy. Without this information, it can be difficult for a consumer to challenge an insurer's decision to not provide insurance where the insurer relies upon the section 46 exemption. We recommend that the DDA (and the *Insurance Contracts Act 1984* (Cth)) be amended to ensure that the statistical and actuarial evidence and other material relied upon by the insurer be available on request, and that this evidence be regularly reviewed by the insurer for currency.

We also recommend that the exemption applying to 'Acts done under statutory authority'[36] be more clearly and narrowly specified in the DDA.

AHRC power to grant special measures certificates

The AHRC should be allowed to officially approve special programs that help people with disability – like targeted jobs or housing initiatives – by giving out certificates that confirm these programs are lawful.

To make sure this power is used fairly, there should be clear rules and oversight, such as public reporting or review by an independent body. This would help organisations support inclusion with confidence, while protecting the rights of people with disability.

Definition for temporary exemptions

We support clear definitions for special measures and temporary exemptions being added to the DDA.

Legislative process for granting temporary exemptions

We support streamlining the exemption process by establishing clear, transparent criteria to guide decision-making. This would enhance consistency, reduce administrative burden, and improve accessibility for eligible applicants.

We also support strengthening oversight and scrutiny of repeat applications for exemptions. Reforms should clarify that temporary exemptions should only be provided in genuinely exceptional cases where compliance is not practically achievable in the immediate future, so as not to undermine DDA protections.

Recommendations

[35] Welcome Disability, Position Statement on Migration and Disability, August 2025. Available at: WD+Position+statement+August+2025.pdf

[36] Section 47, *Disability Discrimination Act 1998* (Cth).

57. That government ensure the DDA, *Migration Act 1958 (Cth),* and *Migration Regulations* are consistent with its obligations at international law and in particular Article 5 of the CRPD.

58. That the DDA (and the *Insurance Contracts Act 1984* (Cth)) be amended to ensure that the statistical and actuarial evidence and other material relied upon by an insurer under the exemption in section 46 of the DDA be made available on request, and that this evidence be regularly reviewed for currency

59. That the AHRC be given the power to officially approve special programs that help people with disability – like targeted jobs or housing initiatives – by giving out certificates that confirm these programs are lawful, accompanied by clear rules and oversight.

60. That the DDA be amended to include clear definitions for special measures and temporary exemptions.

61. That the legislative process for granting temporary exemptions should be streamlined by establishing clear, transparent criteria to guide decision-making, and reforms should clarify that temporary exemptions should only be provided in genuinely exceptional cases where compliance is not practically achievable in the immediate future.

Assistance animals

Consultation questions

38. How could the protections for assistance animals be clarified for both people with disability and duty holders, including in relation to evidence of training, evidence or standards of hygiene and behaviour that are appropriate for a public place?

39. Would legislative amendments or guidance materials be helpful to balance flexibility and certainty, or a mixture of both?

40. Should specific training organisations be prescribed under the Disability Discrimination Regulations?

We support clarifying protections for assistance animals through both legislative amendments and guidance materials, developed in close consultation with relevant stakeholders, including those with lived experience. Legal Aid clients report their use of assistance animals being constantly questioned and being refused access to services and public places, with the use of assistance animals by those who are not blind or vision impaired as being particularly poorly understood.

Clarifying protections for assistance animals

The need for clearer guidance on what constitutes an assistance animal, particularly in relation to psychosocial support and informal training, is highlighted in *Reurich v Club Jervis Bay Pty Ltd [2018] FCA*.

In this case, the Federal Court found that the respondent had unlawfully discriminated against Mr Reurich on the basis of his use of an assistance animal.

The animal in question, Mr Boofhead, was originally Mr Reurich's companion animal and had not yet completed formal assistance training at the time of the discriminatory conduct. Nonetheless, Mr Boofhead provided meaningful assistance to Mr Reurich by responding to simple commands such as "sit" and "stay," which Mr Reurich had taught him. His presence helped alleviate symptoms of Mr Reurich's psychosocial disabilities and facilitated social interaction with other patrons – functioning as both a calming influence and a social bridge.

While subsection 54A(5) of the DDA requires individuals to produce evidence that their animal meets the criteria of an assistance animal when requested, this case suggests that the definition may be broader than many duty holders assume. Clarification would promote greater understanding and compliance among duty holders and ensure that people with disability are not unfairly excluded from public spaces due to narrow interpretations of the law.

The *Reurich* case demonstrates that assistance animals may provide legitimate support even without formal certification. To clarify protections:

- The DDA should explicitly recognise assistance animals that support psychosocial disabilities and are trained by their owners.
- Guidance should outline acceptable forms of evidence, including behavioural reliability, hygiene standards, and the nature of support provided—not just formal training credentials.
- Duty holders should be educated on the broader scope of assistance animals to avoid unlawful exclusion based on assumptions about certification.

The need for both legislative amendments and guidance materials

We support both legislative amendments and guidance materials and consider them essential to achieving a balance between flexibility and certainty. These should be developed in close consultation with relevant stakeholders, including those with lived experience. The use of assistance animals by people who are not blind or vision impaired is particularly poorly understood – legal aid clients report being constantly questioned and refused access to services and public places.

Guidance materials that raise awareness for duty holders and provide guidance about evidence for training and standards of hygiene and behaviour (if these requirements are not removed) would be helpful. Guidance materials should:

- Provide practical examples of assistance animals across a range of disability types.
- Clarify evidentiary expectations for entry into public spaces.
- Offer duty holders clear protocols for assessing compliance without infringing on individual rights.

Legislative amendments should broaden the definition of assistance animals to better reflect lived experience and evolving case law.

We note that there are currently no accredited services under subsections 9(2)(a)-(b) of the DDA. For many people with disability, formally training an assistance animal can be cost prohibitive, inaccessible, and not fit for purpose (for example a person who needs an assistance animal for psychosocial disability

will not benefit from having their dog trained by an organisation that trains dogs for vision impaired or blind people).

Further legislative or other guidance on subsection 9(2)(c) would assist. We suggest clarifying explicitly that "training" does not need to be paid and can be done by the person with disability. Determinations as to whether an assistance animal has been trained should look at the totality of the evidence and/or a non-exhaustive list of relevant factors.[37]

Possible options for evidence of training could include:

- A statutory declaration from the person with disability.
- Evidence from a treating practitioner about the tasks they have observed the assistance animal performing.

We recommend removing the requirement for evidence of "standards of hygiene and behaviour that are appropriate for a public place". We note that it is difficult for people to provide evidence of this. This is not a requirement under the Victorian EOA.

Prescription of specific training organisations

Specific training organisations should be prescribed under the Disability Discrimination Regulations. Prescribing training organisations may help standardise expectations and improve consistency in recognition. However, this should not be the sole pathway to recognition. Flexibility must be retained to accommodate diverse and legitimate forms of training and support that may fall outside prescribed frameworks. Care should also be taken to ensure these services are accessible, affordable, and available to people in regional and rural areas.

To avoid excluding informally trained animals like Mr Boofhead:

- Regulations should allow for multiple pathways to recognition, including owner-led training.
- Prescribed organisations could be listed as one option, not a requirement.
- A flexible framework would better reflect the diversity of assistance animal use, especially for psychosocial support.

Any prescription of training organisations must not limit the ability of people with disability to be protected against discrimination on the basis of assistance animals they have trained themselves. The framework must remain inclusive of diverse, legitimate training pathways that reflect individual needs and lived experience.

Recommendations

62. That the requirement for evidence of "standards of hygiene and behaviour that are appropriate for a public place" should be removed.

63. That the the definition of assistance animals should be broadened to better reflect lived experience and evolving case law, including recognising assistance animals that support psychosocial disabilities and are trained by their owners.

[37] We note that the reasoning in *Matthews v Woombye Pub Trading Pty Ltd* [2022] QCAT 301 provides a useful framework.

64. That guidance materials should: outline acceptable forms of evidence that an animal meets the criteria of an assistance animal, including behavioural reliability and the nature of support provided—not just formal training credentials; provide practical examples of assistance animals across a range of disability types; clarify evidentiary expectations for entry into public spaces; and offer duty holders clear protocols for assessing compliance without infringing on individual rights.

65. That duty holders should be educated on the broader scope of assistance animals to avoid unlawful exclusion based on assumptions about certification.

66. That specific training organisations should be prescribed under the Disability Discrimination Regulations, however regulations should allow for multiple pathways to recognition, including owner-led training.

67. That the prescription of training organisations must ensure that these services are accessible, affordable, and available to people in regional and rural areas.

Disability Standards

Consultation questions

45. How could compliance with and enforcement of the Disability Standards be improved?

46. Should the Disability Discrimination Act be amended to encourage relevant duty holders to self-report on their compliance with the Disability Standard(s) in disability action plans?

47. Could the Australian Human Rights Commission provide additional guidance to duty holders regarding how to self-report on the Disability Standards in disability action plans?

Compliance with and enforcement of the Disability Standards could be improved by strengthening regulator enforcement powers. The AHRC should be empowered with investigation and compliance powers, power to issue enforceable undertakings, and the ability to seek penalties.

This would support the aims of shifting reform of the DDA from a complaints-driven system that relies on individuals- often without resources- to carry the weight of systemic problems, towards proactive prevention of discrimination, systemic compliance and access to justice.

The AHRC should be able to prosecute breaches and seek sanctions; adopt a regulatory pyramid model (persuasion → investigation → enforceable undertakings → prosecution and penalties).

The AHRC should issue compliance guidelines and systemic recommendations. Guidance should clarify duties to provide adjustments, supported by examples.

We support:

- Improved enforcement through audits and penalties.

- Encouraging self-reporting in action plans.
- Providing AHRC guidance on reporting.

We also support reviews of the Disability Standards to ensure consistency with the DDA.

Recommendations

68. That the AHRC be granted investigation and compliance powers, power to issue enforceable undertakings, and the ability to seek penalties.

69. That the AHRC be resourced to issue compliance guidelines and systemic recommendations.

Other options for reform

Consultation questions

48. Are there examples of legislative provisions in Commonwealth or state and territory anti-discrimination law that could be drawn on to modernise or strengthen the Disability Discrimination Act?

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?

51. Are there any other issues with the Disability Discrimination Act that should be considered as part of this review?

To strengthen the DDA we recommend drawing on best practices from other jurisdictions, such as:

- Victoria's EOA, which offers a more contemporary and proactive framework for promoting equality.
- Accessible guidance materials, to support understanding and compliance across diverse communities, with authoritative guidance[38] where appropriate.
- Mechanisms for ongoing review and adaptability, ensuring the legislation remains responsive to social and technological change.

[38] See, for example, the Victorian Equal Opportunity and Human Rights Commission Guideline: Preventing and responding to workplace sexual harassment (August 2020) https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/, accessed on 12 May 2025. This guideline was issued under section 148 of the Vic EOA, meaning that "[w]hile it is not legally binding, it is authoritative – a court or the Victorian Civil and Administrative Tribunal may consider whether employers have complied with this guideline when hearing a case of sexual harassment."

- Provisions addressing emerging issues, including AI bias and digital accessibility, which are increasingly relevant to the lived experience of people with disability.

Removing barriers to bringing a claim at both the state and territory and Commonwealth level

We recommend that the DDA be amended to improve equitable access to justice by removing barriers to bringing a complaint at both the state/territory and Commonwealth level. Subsection 13(4) of the DDA prevents a person from bringing a complaint to the AHRC in relation to an act or omission that is unlawful under the DDA if they have already made a complaint or initiated a proceeding under state or territory laws in relation to that act or omission.

There is significant variation between state and territory legislative frameworks protecting against disability discrimination. For some states, such as Queensland, the DDA currently offers stronger protections (for example in relation to the duty to make reasonable adjustments) than the relevant Queensland legislation. Most people do not have the benefit of receiving legal advice about the most appropriate body to hear their complaint before they initiate a complaint or proceeding. A complainant may therefore initiate proceedings under their state or territory legislation, which is ultimately not successful when if the complaint had been made to the AHRC they would have had a strong likelihood of their complaint being found. Subsection 13(4) of the DDA prevents that complainant from initiating proceedings in the AHRC in this circumstance, which is a barrier to accessing justice for many people – particularly those without access to legal advice or assistance.

Given the patchwork of legislative protections across Australia, removing the prohibition in subsection 13(4) would go some way to addressing the need for people with disability to need to 'forum shop' in order to access justice.

We acknowledge the need to achieve a balance between finalising disputes and providing access to justice for applicants. 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. However, the VEOHRC also has the discretion to accept a matter that has been lodged in the federal jurisdiction.[39] We recommend providing the AHRC with similar discretion/powers to accept a matter that has been previously lodged in a state jurisdiction.

Recommendations

70. That subsection 13(4) of the DDA be removed.

71. That the AHRC be provided with discretion to accept a complaint that has previously been lodged in a state jurisdiction.

[39] See, for example, *Bashour v Australia & New Zealand Banking Group Ltd* [2015] VCAT 308.

Restrictions on non-disclosure agreements

We recommend that the DDA be amended to restrict the use of non-disclosure agreements (NDAs). Key to ensuring that the intent of any DDA reforms is fully realised will be ensuring transparency and accountability in relation to the duty to prevent discrimination against people with disability. 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.

We note that regulating the use of NDAs involves complex legal and ethical considerations, given that this may restrict people with disability who have experienced discrimination from freedom to choose how to resolve their dispute (for example by agreeing to a higher amount of compensation in exchange for a highly restrictive NDA).

We therefore recommend that NDAs be permitted only: if it is the complainant's 'expressed wish or preference'; the complainant has been offered legal advice; there was no undue attempt to influence the complainant; the NDA is not contrary to the future interests of a third party or the public interest; and the NDA is of limited duration. Any reforms should also prevent the NDA from restricting communications to certain parties, such as medical professionals, friends and family members.

We recommend the provisions be modelled on the best practice components of section 14B of Ireland's *Employment Equality Act 1998*.

Recommendations

72. That the DDA be amended to restrict the use of non-disclosure agreements (NDAs), modelled on the best practice components of section 14B of Ireland's *Employment Equality Act 1998*.

Time limits for making complaints

Time limits for making complaints should be extended to six years.

For a variety of reasons, 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 make a complaint under legislation that is not the most appropriate to the subject matter of their complaint. Many people then delay in seeking advice after making their complaint and by this time it may be too late for them to make their complaint in the more appropriate jurisdiction. Extending the time limit for making complaints would therefore improve access to justice for people with disability.

Recommendations

73. That time limits for making complaints under the DDA be extended to six years.

Considerations for implementation

To ensure DDA reforms achieve their aims, we recommend government commit to:

- **Resourcing and support**: A critical component of any reforms will be funding the AHRC to educate, audit and enforce; investing in accessible information; and ensuring dedicated funding for specialist advocacy and legal assistance.
- **Practical measures to support compliance:** For example, clear statutory guidance on what "reasonable and proportionate" looks like in common settings, and examples of reasonable adjustments.
- **First Nations leadership**: Government must partner with and fund First Nations organisations to ensure reforms centre culture, community control and on-Country accessibility, and commit funding for ACCOs to provide legal assistance for Aboriginal and Torres Strait Islander people with disability to access civil justice remedies including for disability discrimination.
- **Government leadership**: Government should lead the way by embedding accessibility in procurement, ensuring agency compliance and strengthening Model Litigant obligations in disability matters.
- **Evaluation**: Government must resource an independent evaluation framework so both government and the community can see whether reforms are working.

Recommendations

74. That in preparing for the implementation of any reforms as a result of the review of the DDA, the government commit to:

a) Resourcing and support: A critical component of any reforms will be funding the AHRC to educate, audit and enforce; investing in accessible information; and ensuring dedicated funding for specialist advocacy and legal assistance.

b) Practical measures to support compliance: For example, clear statutory guidance on what "reasonable and proportionate" looks like in common settings, and examples of reasonable adjustments.

c) First Nations leadership: Government must partner with and fund First Nations organisations to ensure reforms centre culture, community control and on-Country accessibility, and commit funding for ACCOs to provide legal assistance for Aboriginal and Torres Strait Islander people with disability to access civil justice remedies including for disability discrimination.

d) Government leadership: Government should lead the way by embedding accessibility in procurement, ensuring agency compliance and strengthening Model Litigant obligations in disability matters.

e) Evaluation: Government must resource an independent evaluation framework so both government and the community can see whether reforms are working.

We call on the Government to commit to passing legislative amendments to strengthen the DDA in this term. Legal Aid Commissions are ready to work with the Attorney-General's Department to ensure the reforms make a real difference in the daily lives of people with disability.