

# **Disability Discrimination Act 1992 Review**

7 November 2025

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# About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

**Disability rights:** challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

**Justice for First Nations people:** challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

**Homelessness:** reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

**Civil rights:** defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

**Energy and water justice:** working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

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# Recommendations

## ***Recommendation 1 – Modernising the definition of disability***

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*The definition of disability should be developed in close consultation with the disability community. At a minimum, the definition should not include deficit-based language; maintain its current breadth, including coverage of neurodiversity; not require a formal diagnosis; and incorporate health status/medical condition and medical record.*

## ***Recommendation 2 – Incorporating intersectionality***

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*The DDA should be amended to require consideration of the barriers to accessibility which may be compounded by intersectionality, when the DDA requires:*

- *people with disability to be consulted; and*
- *considering a person's circumstances and/or impact on a person with disability.*

*These amendments should be accompanied by introducing a definition of 'intersectionality'.*

## ***Recommendation 3 – Discrimination may be direct, indirect or both***

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*The DDA should be amended to recognise discrimination may be direct, indirect or both.*

## ***Recommendation 4 – Replacing the 'comparator' test***

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*The comparator test should be replaced with an 'unfavourable treatment' or 'detriment' test.*

## ***Recommendation 5 – Shifting the burden of proof for causation***

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*Once a complainant has established they are a person with disability and they were treated unfavourably, there should be a rebuttable presumption that the conduct occurred for an unlawful reason ie the burden should shift to the respondent to demonstrate the unfavourable treatment was not because of the person's disability.*

## ***Recommendation 6 – Removing the 'reasonableness' element***

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*The reasonableness element of indirect discrimination in section 6(3) should be removed and replaced with a test based on unjustifiable hardship. If an additional element is to be retained, reasonableness should be replaced with a 'legitimate and proportionate' test.*

## ***Recommendation 7 – Removing the 'not able to comply' element***

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*The 'not able to comply' element of indirect discrimination should be removed.*

### ***Recommendation 8 – Express reference to human rights-focused approach***

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*The objects and interpretation provisions should be amended to expressly reference Australia’s obligations under the CRPD and the need for the DDA to be interpreted in a way that is beneficial to people with disability.*

### ***Recommendation 9 – Introducing a positive duty to eliminate discrimination***

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*A positive duty to eliminate discrimination should be introduced and apply to all forms of unlawful conduct, all areas of public life and all duty holders under the DDA. The duty should require taking ‘reasonable and proportionate measures’ as recommended by the Disability Royal Commission.*

*The positive duty must be introduced with an effective enforcement framework with the AHRC granted a full suite of compliance and enforcement powers, including the power to seek civil penalty orders. The AHRC should receive adequate and sustainable funding to carry out this regulatory function.*

### ***Recommendation 10 – Replacing the term ‘reasonable adjustments’ with ‘adjustments’***

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*The term reasonable adjustments should be replaced with adjustments.*

### ***Recommendation 11 – Introducing a standalone positive duty to provide adjustments***

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*A standalone positive duty to provide adjustments, as recommended by the Disability Royal Commission, should be introduced. The duty should apply to all areas of public life, including those not covered by the DDA. Duty holders should identify, consult and implement adjustments proactively and in a timely manner, where the need is either known or reasonably foreseeable.*

### ***Recommendation 12 – Two additional factors when assessing unjustifiable hardship***

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*The following two additional factors should be considered when assessing unjustifiable hardship:*

- consultation with any person with disability concerned; and*
- all available alternative measures to eliminate or reduce hardship.*

### ***Recommendation 13 – Documenting the factors considered in assessing hardship***

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*Duty holders should be required to document the factors considered in assessing hardship at the time of the alleged discriminatory conduct.*

### ***Recommendation 14 – Abolish the general defence of unjustifiable hardship***

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*The general defence of unjustifiable hardship in sections 21B and 29A should be abolished.*

- Reasonableness should be replaced with unjustifiable hardship for the purposes of indirect discrimination; and*

- *Unjustifiable hardship should be available as a defence to the standalone duty to provide adjustments.*

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**Recommendation 15 – Expanding the factors to consider for inherent requirements**

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*The inherent requirements exception should be amended to include:*

- *two additional factors in determining whether a person with disability is able to meet the role's inherent requirements, namely the nature and extent of any adjustments made, and the extent of consultation with any person with disability concerned; and*
- *a requirement that the discrimination is reasonable, proportionate and justifiable in the circumstances.*

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**Recommendation 16 – Covering exclusionary discipline and suspension in education**

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*Exclusionary discipline and suspension should be expressly covered in the DDA.*

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**Recommendation 17 – Introduce standalone prohibition against offensive behaviour**

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*A standalone provision prohibiting offensive behaviour should be introduced, modelled on section 18C of the Racial Discrimination Act 1975 (Cth), including prohibiting 'ridicule' (alongside 'offend', 'insult', 'humiliate' or 'intimidate') and exemptions to avoid undue restriction on free speech.*

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**Recommendation 18 – Introduce standalone prohibition against vilification**

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*A standalone provision prohibiting vilification should be introduced for behaviour that is 'reasonably likely, in all the circumstances, to incite hatred' against people with disability. This prohibition should also protect people who have a personal association (whether as a relative or otherwise) with the person with disability.*

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**Recommendation 19 – Extend scope of s 29 to state and territory laws and programs**

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*The scope of section 29 should be extended to cover the administration of state and territory laws and programs, including extending to policing authorities, corrections authorities, courts administration and child protection authorities.*

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**Recommendation 20 – Sunsetting clauses and reviews of all permanent exemptions**

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*All permanent exemptions should be subject to sunset clauses and reviewed on an ongoing basis.*

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**Recommendation 21 – Amending the superannuation and insurance exemption**

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*The superannuation and insurance exemption should be amended to apply only where:*

- *the discrimination is based on actuarial or statistical data (or where this is unavailable, other relevant documents);*

- *it is reasonable for the provider to rely on the data or other documents; and*
- *the discrimination is reasonable, proportionate and justifiable in the circumstances.*

*The exemption should require the insurance or superannuation provider to provide a copy of the data or other documents to the person or make the data or other documents available for inspection in accessible formats, a plain language explanation of the data, and the reasoning underpinning an adverse insurance decision.*

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#### ***Recommendation 22 – Removing the Migration Act exemption***

*The Migration Act exemption in section 52 of the DDA should be removed. If section 52 is retained, the exemption should be confined to decisions regarding the issuing of visas.*

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#### ***Recommendation 23 – Empowering the AHRC to grant special measure certificates***

*The AHRC should be given the power to grant special measures certificates. The certification process should be voluntary, with no disadvantage to organisations that do not seek certification.*

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#### ***Recommendation 24 – Introducing a definition of special measures***

*A definition of special measures should be introduced modelled on section 7D of the Sex Discrimination Act.*

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#### ***Recommendation 25 – Process and criteria for considering temporary exemptions***

*The process and criteria for considering temporary exemptions should be set out in the DDA, rather than in guidelines.*

*The process for temporary exemptions should include:*

- *applications being published on the AHRC's website;*
- *applications being subject to a period of public consultation;*
- *temporary exemptions being granted for a maximum time limit (not more than 5 years);*
- *temporary exemption decisions being published on the AHRC's website and in the Gazette; and*
- *temporary exemption decisions being reviewable by the Administrative Review Tribunal.*

*The criteria for considering temporary exemptions should include:*

- *whether the exemption is consistent with the objects of the DDA;*
- *whether the exemption is necessary;*
- *whether there have been genuine attempts by the applicant to comply with the provisions of the DDA;*

- *whether matters raised in any submissions in response to the application have been addressed;*
- *whether the applicant has an action plan to ensure compliance with the DDA, following the expiration of the exemption; and*
- *whether it is appropriate to grant the exemption subject to any terms and conditions.*

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***Recommendation 26 – A national legislated framework to govern assistance animals***

*A national framework should be established as regulations under the DDA to govern the recognition and accreditation of assistance animals. This framework should:*

- *be accessible to all people with disability who need the rights and legal protections it confers, and not exclude people due to its cost, time or administrative burdens; and*
- *be inclusive of all people with disability who use assistance animals, respecting their choice of the most appropriate animal for them and how they obtain and/or train that animal.*

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***Recommendation 27 – AHRC to approve Disability Action Plans***

*The AHRC should be empowered to approve Disability Action Plans according to minimum requirements to be developed in guidelines by the AHRC. The AHRC should be able to provide feedback and guidance on a draft Disability Action Plan to assist action planners meet the minimum requirements and best practice.*

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***Recommendation 28 – A breach of the Disability Standards should be unlawful***

*The DDA should be amended to clarify that a breach of the Disability Standards is unlawful and does not need to be made together with a claim of direct and/or indirect discrimination.*

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***Recommendation 29 – AHRC to enforce compliance with the Disability Standards***

*The AHRC should be granted a full suite of powers to monitor and enforce compliance of the Disability Standards. If necessary to stagger enforcement, compliance could commence first in relation to the Disability Standards for Accessible Public Transport. The AHRC should receive adequate and sustainable funding to carry out this regulatory function.*

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***Recommendation 30 – Expert Advisory Groups to advise on Disability Standards***

*Expert Advisory Groups be established in respect of each Disability Standard as an ongoing governance mechanism to ensure standards remain fit for purpose. The Expert Advisory Groups should be resourced to include equal participation of people with disability.*

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***Recommendation 31 – Free access to Australian Standards for non-commercial use***

*Access to relevant Australian Standards referred to in the Disability Standards for non-commercial use should be made free.*

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**Recommendation 32 – Mandatory reporting and publication of compliance with the DSAPT**

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*The DDA should be amended to require public transport operators and providers to report data on compliance with the DSAPT. Reporting requirements should apply to all assets (existing, new, refurbished or upgraded) and to all sections of the DSAPT. All data should be provided in accessible formats and accompanied by plain English explanations prepared by the transport operator or provider.*

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**Recommendation 33 – Victimisation is unlawful even if it occurs for two or more reasons**

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*The DDA should be amended to clarify that victimisation is unlawful even if it occurs for two or more reasons.*

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**Recommendation 34 – Expand the definition of employment**

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*The DDA should be amended to expand the definition of employment to reflect the diversity of contemporary work arrangements, including by adopting the term ‘person conducting a business or undertaking’ and replacing the word ‘employee’ with ‘worker’.*

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**Recommendation 35 – Expand the scope of accessorial liability**

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*The scope of accessorial liability should be expanded to ensure a person conducting business can be held liable for all workers under their control.*

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**Recommendation 36 – Clarify the meaning of ‘permitting’ in section 122**

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*Section 122 of the DDA should be amended to clarify that a person ‘permits’ a particular act if they were able to prevent the act and did not take action to do so.*

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**Recommendation 37 – Extend liability to capture those who control AI systems**

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*The DDA should be amended to ensure that liability for discriminatory conduct extends to individuals or organisations that control and/or benefit from AI systems.*

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**Recommendation 38 – Expand the definition of ‘accommodation’**

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*The definition of accommodation should be expanded to expressly include all forms of housing, including caravans, mobile homes, boarding homes, group homes, and other non-traditional or informal living arrangements.*

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**Recommendation 39 – Defining sport and competitions and limiting exceptions**

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*The DDA should define sport as formally-organised (but not informal) sporting activities, and should also prohibit discrimination in relation to formally-organised competitions. Exceptions to prohibitions on discrimination in sport and competitions (as recommended) should be ‘reasonable, proportionate and justifiable in the circumstances’.*

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**Recommendation 40 – Remove subsection 13(4) to improve access to justice**

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*Remove subsection 13(4) to enable a complainant to make a complaint where they have made and withdrawn a similar complaint under a state or territory law.*

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**Recommendation 41 – Clarify the meaning of ‘refusal’**

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*Amend the DDA to clarify that ‘refusing’, as used for example in sections 23 and 24 of the DDA, includes a ‘deemed refusal’ or ‘constructive refusal’ where there has been a failure to make a decision within a reasonable period of time.*

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**Recommendation 42 – Restrict the use of non-disclosure agreements in settlements**

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*The DDA should be amended to restrict the use of NDAs in the settlement of any alleged conduct protected under the DDA, and in any setting.*

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**Recommendation 43 – Clarify and expand the range of remedies**

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*The AHRC Act should clarify and expand the range of remedies available on a finding of unlawful discrimination, to include the capacity for the court to make orders where appropriate:*

- *restraining a respondent from continuing a particular policy or practice;*
- *requiring a respondent to take specific action eg engage in training or review a policy or practice;*
- *requiring a respondent to take corrective action to prevent further discrimination; and*
- *requiring a respondent to pay a civil penalty for a breach of anti-discrimination law.*

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**Recommendation 44 – Periodic statutory reviews of the DDA**

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*The DDA should be subject to periodic statutory reviews to ensure it remains fit for purpose.*

# 1. Introduction

The Justice and Equity Centre ('JEC', formerly the Public Interest Advocacy Centre), welcomes the opportunity to respond to the Attorney-General's Department ('Department') Review of the *Disability Discrimination Act 1992* ('DDA').

We are a leading social justice law and policy centre, focusing on tackling barriers to justice and fairness experienced by marginalised communities – including people with disability. We have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability.

We have considerable experience in disability discrimination litigation, representing clients in the Australian Human Rights Commission ('AHRC') and in the federal courts. We work on related policy and law reform in consultation with disability advocates and Disability Representative Organisations ('DROs'). We are also a member of the Steering Committee and a co-design partner with People with Disability Australia and the Australian Federation of Disability Organisations on the co-design of proposed Aviation Disability Standards.

The DDA is no longer fit for its intended purpose and is long overdue for modernisation. It is unnecessarily complex, contains numerous practical hurdles for those seeking its protection, and imposes an undue burden on people with disability to enforce their rights.

In answering the questions set out in the Issues Paper and raising other areas of reform, we have applied the following principles:

- Protections under the DDA should apply broadly, reflecting the intended beneficial purpose of the Act, namely to eliminate discrimination against people with disability.
- Exceptions, exemptions and defences for acts of discrimination that would otherwise be prohibited should be as limited as possible, and necessary and proportionate to achieving a legitimate purpose.
- The law should be clear and easy to understand and apply: this includes by reflecting the lived reality of discrimination, vilification, victimisation and harassment in all its forms.
- The DDA should aim for best practice in the realisation of human rights. While consistency with other Australian jurisdictions and discrimination protections is valuable, this review equally presents an opportunity to drive innovation at the federal level and set high standards which realise the rights of people with disability.

## 2. Part 1: Updating understandings of disability and disability discrimination

### 2.1 Definition of disability

The definition of disability in the DDA reflects a medical model of disability, including by using deficit-based language. Some of this language is outdated and should be updated to reflect contemporary understandings of disability. The definition should be redrafted to align with community expectations, human rights principles and international obligations such as the UN Convention on the Rights of Persons with Disabilities ('CRPD').

As the Disability Royal Commission observed, the CRPD ‘reflects the fundamental shift from a medical model of disability (defining people by their impairments) to a social model and human rights model (treating people with disability as rights holders)’.<sup>1</sup> The CRPD provides ‘the most contemporary and holistic application of human rights and fundamental freedoms to people with disability’.<sup>2</sup> We therefore agree its model of disability should be adopted as much as possible in all Australian policy and law reform.<sup>3</sup>

The DDA can give effect to the social model of disability by addressing discrimination faced by people with disability.<sup>4</sup> However, to do this, it requires a broad and inclusive definition of disability which describes the diverse range of people who may experience discrimination related to their differences, conditions or impairments.

The new definition should not create unintended hurdles or consequences for people with disability. The current structure and breadth of the definition is a strength. An amended definition must enable the DDA to achieve its objective to eliminate discrimination (compared to definitions of disability that apply to other government laws or programs with different objectives).

### 2.1.1 Avoiding circularity

One such challenge in developing a definition based on the social model of disability is avoiding potential circularity. The social model recognises various barriers (eg attitudinal, environmental, communication and social) to full and effective participation in society, while discrimination laws target actions that create or perpetuate those barriers. There is a circularity in prohibiting actions causing disadvantage because of disability, if disability is itself defined by reference to such disadvantage.

Additionally, reference to barriers in the definition may unintentionally exclude people who cannot demonstrate they experience the barriers and/or have taken steps to reduce the barriers they face. In this regard, lessons can be drawn from the interpretation of ‘disability’ in the United States, which is primarily defined as ‘a physical or mental impairment that substantially limits one or more major life activities of such an individual’.<sup>5</sup> Early interpretation by the US Supreme Court found this required considering the ameliorative effects of mitigating measures when deciding whether a person has a disability, which resulted in many decisions where impairments were not considered a disability because in their mitigated state they did not cause a substantial limitation on any major life activities.<sup>6</sup> Subsequent amendments were needed to reject that interpretation.<sup>7</sup>

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<sup>1</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 44.

<sup>2</sup> Rosemary Kayess and Therese Sands, ‘Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation’ (Research Report, September 2020) 2.

<sup>3</sup> See eg, *National Disability Insurance Scheme Act 2013* (Cth) s 31(1); *Disability Services and Inclusion Act 2023* (Cth) s 3(a); *Disability Inclusion Act 2014* (NSW) s 3(e).

<sup>4</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Productivity Commission Inquiry Report, 30 April 2004) Chapter 11 ‘Definitions’, 298.

<sup>5</sup> *Americans with Disabilities Act* 42 USC § 12102.

<sup>6</sup> Nicole Buonocore Porter, ‘Explaining ‘Not Disabled’ Cases Ten Years After the ADAA: A Story of Ignorance, Incompetence, and Possibly Animus’ (2019) 26(3) *Georgetown Journal on Poverty Law and Policy* 383, 386-387.

<sup>7</sup> *Ibid* 389.

### 2.1.2 Health status, medical condition and medical record

We support incorporating ‘health status’ as a means of protecting people who may be subject to significant discrimination but may not consider themselves to have a disability (eg people living with HIV or other blood-borne viruses).

‘Medical condition’ could also be considered as a way of avoiding unintended gaps in the definition (including as a result of removing deficit-based language), subject to the views of relevant community organisations such as ACON and the HIV/AIDS Legal Centre.

‘Medical record’, including past illnesses that have no bearing on current abilities, can also be unfairly used to exclude individuals, and therefore should also be incorporated into the definition of disability. This should be informed by existing law in Tasmania, the Northern Territory and Queensland, as well as the public health and disability sectors and should ensure protections while allowing for reasonable, safety-related exceptions.<sup>8</sup>

### 2.1.3 Conclusions on definition

In summary, we recommend the Department engage in close consultation with DROs and the disability community as to the appropriate definition of disability, including on the preferred language. Subject to this, the definition should:

- not include stigmatising, negative or deficit-based language, ie ‘malfunction’, ‘malformation’ and ‘disfigurement’, while maintaining the range of impairments, conditions or differences covered;
- reflect human rights understandings of disability while:
  - avoiding potential circularity if disability is defined by reference to various barriers; and
  - adopting an approach that recognises an impairment could be permanent, long-term, temporary or episodic in nature (avoiding, for example, the reference to ‘long term’ in Article 1 of the CRPD);
- ensure discrimination on the basis of neurodiversity is covered;
- maintain coverage for genetic information discrimination;
- not rely on a formal diagnosis;
- maintain coverage for a person with past, current, future and imputed disability;
- continue to include ‘behaviour that is a symptom or manifestation of disability’; and
- incorporate ‘health status’ and/or ‘medical condition’ and ‘medical record’ to protect people who may be subject to discrimination but may not consider themselves to have a disability.

#### ***Recommendation 1 – Modernising the definition of disability***

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*The definition of disability should be developed in close consultation with the disability community. At a minimum, the definition should not include deficit-based language; maintain its*

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<sup>8</sup> *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(1)(p); *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), s 52(2), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pf), sch 1 definition of ‘irrelevant medical record’ (uncommenced).

current breadth, including coverage of neurodiversity; not require a formal diagnosis; and incorporate health status/medical condition and medical record.

## 2.2 Addressing intersectionality

To reflect the reality that disadvantage rarely arises from a single attribute in isolation, but from the interaction of multiple attributes such as race, sex, sexuality, gender identity, disability, or age,<sup>9</sup> anti-discrimination law should recognise that experiences of discrimination often arise from the interaction of multiple attributes.

While it is possible for a complainant to bring a claim on multiple attributes under different federal anti-discrimination laws, current legislation does not allow the combined and compounding effect of multiple protected attributes to be considered together in a single claim. This means that intersectional discrimination – for example, discrimination experienced because of the combined effect of being a First Nations woman with disability – is not adequately recognised. This gap was identified by McElwaine J in response to the applicant having ‘an intersectionality of protected attributes relevant to race, age, sex, and imputed disability discrimination’:

...My research has failed to turn up any case that has considered this issue pursuant to the discrimination statutes relied on by Dr Pathmanathan.

I do not find that [intersectionality] is of no assistance in understanding how Dr Pathmanathan frames discrimination claims, though ultimately I am bound to proceed in accordance with the provisions of each statute...<sup>10</sup>

This problem demonstrates the need to consolidate and streamline the separate federal discrimination Acts. This has previously been recommended on several occasions.<sup>11</sup> In the absence of a proposal to consolidate federal anti-discrimination law, the Department should consider how discrimination claims can be brought on the basis of multiple interacting attributes.

Continuing to consider people with disability in an isolated way obscures how disability discrimination often intersects with other barriers and prejudice. In the context of the DDA, we suggest other changes could also be made to recognise people with disability who have intersecting identities and address compounding discrimination.

First, as the Issues Paper acknowledges, the comparator test poses difficulties for people with intersecting identities.<sup>12</sup> This is another reason to replace the comparator test (further to the reasons we provide below in section 2.3.1.1), and to respect the complexity of people’s identities.

Second, the Issues Paper proposes introducing in at least two contexts (proposed amendments to the unjustifiable hardship exception and consideration of inherent requirements), the need for a

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<sup>9</sup> See, eg, Law Reform Commission of Western Australia, *Project 111 - Review of the Equal Opportunity Act 1984 (WA)* (Final Report, August 2022) [4.1.3]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Review, July 2022) 50.

<sup>10</sup> *Pathmanathan v St John of God Healthcare Inc (No 3)* [2023] FCA 628 at [29]-[30].

<sup>11</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (Final Report, December 2021) 20, 34.

<sup>12</sup> Commonwealth Attorney-General's Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 28.

duty holder to consult with people with disability. As with the *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas), any amendments to the DDA requiring a duty holder to consult with people with disability should require the duty holder to consider, among other things, barriers to accessibility which may be compounded by intersectionality.<sup>13</sup> This should be accompanied by introducing a definition of intersectionality in the DDA.<sup>14</sup>

Third, the DDA could stipulate that whenever the DDA requires considering a person's circumstances and/or impact on a person with disability (ie whether the person has been treated unfavourably or has experienced disadvantage), a court should consider, among other things, whether the barriers to accessibility are compounded by intersectionality. This could be done either as a standalone provision or as a subsection to relevant provisions.

### ***Recommendation 2 – Incorporating intersectionality***

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*The DDA should be amended to require consideration of the barriers to accessibility which may be compounded by intersectionality, when the DDA requires:*

- *people with disability to be consulted; and*
- *considering a person's circumstances and/or impact on a person with disability.*

*These amendments should be accompanied by introducing a definition of 'intersectionality'.*

## **2.3 Amending the tests for discrimination**

The tests for discrimination should be improved and simplified. Our recommendations below would make the law more accessible and better reflect how discrimination is experienced.

Discrimination is not always easily categorised as either 'direct' or 'indirect'. The current binary approach is outdated and often leads to complexity and confusion. A modernised approach should acknowledge overlap and allow for flexibility in how claims are framed and determined to avoid unjust technical barriers for complainants. We support the approach taken in the *Discrimination Act 1991* (ACT) which recognises discrimination may be direct, indirect, or both.

### **2.3.1 Amending the definition of direct discrimination**

#### **2.3.1.1 Replacing the 'comparator' test**

We support amending the definition of direct discrimination to replace the current 'comparator' test. The comparator test is complex, restrictive and unpredictable. In particular, the reliance on a hypothetical comparator is open to misapplication to the detriment of people experiencing mistreatment.<sup>15</sup>

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<sup>13</sup> See *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) s 17.

<sup>14</sup> See also, *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) s 5; *Disability Inclusion Act 2024* (ACT) Dictionary.

<sup>15</sup> See, eg, *Purvis v New South Wales* (2003) 217 CLR 92.

The comparator test should be replaced with the more modern and simplified test concerned with whether a person with disability has experienced 'unfavourable treatment' or 'detriment'. Taking this approach removes the need for a comparator, focusing instead on whether someone is treated unfavourably because of their disability. This simplification has numerous benefits, including that it would assist duty holders to better understand their legal obligations. Amending the test in this way would be consistent with the approach taken in other jurisdictions.<sup>16</sup>

### 2.3.1.2 Shifting the burden of proof for causation

The DDA should require complainants of direct discrimination to demonstrate they have been treated unfavourably, while shifting some of the burden of proof regarding the cause of that treatment to respondents. We support a shifting burden of proof model as a more efficient and effective way of considering the reason for discriminatory treatment, easing the current onerous burden on complainants to demonstrate why they have been treated poorly (where, as we explain below, that is not often within their knowledge).

Once a complainant has established they are a person with disability and were treated unfavourably, the conduct should be presumed to have occurred for an unlawful reason. Then the burden should shift to the respondent to demonstrate the unfavourable treatment was not because of the person's disability. This rebuttable presumption would address a significant barrier in the current framework which requires complainants to prove the reason for their treatment – something that is often difficult or impossible to assess, particularly where the discrimination may be due to the respondent's unconscious bias.<sup>17</sup> This approach also recognises that evidence for the reason behind the relevant treatment is likely to be within the possession or control of the respondent, making it appropriate that they bear the onus to provide that explanation.

This approach is consistent with the burden of proof that already applies for indirect discrimination, where once a complainant shows a condition or requirement has, or is likely to have, the effect of disadvantaging people with disability, the respondent needs to prove the requirement is reasonable in the circumstances.<sup>18</sup>

Reforming the burden of proof in this way would bring the DDA in line with other best practice models such as those enacted in Queensland, the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth), and the adverse action protections of the *Fair Work Act 2009* (Cth) ('FWA').<sup>19</sup>

The DDA should also make clear that the motive and intention of a respondent is not relevant. We support an amendment based on the Victorian *Equal Opportunity Act* which explicitly provides that in determining whether a person directly discriminates, it is irrelevant whether the

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<sup>16</sup> See, eg, *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1).

<sup>17</sup> See, eg, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 301-2, Recommendation 4.23.

<sup>18</sup> DDA s 6(3)-(4).

<sup>19</sup> *Anti-Discrimination Act 1991* (Qld) s 204; Exposure Draft, *Human Rights and Anti-Discrimination Bill 2012* (Cth) s 124; *Fair Work Act 2009* (Cth) s 361.

person is aware of the discrimination or considers the treatment to be unfavourable, or whether the disability is the only or dominant reason for the treatment, as is a person's motive.<sup>20</sup>

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***Recommendation 3 – Discrimination may be direct, indirect or both***

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*The DDA should be amended to recognise discrimination may be direct, indirect or both.*

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***Recommendation 4 – Replacing the 'comparator' test***

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*The comparator test should be replaced with an 'unfavourable treatment' or 'detriment' test.*

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***Recommendation 5 – Shifting the burden of proof for causation***

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*Once a complainant has established they are a person with disability and they were treated unfavourably, there should be a rebuttable presumption that the conduct occurred for an unlawful reason ie the burden should shift to the respondent to demonstrate the unfavourable treatment was not because of the person's disability.*

## **2.3.2 Amending the definition of indirect discrimination**

### **2.3.2.1 Removing the 'reasonableness' test**

The reasonableness element of the test for indirect discrimination poses multiple challenges: it is overly broad, it privileges the status quo and its overlap with 'unjustifiable hardship' creates confusion and duplication.

Allowing discrimination which is 'reasonable, having regard to the circumstances' provides a wide scope for respondents to justify their discriminatory conduct without engaging with how they could change their practice to be more inclusive. As the Australian Discrimination Law Experts Group ('ADLEG') points to in their submission to this Review, this risks 'perpetuat[ing] the status quo'.<sup>21</sup>

The availability of the unjustifiable hardship exception alongside the reasonableness requirement creates a double layer of defence which is unnecessarily complex for complainants, as recognised by the Disability Royal Commission.<sup>22</sup>

In our view, determining whether the discriminatory impact of any requirement or condition is justified should be based on a test of unjustifiable hardship, as recommended by the Disability Royal Commission.<sup>23</sup> This would assist with simplifying the operation of the DDA by reducing the number of different concepts applied in assessing whether discrimination has occurred.

We therefore support the removal of the reasonableness element from indirect discrimination and its replacement with a test based on unjustifiable hardship. We also suggest changes to the

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<sup>20</sup> *Equal Opportunity Act 2010* (Vic) ss 8 and 10.

<sup>21</sup> Australian Discrimination Law Experts Group, Submission to the Commonwealth Attorney General's Department, *Review of the Disability Discrimination Act* (16 October 2025) 44.

<sup>22</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 304.

<sup>23</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 304.

definition and application of unjustifiable hardship so it is clear and fit for this purpose, as outlined further in section 4.2.

In the alternative to this single-test approach, reasonableness should be replaced with a 'legitimate and proportionate' test for the reasons given by the AHRC – namely that it would support 'more rigour and specificity' than the more general and deferential reasonableness test.<sup>24</sup> This test should be introduced together with listed factors relevant to determining legitimacy and proportionality of a requirement or condition. This may include the extent of the disadvantage created, the costs of remedying that disadvantage and the availability of less restrictive means of achieving any legitimate aim that is the basis for the requirement or condition.

If 'reasonableness' itself is retained as an element, the DDA should provide guidance as to relevant factors to be considered, including considerations of proportionality, similar to the Victorian approach.<sup>25</sup> This would provide greater clarity and consistency, helping both complainants and respondents understand how the law is likely to be applied.

### 2.3.2.2 Removing the 'not able to comply' element

The 'not able to comply' element of the test for indirect discrimination should be removed to simplify the law, reduce evidentiary barriers, and ensure the test reflects real-world disadvantages experienced by people with disability.

Requiring a complainant to demonstrate they are not able to comply with a requirement or condition places an additional burden on complainants and detracts from what should be the central issue: whether the condition disadvantages people with disability. As former Disability Discrimination Commissioner Graeme Innes said:

A test of compliance focuses a court's inquiry on the resources and perseverance of a person with disability. It results in the court asking, in effect, what level of distress, inconvenience and embarrassment a person with a disability should have to endure before they can be said to be unable to comply with a requirement or condition. That is a long way from equality for people with disability. The starting point should be that people with disability are entitled to live without disadvantage, not that they are expected to put up with it.<sup>26</sup>

Notwithstanding the element has, at times, been interpreted more liberally than it appears on its face,<sup>27</sup> it has also led to perverse outcomes.<sup>28</sup> Further, as the Issues Paper cites, the 'disadvantages people with disability' element is already enough to capture evidence of an inability to comply.<sup>29</sup>

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<sup>24</sup> Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free and Equal Final Report 2023* (Final Report, November 2023) 296.

<sup>25</sup> *Equal Opportunity Act 2010* (Vic) s 9(3).

<sup>26</sup> Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 21 January 2009, 3 (Graeme Innes, Human Rights Commissioner and Disability Discrimination Commissioner).

<sup>27</sup> See, eg, *Hurst v Queensland* (2006) 151 FCR 562 [134].

<sup>28</sup> See, eg, *Hinchcliffe v University of Sydney* (2004) 186 FLR 376 [115].

<sup>29</sup> Commonwealth Attorney-General's Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 37.

We recommend the DDA be amended to bring it in line with the *Age Discrimination Act 2004* (Cth) ('ADA') and the *Sex Discrimination Act 1984* (Cth) ('SDA'), as well as anti-discrimination legislation in numerous states and territories.<sup>30</sup> This shift would better capture the impact of indirect discrimination and align with contemporary understandings of equality and structural barriers.

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***Recommendation 6 – Removing the 'reasonableness' element***

*The reasonableness element of indirect discrimination in section 6(3) should be removed and replaced with a test based on unjustifiable hardship. If an additional element is to be retained, reasonableness should be replaced with a 'legitimate and proportionate' test.*

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***Recommendation 7 – Removing the 'not able to comply' element***

*The 'not able to comply' element of indirect discrimination should be removed.*

## **2.4 Interpreting the DDA in line with the CRPD**

We support proposed measures to ensure the DDA takes a human rights-focused approach towards eliminating discrimination against people with disability. While Australia is committed to implementing the CRPD in theory, in practice '[t]here presently remains gaps in the implementation of the CRPD to protect, promote and ensure the CRPD rights'.<sup>31</sup>

Although statutory interpretation principles enable courts to consider international human rights agreements and/or to construe provisions consistently with Australia's international obligations,<sup>32</sup> there would be practical benefit in making this a clear requirement in the DDA. Express reference to the CRPD in the objects and interpretation provisions of the DDA would assist to provide a reference framework to understand the overall purpose and direction of the legislation, and on that basis, assist to better interpret and apply the legislation. In addition to guiding courts, it would also guide duty holders to act consistently with Australia's international obligations (noting the few instances where disability discrimination complaints are determined by courts).

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***Recommendation 8 – Express reference to human rights-focused approach***

*The objects and interpretation provisions should be amended to expressly reference Australia's obligations under the CRPD and the need for the DDA to be interpreted in a way that is beneficial to people with disability.*

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<sup>30</sup> *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Anti-Discrimination Act 1992* (NT) s 20; *Discrimination Act 1991* (ACT) s 8.

<sup>31</sup> Kate Eastman AM SC, 'Opening Address Counsel Assisting – Public hearing 18', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Opening Address, 8 November 2021) 83 [287].

<sup>32</sup> *Acts Interpretation Act 1902* (Cth) s 15AB(2)(d); *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287.

### 3. Part 2: Positive duty to eliminate discrimination

We strongly support the introduction of a positive duty to eliminate discrimination. Achieving substantive equality requires proactive action to remove systemic barriers, together with effective enforcement measures.

As we explain below, the issues with the current complaints-based process demonstrates the need to shift the burden away from individuals who experience discrimination. This approach would align with reforms recently made to the SDA and with recommendations of the Disability Royal Commission,<sup>33</sup> as well as increasing reforms in other Australian jurisdictions.<sup>34</sup> As the Issues Paper states, implementation of positive duty provisions ‘is the new standard being adopted across Australia to improve the prevention of discrimination.’<sup>35</sup>

#### 3.1 Issues with the current complaints-based process

Reliance on individual complaints to achieve the objective of eliminating discrimination is ineffective and inadequate. The Disability Royal Commission found ‘existing individual complaints mechanisms are often not an accessible or practical option for many people with disability.’<sup>36</sup> It attributed this to the ‘lack of accessible information’, ‘complexity of navigating systems’, ‘overly formalistic processes’, ‘inability to address the significant power imbalances between complainants and respondents’, ‘inadequacy of remedies’, and ‘the ongoing stress and anxiety caused by the complaints process.’<sup>37</sup>

The JEC agrees with these findings. In our experience, the complexity, time and cost of the complaints-based process means many instances of discrimination do not lead to a complaint to the AHRC. This results in underreporting of issues, lack of accountability and lack of meaningful action to eliminate discrimination.

Even where a discrimination complaint is made and resolved before the AHRC, settlements are binding only between the parties to the complaint. If a settlement includes systemic outcomes such as training or policy changes, only the complainant who is a party to the settlement agreement can hold a respondent accountable for failing to fulfil those obligations. Enforcing a settlement agreement in court requires significant resources which are often not available to complainants.

In addition, settlement agreements almost always require the terms of the settlement to remain confidential. This means outcomes or improvements resulting from the complaint cannot be disclosed or used by other potential complainants as a precedent to seek improvements in similar

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<sup>33</sup> *Sex Discrimination Act 1984* (Cth) s 47C; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, Recommendation 4.27.

<sup>34</sup> *Equal Opportunity Act 2010* (Vic) s 15; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1992* (NT) s 18B; *Anti-Discrimination Act 1998* (Tas) s 104.

<sup>35</sup> Commonwealth Attorney-General’s Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 41.

<sup>36</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 221.

<sup>37</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 221-2.

circumstances. For this and other reasons, we recommend the DDA be amended to restrict the use of non-disclosure agreements (see below section 8.9).

If conciliation before the AHRC is not successful, and a complainant proceeds to a federal court, they face additional obstacles – although the adverse costs risk of bringing litigation has been significantly alleviated by the Australian Government’s new ‘equal access’ cost provisions,<sup>38</sup> some costs risk remains, on top of a complainant’s need to obtain legal representation, and the intense and time-consuming nature of litigation.

If a complainant succeeds in court, the outcome will generally be a declaration of unlawful discrimination and a modest award of compensation. These remedies are often inadequate to eliminate discriminatory practices. Respondents may still avoid implementing systemic changes, arguing a declaration of unlawful disability discrimination only relates to the specific facts of that case. Although many complainants want the respondent not to continue or repeat the unlawful conduct, courts do not commonly make orders which might require ongoing supervision by the Court.

These issues highlight a more fundamental contradiction: while seeking to address disadvantage, the DDA places the greatest burden on those experiencing it. This review presents an opportunity to address this issue.

The current complaints-based process is neither empowering for people with disability nor effective at achieving the DDA’s objects. A positive duty is needed to shift the burden from complainants and instead encourage proactive prevention by those in a position to effect change.

### **3.2 Scope of the positive duty**

The positive duty to eliminate discrimination should apply across all forms of unlawful conduct covered by the DDA, including discrimination, harassment, vilification and victimisation, as well as non-compliance with Disability Standards. It should apply to all areas of public life and therefore to all duty holders (public and private bodies) under the DDA. This scope aligns with other Australian jurisdictions which have introduced a positive duty.<sup>39</sup>

The duty should be to take reasonable and proportionate measures to eliminate discrimination against people with disability. We support the Disability Royal Commission’s recommendation, which builds on the Victorian approach to this duty, and which sets out the following factors that must be considered in determining whether a measure is reasonable and proportionate:

- the size, nature and circumstances of the duty holder’s business or operations;
- their resources;
- their business, risk management plans and operational priorities;
- the practicability and cost of the measures;
- whether the duty holder has a disability action plan; and

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<sup>38</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PSA.

<sup>39</sup> See, eg, *Equal Opportunity Act 2010* (Vic) s 15(1)-(2); *Discrimination Act 1991* (ACT) s 75(1)-(2); *Anti-Discrimination Act 1992* (NT) s 18B(1)-(2).

- the nature and extent of consultation with any person with disability concerned.<sup>40</sup>

These steps could include conducting risk assessments, implementing policies, providing training, and responding effectively to complaints.

As the Issues Paper recognises, ‘duty holders in a large portion of the country are already familiar with and subject to these kinds of obligations.’<sup>41</sup> Duty holders in those jurisdictions which already have a positive duty will (or should) already have compliance measures in place, such that any additional burden to them will be minimal.

We also support the introduction of an additional, proactive duty to promote equality. This would be similar to the Victorian approach to promoting gender equality, the broad-based UK equality duty and in line with the recommendations of the Disability Royal Commission. This would operate alongside the broader duty to take reasonable and proportionate measures to prevent or eliminate discrimination.

### 3.3 Implementation and enforcement of the positive duty

A positive duty under the DDA must be accompanied by an effective enforcement framework to be truly preventative and not reactionary. This includes an aggrieved individual being able to make a complaint under the DDA for breach of the positive duty, as well as proactive enforcement mechanisms which do not rely on individual complaints. Additionally, guidance together with a strong education and outreach campaign will be necessary to support duty holders to effectively implement the positive duty.

Given the existing functions of the AHRC under section 11 of the *Australian Human Rights Commission Act 1986* (Cth) (‘AHRC Act’), the role of the Disability Discrimination Commissioner and the expertise of the AHRC, the AHRC should perform this role. This would require the AHRC being empowered with a full suite of compliance and enforcement powers, beyond those relating to the positive duty under the SDA.

In the *Speaking from Experience* report, the AHRC identifies limitations to its powers under the SDA. First, the AHRC recommends it should have the power to seek a civil penalty order from a court for breaches of the positive duty.<sup>42</sup> Second, the AHRC identifies the secrecy provision limits its ability to share and publicise information about its compliance and enforcement activities.<sup>43</sup>

Effective penalties and the ability to be transparent about its enforcement actions are critical for any regulator. However, powers alone are not enough. While the AHRC has relevant regulatory

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<sup>40</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 30-31 Recommendation 4.27; *Equal Opportunity Act 2010* (Vic) s 15(6).

<sup>41</sup> Commonwealth Attorney-General’s Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 41.

<sup>42</sup> *Australian Human Rights Commission Act 1986* (Cth) s 49; Australian Human Rights Commission, *Speaking from Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025), 67-68, Recommendation 11(b).

<sup>43</sup> Australian Human Rights Commission, *Speaking from Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025) 68.

powers to enforce the positive duty in the SDA, it is not properly resourced to perform those functions.<sup>44</sup> As the Australian Law Reform Commission said:

The benefits of the regulatory roles given to the AHRC... by the implementation of the recommendations made by the Respect@Work Report... depend upon those regulators being properly resourced... To be effective, regulators must be funded so that they are able to carry out their educative and investigative functions as well as their function of sufficiently promoting compliance by bringing or supporting proceedings to deal with non-compliance. Rather than being resourced to conduct occasional 'test cases', an effective regulator should be sufficiently resourced to pursue most meritorious claims of non-compliance.<sup>45</sup>

The AHRC is not adequately funded to carry out its role with respect to the positive duty in the SDA. The AHRC has identified that its 'core funding continues to pose problems' and it 'regularly faces funding challenges', impacting its ability to fulfil its statutory functions.<sup>46</sup> Notably, in relation to specific funding for the positive duty under the SDA, in the October 2022 budget, the AHRC received \$8.9 million over four years to support implementation of the Respect@Work Report recommendations 'which includes the positive duty education and enforcement function and information service for workplace sexual harassment information'.<sup>47</sup> However, as at September 2024, the AHRC's current core funding for workplace and community education 'supports only two FTE staff and is inadequate to properly deliver on this important function'.<sup>48</sup> The AHRC's education capacity 'has had to be supplemented by fee for service funding'.<sup>49</sup>

Without sufficient funding, the AHRC cannot fulfil its regulatory, educative and enforcement functions – this significantly limits the effectiveness of the positive duty under the SDA. It is critical the AHRC has adequate and sustainable funding and resourcing for the proposed duty under the DDA to be effective and to achieve its intended purpose.

### ***Recommendation 9 – Introducing a positive duty to eliminate discrimination***

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*A positive duty to eliminate discrimination should be introduced and apply to all forms of unlawful conduct, all areas of public life and all duty holders under the DDA. The duty should require taking 'reasonable and proportionate measures' as recommended by the Disability Royal Commission.*

*The positive duty must be introduced with an effective enforcement framework with the AHRC granted a full suite of compliance and enforcement powers, including the power to seek civil*

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<sup>44</sup> Karen O'Connell and Josh Bornstein, 'We have a great law to tackle workplace sexual harassers. Pity it's never been used', *The Sydney Morning Herald* (Online, 3 July 2025) <<https://www.smh.com.au/national/we-have-a-great-law-to-tackle-workplace-sexual-harassers-pity-it-s-never-been-used-20250703-p5mc82.html>>.

<sup>45</sup> Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Final Report, January 2025) 448.

<sup>46</sup> Australian Human Rights Commission, *Annual Report 2023-2024* (Final Report, September 2024) 7; Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free and Equal Final Report 2023* (Final Report, November 2023) 162.

<sup>47</sup> Australian National Audit Office, *Management of Complaints by the Australian Human Rights Commission* (Performance Audit Report, 17 February 2025) [3.45].

<sup>48</sup> Australian Human Rights Commission, *Annual Report 2023-2024* (Final Report, September 2024) 7.

<sup>49</sup> Australian Human Rights Commission, *Annual Report 2023-2024* (Final Report, September 2024) 7.

penalty orders. The AHRC should receive adequate and sustainable funding to carry out this regulatory function.

## 4. Part 3: Encouraging inclusion in employment, education and other areas of public life

### 4.1 Strengthening the duty to provide adjustments

We support the introduction of a positive standalone duty to provide adjustments. This standalone duty should replace ss 5(2) and 6(2) of the DDA.

From a terminology perspective, we support the Disability Royal Commission's recommendation to replace the term 'reasonable adjustments' with 'adjustments'. We agree the requirement to make an adjustment 'has nothing to do with whether an adjustment is reasonable, or if a request for an adjustment is reasonable or if a respondent's response to the request is reasonable.'<sup>50</sup> This is consistent with judicial interpretation, and with the Committee on the Rights of Persons with Disabilities' ('CRPD Committee') stance that 'reasonableness' should not act as a distinct qualifier or modifier to the duty.<sup>51</sup> To remove any misconception – including to make clear the duty is not qualified in any additional way to unjustifiable hardship – the term 'adjustments' rather than 'reasonable adjustments' should be adopted in the DDA.<sup>52</sup>

The existing provisions which incorporate the requirement to make reasonable adjustments into direct (s 5(2)) and indirect (s 6(2)) discrimination have failed to achieve their purpose.<sup>53</sup> People with disability continue to face structural barriers in areas such as employment, education and access to goods and services, and duty holders are able to evade responsibility for making adjustments that would enable people to participate. As the Disability Royal Commission says, providing adjustments 'is a core principle of the CRPD, which suggests the failure to make an adjustment should be recognised as a form of discrimination, not just an element of direct or indirect discrimination'.<sup>54</sup>

A distinct duty would address issues we have repeatedly raised since the Federal Court's decision in *Sklavos v Australian College of Dermatologists*,<sup>55</sup> which found s 5(2) of the DDA required Mr Sklavos to demonstrate a causal connection between the failure to make an

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<sup>50</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 307 and Recommendation 4.25.

<sup>51</sup> *Watts v Australia Postal Corporation* (2014) 222 FCR 220, [22]; Committee on the Rights of Persons with Disabilities, *General Comment No. 6: Equality and non-discrimination*, 19<sup>th</sup> sess, UN Doc CRPD/C/GC/6 (26 April 2018) 7 [25].

<sup>52</sup> Noting a duty holder may still be able to claim unjustifiable hardship.

<sup>53</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 306.

<sup>54</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 308.

<sup>55</sup> [2017] FCAFC 128.

adjustment and his disability.<sup>56</sup> This has made it very difficult for complainants to rely on this provision, because respondents will rarely, if ever, admit to not making adjustments because of a person's disability – it will almost always be said to be for some other reason. The JEC and others have since called for this to be addressed by the creation of a standalone obligation to provide adjustments. This change is long overdue.

We support the framing of the duty as recommended by the Disability Royal Commission – this would make the obligation clearer, more proactive, and easier to enforce than the current provisions, reducing the onus on individuals to first prove discrimination.

The duty should apply to all areas of public life, including those not covered by the existing areas of life specified in the DDA. We think this is necessary to achieve the purpose of the duty to provide adjustments – to eliminate discrimination and advance substantive equality and inclusion.

To practically discharge the duty, duty holders should be expected to identify, consult and implement adjustments proactively, wherever the need is either known or reasonably foreseeable. Requiring a person to request an adjustment as a precondition risks undermining the purpose of the obligation, especially where individuals may not feel safe or empowered to ask, or where the need is obvious. Consistent with the views of the CRPD Committee, an adjustment must be provided from the moment a person requires access to non-accessible situations and is not limited to the person asking for the adjustment.<sup>57</sup>

The duty to identify and implement adjustments should be delivered in a timely manner, taking into account the nature of the adjustment. To illustrate, we are aware of a duty holder taking more than 24 months to consider a request for a person to have their assistance dog in the workplace. The duty holder should have the onus of showing the duty was discharged, which may in some cases involve actively progressing implementation of an adjustment. The DDA should also specify if an adjustment is not provided in a timely manner, the duty holder will be taken to have refused the adjustment.

In addition, these changes to the duty to provide adjustments must be carried through to the *Disability Standards for Education 2005* (Cth), as we previously recommended in our [Submission to 2020 Review of Disability Standards for Education 2005](#).<sup>58</sup> The current stark inconsistency

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<sup>56</sup> See, eg, Public Interest Advocacy Centre, Submission No 57 to Senate Standing Committee on Education and Employment, *Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (11 November 2022) 2-3 <<https://jec.org.au/wp-content/uploads/2022/11/22.11.11.-PIAC-Submission-Fair-Work-Amendment-Legislation-Inquiry.pdf>>; Public Interest Advocacy Centre, Submission No 212 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (7 July 2023) 11 <<https://jec.org.au/wp-content/uploads/2023/08/23.07.07-PIAC-Submission-Human-Rights-Framework-Final.pdf>> Public Interest Advocacy Centre, Submission to Australian Human Rights Commission, *Free & Equal Anti-Discrimination Law Reform Discussion Paper* (8 November 2019) 4-5 <<https://jec.org.au/wp-content/uploads/2019/11/19.11.08-PIAC-Submission-Free-and-Equal-Anti-Discrimination-Law-Reform-Final.pdf>>.

<sup>57</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 6: Equality and non-discrimination*, 19<sup>th</sup> sess, UN Doc CRPD/C/GC/6 (26 April 2018) 6-7.

<sup>58</sup> Public Interest Advocacy Centre, Submission to the Department of Education, *2020 Review of Disability Standards for Education 2005* (September 2020) 2 <<https://www.education.gov.au/system/files/documents/submission-file/2021-02/Submission%20-%20Public%20Interest%20Advocacy%20Centre.pdf>>.

between the definition of reasonable adjustments in the Standards and the understanding of the concept in the DDA itself is unacceptable and must be addressed alongside changes to the DDA.

### ***Recommendation 10 – Replacing the term ‘reasonable adjustments’ with ‘adjustments’***

*The term reasonable adjustments should be replaced with adjustments.*

### ***Recommendation 11 – Introducing a standalone positive duty to provide adjustments***

*A standalone positive duty to provide adjustments, as recommended by the Disability Royal Commission, should be introduced. The duty should apply to all areas of public life, including those not covered by the DDA. Duty holders should identify, consult and implement adjustments proactively and in a timely manner, where the need is either known or reasonably foreseeable.*

## **4.2 Definition and application of ‘unjustifiable hardship’**

We agree with the ADLEG that the concept of unjustifiable hardship represents a ‘critical threshold’ in the DDA and the approach to assessing unjustifiable hardship has not been effective in providing legal certainty or upholding the rights of people with disability.<sup>59</sup> As the Issues Paper notes, courts have often considered financial costs and other hardship to the duty-holder in accommodating the person with disability.<sup>60</sup> A narrow focus on costs to the duty-holder obscures the broader systemic impacts of the failure to accommodate a person with disability.<sup>61</sup> In our view, and having regard to our recommendations regarding indirect discrimination above, ‘unjustifiable hardship’ requires change.

### **4.2.1 Definition**

We support the Disability Royal Commission recommendation to amend the definition of unjustifiable hardship in s 11 of the DDA to include mandatory consideration of additional factors. Clearly identifying factors which require consideration of the impact of conduct on the person with disability can start to address the tendency to focus too narrowly on costs to the respondent. This should include ‘consultation with any person with disability concerned’ and ‘consideration of all available alternative measures to eliminate or reduce hardship’ as recommended by the Disability Royal Commission.<sup>62</sup>

We further agree that duty holders should be required to document the factors they considered in assessing hardship, noting this must relate to their consideration *at the time* of the discriminatory

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<sup>59</sup> Australian Discrimination Law Experts Group, Submission to the Commonwealth Attorney General’s Department, *Review of the Disability Discrimination Act* (16 October 2025) 72.

<sup>60</sup> Commonwealth Attorney-General’s Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 51.

<sup>61</sup> Commonwealth Attorney-General’s Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 51.

<sup>62</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 337 and Recommendation 4.32.

conduct.<sup>63</sup> This will help to minimise current information barriers between applicants and respondents when contesting claims of unjustifiable hardship. As the Disability Royal Commission noted:

...In the context of litigation, the person with disability is often disadvantaged in responding to or challenging the claimed unjustifiable hardship. For example, they will not know if and when the respondent, such as a service provider, considered unjustifiable hardship when designing the service. Nor will the person with disability know what factors were considered or whether any measures were taken to ameliorate the risk of unjustifiable hardship; whether other legal or policy obligations are relevant; what records exist; the duration of the hardship; and what alternatives were available to avoid hardship.<sup>64</sup>

#### 4.2.2 Application

If, as recommended above, the DDA is amended to introduce a positive duty on all duty holders to eliminate discrimination and a standalone duty to provide adjustments, the defence of unjustifiable hardship in s 29A (as defined in section 11) should only apply to the extent required in the operative provisions of the DDA that remain relevant, ie:

- in the assessment of a claim of indirect discrimination (noting our Recommendation 6 to replace the test of reasonableness with unjustifiable hardship); and
- in the assessment of whether the standalone duty to provide adjustments has been discharged.

The general defence of unjustifiable hardship in s 29A of the DDA should be removed for three reasons.

First, maintaining a test of reasonableness for indirect discrimination (or alternatively, a proportionality test) and a general defence of unjustifiable hardship is duplicative and provides respondents with overlapping layers of defence against discrimination claims.

Second, it is not appropriate or desirable for unjustifiable hardship to apply as a defence to a claim of direct discrimination. For example, an archery club should not be protected by a general defence of unjustifiable hardship for having a policy that explicitly excludes people who are blind from membership of the club. Rather, they may seek to impose a condition that people can only participate in archery activities if they can demonstrate their ability to safely operate a bow and arrow. The archery club could then defend itself against an indirect discrimination claim based on the test of unjustifiable hardship.

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<sup>63</sup> Australian Discrimination Law Experts Group, Submission to the ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination law reform: Discussion Paper 1 - Extending the Protections of Discrimination Law* (January 2022) 21; *Moxon (No 2) v Westbus Pty Ltd (EOD)* NSWADTAP 24 at [50], referred to in Neil Rees, Simon Rice, and Dominique Allen, *Australian anti-discrimination law* (Federation Press, 2nd ed, 2014) 307.

<sup>64</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4,337.

Third, maintaining a general defence of unjustifiable hardship would be contrary to any positive duty and would be duplicative in the context of the standalone duty to provide adjustments.

### 4.2.3 Rationale for the defence

Sections 21B and 29A were introduced in the DDA in 2009 following the Productivity Commission's recommendation that an unjustifiable hardship defence apply 'in all areas of the [DDA] that make discrimination on the ground of disability unlawful.'<sup>65</sup> Prior to then, the defence of unjustifiable hardship did not apply in education after enrolment, in employment between hiring and dismissal, administration of Commonwealth laws and programs, sports and land.<sup>66</sup>

In making this recommendation, the Productivity Commission concluded that '[a]s a duty to make adjustments might be implied from existing provisions, an across the board unjustifiable hardship defence is required as the Act stands now to provide the necessary balance' and '[i]f the Commission's proposal for a duty to make reasonable adjustments were adopted, an accompanying unjustifiable hardship defence would become even more important as an across the board safeguard to balance rights and obligations.'<sup>67</sup>

The application of the unjustifiable hardship test to the standalone duty to provide adjustments will meet the Productivity Commission's concerns in relation to balancing rights and obligations, such that the purpose of maintaining a general unjustifiable hardship defence is no longer relevant.

### 4.2.4 Equivalent provisions in state/territory legislation

Equivalent or similar provisions in many state/territory jurisdictions apply more narrowly. The Law Council of Australia noted this in response to the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* at the time:

...similar defences in all State and Territory discrimination statutes are rarely available to all areas of public life covered by the legislation. Extending the unjustifiable hardship defence to all areas of the Disability Discrimination Act would create further differences between jurisdictions in an area of discrimination law that already suffers substantially from a lack of uniformity and the Law Council suggests that this aspect relating to extension should be considered carefully by the Committee, as should the need for extension to all areas.<sup>68</sup>

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<sup>65</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Productivity Commission Inquiry Report, 30 April 2004) 211, Recommendation 8.2.

<sup>66</sup> Ibid 205.

<sup>67</sup> Ibid 210-211.

<sup>68</sup> Law Council of Australia, Submission No 17 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (14 January 2008) 7 [32].

Our recommendation to limit the application of the defence of unjustifiable hardship also aligns with the view of the Queensland Human Rights Commission in its 2022 Review of Queensland's *Anti-Discrimination Act 1991*.<sup>69</sup>

However, if the test for indirect discrimination retains an internal assessment of reasonableness, we instead suggest reasonableness be replaced with the 'legitimate and proportionate' test, and unjustifiable hardship apply only for the purpose of the duty to provide adjustments. This will remove the duplicative application of the tests in the current framework, so that only one (either proportionality or unjustifiable hardship) applies at any one time.

Similarly, section 21B (which provides a defence of unjustifiable hardship in the work context) should be removed.

Any changes to the definition of unjustifiable hardship should also be applied consistently in the definitions used in the *Disability Standards for Accessible Public Transport 2002* (Cth) ('DSAPT'), *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and the *Disability Standards for Education 2005* (Cth).

#### ***Recommendation 12 – Two additional factors when assessing unjustifiable hardship***

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*The following two additional factors should be considered when assessing unjustifiable hardship:*

- *consultation with any person with disability concerned; and*
- *all available alternative measures to eliminate or reduce hardship.*

#### ***Recommendation 13 – Documenting the factors considered in assessing hardship***

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*Duty holders should be required to document the factors considered in assessing hardship at the time of the alleged discriminatory conduct.*

#### ***Recommendation 14 – Abolish the general defence of unjustifiable hardship***

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*The general defence of unjustifiable hardship in sections 21B and 29A should be abolished.*

- *Reasonableness should be replaced with unjustifiable hardship for the purposes of indirect discrimination; and*
- *Unjustifiable hardship should be available as a defence to the standalone duty to provide adjustments.*

### **4.3 Inherent requirements exception**

We share the Disability Royal Commission's concerns about the inherent requirements exception. We support its recommendation for the inclusion of two additional factors in determining whether a person with disability is able to meet the role's inherent requirements,

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<sup>69</sup> Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Final Report, July 2022) 129.

namely the nature and extent of any adjustments made, and the extent of consultation with any person with disability concerned.

As in the ACT, this change should be introduced alongside a duty to make adjustments, as well as a requirement that discrimination must be reasonable, proportionate and justifiable in the circumstances for the inherent requirements exception to apply.<sup>70</sup>

#### ***Recommendation 15 – Expanding the factors to consider for inherent requirements***

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*The inherent requirements exception should be amended to include:*

- *two additional factors in determining whether a person with disability is able to meet the role’s inherent requirements, namely the nature and extent of any adjustments made, and the extent of consultation with any person with disability concerned; and*
- *a requirement that the discrimination is reasonable, proportionate and justifiable in the circumstances.*

### **4.4 Exclusionary discipline and suspension in education**

We support amendments to ensure exclusionary discipline and suspension are expressly covered by the DDA (in addition to expulsions). As the Issues Paper states, several reviews and inquiries in recent years have demonstrated the need to address the inappropriate use of exclusionary discipline.<sup>71</sup> We defer to the views of disability representative organisations and other legal stakeholders on how exclusionary discipline and suspension should be defined.<sup>72</sup>

We also support calls for the *Disability Standards for Education 2005* (Cth) to be updated, including in relation to the process of providing adjustments for students with disability.

The JEC further encourages the Department to consult with disability representative organisations and legal stakeholders about any additional amendments to ensure education settings in Australia are inclusive, and uphold our commitments under the CRPD.

#### ***Recommendation 16 – Covering exclusionary discipline and suspension in education***

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*Exclusionary discipline and suspension should be expressly covered in the DDA.*

## **5. Part 5: Improving access to justice**

### **5.1 Offensive behaviour and vilification protections**

The DDA should be amended to enact standalone prohibitions on both offensive behaviour and vilification on the basis of disability.

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<sup>70</sup> *Discrimination Act 1991* (ACT) ss 33C, 74.

<sup>71</sup> Commonwealth Attorney-General’s Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 59.

<sup>72</sup> See, eg, *A Right to Learn - Keep Disabled Kids in Class* (Webpage) <<https://www.arighttolearn.com.au/>>.

The issue of public abuse and harassment of people with disability was highlighted by the Disability Royal Commission:

The evidence shows that many people with disability experience harassment in a range of places and circumstances not covered by the DDA. This includes harassment in public and by strangers. At Public hearing 28, people with disability shared their experiences of harassment in public places and said they have come to expect some form of abuse and harassment whenever they leave their homes.<sup>73</sup>

Similar prohibitions on the basis of disability are increasingly being adopted at the state and territory level.<sup>74</sup> To promote consistency with other jurisdictions, and to protect people with disability against harassment, offensive behaviour and vilification, the DDA should be amended to include standalone prohibitions.

The prohibition on offensive behaviour should be primarily modelled on s 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA'). Section 18C has operated effectively for 30 years, offering an avenue for civil redress against harmful racist public statements. However, we agree with the position of the ADLEG and Disability Voices Tasmania ('DVT'), that it should also include 'ridicule' (alongside 'offend', 'insult', 'humiliate' or 'intimidate'), in line with s 17(1) of the *Anti-Discrimination Act 1998* (Tas).

The standalone prohibition of offensive behaviour in the DDA should be introduced together with relevant exemptions reflecting those outlined in s 18D of the RDA, to ensure legitimate expression is not unduly constrained. The introduction of this prohibition on offensive behaviour would broadly implement recommendation 4.29 of the Disability Royal Commission.

A separate prohibition on vilification should also be enacted, in line with recommendation 4.30 of the Disability Royal Commission. This would deal with more serious behaviour that is 'reasonably likely, in all the circumstances, to incite hatred' against people with disability, and remains necessary given the criminal offences created by the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) are much narrower than the Disability Royal Commission recommendation. Similar to Victoria, we support legislation which clarifies that any vilification prohibition also protects people who have a personal association (as a relative or otherwise) with the person with disability.

### ***Recommendation 17 – Introduce standalone prohibition against offensive behaviour***

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*A standalone provision prohibiting offensive behaviour should be introduced, modelled on section 18C of the Racial Discrimination Act 1975 (Cth), including prohibiting 'ridicule' (alongside 'offend', 'insult', 'humiliate' or 'intimidate') and exemptions to avoid undue restriction on free speech.*

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<sup>73</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, (Final Report, September 2023) vol 4, 319 [footnotes omitted].

<sup>74</sup> See, eg, *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19(b); *Discrimination Act 1991* (ACT) s 67A(1)(a); *Anti-Discrimination Act 1992* (NT) s 20A(1); draft *Anti-Discrimination Bill 2024* (Qld) cl 84(1); *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic), pt 6A (to commence from 30 June 2026); Law Reform Commission of Western Australia, *Project 111 - Review of the Equal Opportunity Act 1984* (WA) (Final Report, August 2022) Recommendations 114 and 115.

## ***Recommendation 18 – Introduce standalone prohibition against vilification***

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*A standalone provision prohibiting vilification should be introduced for behaviour that is ‘reasonably likely, in all the circumstances, to incite hatred’ against people with disability. This prohibition should also protect people who have a personal association (whether as a relative or otherwise) with the person with disability.*

### **5.2 Protection against discrimination in the criminal justice system**

For the reasons outlined by the Disability Royal Commission, we agree it is critical the DDA cover actions of police with respect to people with disability. This should also extend to other institutions in the criminal justice system.

We suggest this can be best achieved by extending the scope of s 29 of the DDA, which covers administration of Commonwealth laws and programs, to also cover the administration of state and territory laws and programs. Public authorities and government services play a central role in people’s lives and the DDA should create a clear obligation and expectation that Commonwealth, state and territory government agencies will not discriminate.

This is preferred instead of extending the definition of ‘service’ in the DDA. Courts have generally found a ‘service’ in the context of the DDA connotes a benefit from the provider of the service to the recipient; this makes it inappropriate to describe certain law enforcement practices, such as those involved in investigating people with disability as potential suspects, as a ‘service’.<sup>75</sup>

We suggest including within the scope of s 29 policing authorities, corrections authorities, courts administration, as well as child protection authorities – all systems where people with disability are over-represented.<sup>76</sup> This would also provide clarity and consistency in coverage of the DDA, given many other state and territory laws and programs are already required to comply with the DDA by virtue of providing goods and services, administering premises or falling within other relevant areas of public life.

This should not unduly impede law enforcement functions, noting that Federal law enforcement and criminal justice actors are already required to perform their duties subject to s 29.

## ***Recommendation 19 – Extend scope of s 29 to state and territory laws and programs***

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*The scope of section 29 should be extended to cover the administration of state and territory laws and programs, including extending to policing authorities, corrections authorities, courts administration and child protection authorities.*

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<sup>75</sup> See, eg, *Rainsford v Victoria* (2007) 96 ALD 90, [73].

<sup>76</sup> See, also, Yoorrook Justice Commission, *Yoorrook for Justice - Report into Victoria’s Child Protection and Criminal Justice Systems* (Final Report, August 2023) 274. While the recommendations in that report are made in the context of over-representation of First Nations people, government agencies should be accountable for all discrimination.

## 6. Part 5: Exemptions

### 6.1 Permanent exemptions

All permanent exemptions in the DDA should be subject to sunset clauses and reviewed on an ongoing basis. Exemptions should not operate indefinitely: they must be tested regularly against contemporary community standards, government policy objectives, and Australia's obligations under the CRPD, to ensure they remain appropriate over time.

The Productivity Commission in its 2004 review recognised exemptions could serve legitimate functions, such as clarifying legislative intent, providing certainty, reducing potentially unnecessary litigation, or supporting other government policy objectives.<sup>77</sup> However, it also stressed that such exemptions must be clearly justified, narrowly framed, and reviewed periodically to ensure their ongoing necessity.<sup>78</sup> This is consistent with the AHRC's *Free and Equal* report (2021), which recommended that all permanent exemptions be subject to periodic review,<sup>79</sup> and with the Disability Royal Commission, which highlighted the importance of reassessing permanent exemptions for their compatibility with the CRPD.<sup>80</sup>

We set out below certain exemptions that warrant reconsideration.

#### ***Recommendation 20 – Sunsetting clauses and reviews of all permanent exemptions***

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*All permanent exemptions should be subject to sunset clauses and reviewed on an ongoing basis.*

##### **6.1.1 Superannuation and insurance exemption**

The current exemption for insurance and superannuation providers under section 46 of the DDA creates a significant imbalance between insurers and consumers, particularly for people with disability and mental health conditions.

While insurers are permitted to discriminate where decisions are based on actuarial or statistical data, consumers are generally unable to access the actuarial or statistical data relied upon. This lack of transparency means that people who suspect unlawful discrimination can realistically only test it through court or tribunal processes, placing an unfair burden on vulnerable individuals. This lack of transparency is particularly acute in cases where insurers assert the exemption under section 46(1)(g), which allows for discrimination where it is 'reasonable having regard to any other relevant factors' and 'where no such actuarial or statistical data is available and cannot reasonably be obtained'.

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<sup>77</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Productivity Commission Inquiry Report, 30 April 2004) 364.

<sup>78</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Productivity Commission Inquiry Report, 30 April 2004) 348, 355-7, 362, Recommendations 12.3, 12.6.

<sup>79</sup> Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free and Equal Final Report 2023* (Final Report, November 2023) 88, proposed reform 29.

<sup>80</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 329-335.

The JEC's position, consistent with our Mental Health Discrimination in Insurance report (2021)<sup>81</sup> and submission to the *NSW Law Reform Commission Review of Anti-Discrimination Act 1977: First Consultation Paper (2025)*,<sup>82</sup> is that greater insurer disclosure, transparency and accountability is required. Consumers should be entitled to actuarial and statistical data with plain language explanations of the data and reasoning underpinning adverse insurance decisions, when such adverse decisions are made.

We generally support the approach enacted in the ACT, requiring that: any discrimination is based on actuarial or statistical data (or where this is unavailable, other relevant documents); it is reasonable for the provider to rely on the data or other documents; and the discrimination is reasonable, proportionate and justifiable in the circumstances.<sup>83</sup> The insurance or superannuation provider is also required to give the consumer a copy of the data or other documents; provide a meaningful explanation of the data or other documents in writing; or, make the data or other documents available for inspection.<sup>84</sup> Any material provided should be in an accessible format.

Equally important is the quality of the data relied upon. Evidence collated by the Victorian Equal Opportunity and Human Rights Commission and the Actuaries Institute demonstrates that insurers have at times relied on outdated, irrelevant or insufficiently analysed data, including data drawn from overseas contexts not adapted for Australian circumstances.<sup>85</sup> As the availability of high quality, condition-specific data improves, it is no longer acceptable for insurers to rely on stereotyped assumptions or outdated underwriting manuals. Insurers must regularly review and update the data they rely on, with the expectation that discrimination is proportionate, justifiable, and based on contemporary evidence.

The insurance exemption under the DDA must not function as a shield for opaque, outdated or unfair practices. Requiring accessible disclosure to consumers upon request and improving the quality and availability of actuarial data relied upon would reduce discrimination and ensure fairer treatment for people with disability, including those with mental health conditions.

### ***Recommendation 21 – Amending the superannuation and insurance exemption***

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*The superannuation and insurance exemption should be amended to apply only where:*

- *the discrimination is based on actuarial or statistical data (or where this is unavailable, other relevant documents);*
- *it is reasonable for the provider to rely on the data or other documents; and*
- *the discrimination is reasonable, proportionate and justifiable in the circumstances.*

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<sup>81</sup> Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021).

<sup>82</sup> Justice and Equity Centre, Submission to the NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977: First Consultation Paper* (29 August 2025) <<https://jec.org.au/wp-content/uploads/2025/09/25.08.29-Justice-and-Equity-Centre-NSWLRC-Anti-Discrimination-Act-Review-Submission12.pdf>>.

<sup>83</sup> *Discrimination Act 1991* (ACT) s 28(2).

<sup>84</sup> *Discrimination Act 1991* (ACT) s 28(3).

<sup>85</sup> Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021) 68-9.

*The exemption should require the insurance or superannuation provider to provide a copy of the data or other documents to the person or make the data or other documents available for inspection in accessible formats, a plain language explanation of the data, and the reasoning underpinning an adverse insurance decision.*

## **6.1.2 Migration Act exemption**

The *Migration Act 1958* (Cth) exemption in s 52 of the DDA should be removed. This was a recommendation of the CRPD Committee<sup>86</sup> and s 52 was a provision about which the Disability Royal Commission had significant concern.<sup>87</sup> We agree with Welcoming Disability, the ADLEG and others that the fundamental rights to be protected against disability discrimination of people who come to Australia should not be different to those of others.

If retained, we suggest at a minimum the DDA should narrow the *Migration Act* exemption under s 52(b) to clarify that this exemption applies only in relation to decisions regarding the issuing of visas by the Australian Government.

We are concerned the exemption is being interpreted more broadly than the intended purpose of balancing the competing policy interest in regulating the entry into Australia of non-citizens. For example, the JEC represented an applicant in a matter in the Federal Court of Australia alleging disability discrimination in their treatment in immigration detention. The Commonwealth raised the *Migration Act* exemption as a defence, arguing the use of handcuffs in an otherwise discriminatory manner was exempt from the DDA because it was permitted under s 52(b).<sup>88</sup>

We are concerned that such a broad approach exempts a broad range of conduct occurring in relation to immigration detention such as access to healthcare, conditions of facilities and treatment of detainees with disability. There is no sufficient policy justification for such an approach. People with disability held in detention should receive the same protection from discriminatory treatment as others.

If s 52 is to be retained, it should be limited to the issuing of visas.

### ***Recommendation 22 – Removing the Migration Act exemption***

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*The Migration Act exemption in section 52 of the DDA should be removed. If section 52 is retained, the exemption should be confined to decisions regarding the issuing of visas.*

## **6.1.3 Special measures exemption**

### **6.1.3.1 Special measures certificates**

The JEC supports the AHRC being given the power to grant special measures certificates. Certification would provide organisations with a clear and authoritative mechanism to confirm a

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<sup>86</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 511th meeting, CRPD/C/AUS/CO/2-3 (15 October 2019), art 18 at [36(a)].

<sup>87</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 331-335.

<sup>88</sup> *EWU20 v Commonwealth of Australia & Anor* (NSD 1258/2020).

measure is lawful under section 45 of the DDA. This would promote certainty, encourage greater use of special measures, and reduce the risk of measures being mischaracterised or challenged. That said, it is important that any certification process is designed in a way that does not discourage organisations from implementing special measures without a certificate.

The Disability Royal Commission emphasised that special measures may be necessary to redress systemic barriers and accelerate equality.<sup>89</sup> It also cautioned that measures must not perpetuate segregation, stereotyping or stigma, and should be designed in consultation with people with disability and their representative organisations.<sup>90</sup> The decision in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 illustrates the risk that initiatives which undermine the object and purposes of the DDA may be improperly asserted as special measures. A certification power would help prevent this by providing an avenue for the AHRC to assess whether measures are genuinely aimed at achieving substantive equality and reasonable in the circumstances.

We support the position in *Free & Equal* that certification should be voluntary, with no disadvantage to organisations that do not seek certification. In our view, this is the appropriate approach – it would preserve flexibility for organisations to adopt special measures without unnecessary procedural barriers – while still allowing those seeking assurance to obtain certification. The AHRC’s role would therefore be both supportive and safeguarding: promoting lawful, well-designed special measures without discouraging their use.

### 6.1.3.2 Definition of special measures

The JEC supports the introduction of a clear statutory definition of special measures, as this would align the DDA with Australia’s obligations under Article 5(4) of the CRPD and provide greater certainty to organisations seeking to implement special measures.<sup>91</sup> At present, s 45 provides that special measures are not unlawful, but does not define what constitutes a ‘special measure’. Section 7D of the SDA offers a useful model.

Section 7D adopts a simple, purpose-based formulation, allowing a person or organisation to take special measures to achieve substantive equality between people with different protected attributes. It makes clear that taking such measures does not constitute discrimination, and recognises a measure may be taken for multiple purposes, provided achieving substantive equality is one of them, whether or not that purpose is the dominant or substantial one. Once the purpose of the measure is achieved (ie the full realisation of substantive equality between different groups), it ceases to be authorised under the SDA.

This approach is consistent with international human rights law, which treats special measures as integral to the right to equality rather than as exceptions to it, and aligns with recent recommendations of the Queensland Human Rights Commission and the ACT Law Reform

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<sup>89</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 329-330.

<sup>90</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 331.

<sup>91</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 6. Equality and non-discrimination*, UN Doc CRPD/C/GC/6, (26 April 2018) [29]. See also *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 330.

Advisory Council.<sup>92</sup> The SDA model provides clarity without unnecessary procedural burden, and would encourage organisations to take proactive, lawful steps to dismantle structural disadvantage.

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***Recommendation 23 – Empowering the AHRC to grant special measure certificates***

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*The AHRC should be given the power to grant special measures certificates. The certification process should be voluntary, with no disadvantage to organisations that do not seek certification.*

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***Recommendation 24 – Introducing a definition of special measures***

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*A definition of special measures should be introduced modelled on section 7D of the Sex Discrimination Act.*

## **6.2 Temporary exemptions**

Given the significance of temporary exemptions (providing authorisation to discriminate), the DDA should specify the process and criteria for considering temporary exemptions, rather than leaving this for AHRC guidelines, as is the current position. This would provide greater clarity and certainty for duty holders and affected persons regarding how temporary exemption provisions are intended to operate and apply.

The process for temporary exemptions should include:

- applications being published on the AHRC’s website;
- applications being subject to a period of public consultation;
- temporary exemptions being granted for a maximum time limit (not more than 5 years);
- temporary exemption decisions being published on the AHRC’s website and in the *Gazette*; and
- temporary exemption decisions being reviewable by the Administrative Review Tribunal.

The criteria for considering temporary exemptions (many of which reflect the AHRC’s current guidelines) should include:

- whether the exemption is consistent with the objects of the DDA;
- whether the exemption is necessary;
- whether there have been genuine attempts by the applicant to comply with the provisions of the DDA;
- whether matters raised in any submissions in response to the application have been addressed;
- whether the applicant has an action plan to ensure compliance with the DDA, following the expiration of the exemption; and
- whether it is appropriate to grant the exemption subject to any terms and conditions.

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<sup>92</sup> ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, (Final Report, 18 March 2015) Recommendation 20.1; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (Final Report, July 2022) Recommendation 4.1.

Temporary exemptions should be available only in relation to discrimination and should not be available in relation to harassment, offensive behaviour or vilification.

***Recommendation 25 – Process and criteria for considering temporary exemptions***

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*The process and criteria for considering temporary exemptions should be set out in the DDA, rather than in guidelines.*

*The process for temporary exemptions should include:*

- *applications being published on the AHRC's website;*
- *applications being subject to a period of public consultation;*
- *temporary exemptions being granted for a maximum time limit (not more than 5 years);*
- *temporary exemption decisions being published on the AHRC's website and in the Gazette; and*
- *temporary exemption decisions being reviewable by the Administrative Review Tribunal.*

*The criteria for considering temporary exemptions should include:*

- *whether the exemption is consistent with the objects of the DDA;*
- *whether the exemption is necessary;*
- *whether there have been genuine attempts by the applicant to comply with the provisions of the DDA;*
- *whether matters raised in any submissions in response to the application have been addressed;*
- *whether the applicant has an action plan to ensure compliance with the DDA, following the expiration of the exemption; and*
- *whether it is appropriate to grant the exemption subject to any terms and conditions.*

## 7. Part 6: Modernising the DDA

### 7.1 Definitions and regulation of assistance animals

We support retaining the DDA's inclusive definition of 'assistance animal', which has been recommended in other jurisdictions.<sup>93</sup> However, this definition has not itself prevented exclusion and discrimination against people with assistance animals.

We have seen this through our casework representing clients in litigation concerning recognition of their rights as assistance animal handlers, against private and public respondents including airlines, Uber and the National Disability Insurance Agency.<sup>94</sup> In particular, assistance dogs that meet the definition in s 9(2)(c) – including self-trained assistance animals – are often not recognised as assistance animals.

Many barriers faced by our clients stem from inconsistencies in the current regulation of assistance animals.<sup>95</sup> In our view, this demonstrates a need for coherent national legislation which recognises and accredits assistance animals, outside the DDA.

We urge the Department to review our recent [submission](#) responding to the consultation on National Principles for the Regulation of Assistance Animals ('Principles'), where we:

- Detailed case studies and observations from our casework to support our view that the proposed Principles will not go far enough to uphold the rights of people with assistance animals.
- Noted that in the 15 years since s 9(2)(a) was inserted into the DDA, only one jurisdiction has created an accreditation system for assistance animals that reflects the breadth of the DDA's provisions.<sup>96</sup> The other three state and territory jurisdictions with accreditation schemes only accredit assistance dogs.<sup>97</sup>

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<sup>93</sup> See, eg, Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Final Report, July 2022) 26, Recommendation 21.3; Law Reform Commission of Western Australia, *Project 111 - Review of the Equal Opportunity Act 1984* (WA) (Final Report, August 2022), Recommendation 18.

<sup>94</sup> See, eg, Celina Edmonds and Evan Young, 'Qantas taken to Federal Court after refusing to let assistance dog on flight', *ABC News* (online, 20 December 2023) <<https://www.abc.net.au/news/2023-12-20/qantas-sued-over-assistance-dog/103223736>>; Sarah Richards, 'Woman with disability twice denied permission to fly with assistance dog by Air New Zealand', *ABC News* (online, 4 October 2025) <<https://www.abc.net.au/news/2025-10-04/qld-air-new-zealand-denies-assistance-dog-flight-twice/105840284>>; Nas Campanella, 'Woman takes Uber to Federal Court over repeated guide dog refusals', *ABC News* (online, 19 February 2025); Kristian Silva, 'Melbourne woman wins battle against National Disability Insurance Agency for mental health assistance dog', *ABC News* (online, 6 December 2022) <<https://www.abc.net.au/news/2022-12-06/ndis-mental-health-assistance-dog-funding-battle/101721420>>.

<sup>95</sup> See, Justice and Equity Centre, Submission to the Department of Social Services, *Consultation on National Principles for the Regulation of Assistance Animals* (30 May 2025) <<https://jec.org.au/wp-content/uploads/2025/06/25.05.30-Submission-on-National-Principles-for-the-regulation-of-Assistance-Animals.pdf>>.

<sup>96</sup> *Domestic Animals Act 2000* (ACT) s 94; *Domestic Animals (Accredited Assistance Animal Public Access Standards) Determination 2023* (ACT) sch 1.

<sup>97</sup> In Queensland, *Guide, Hearing and Assistance Dogs Act 2009* (QLD) pt 4, see especially ss 36-9. In South Australia, *Dog and Cat Management Act 1995* (SA) ss 21A, 81. In Western Australia, *Dog Act 1976* (WA) s 8; Department of Local Government - Sport and Cultural Industries, *Assistance Dog Approvals* (Policy, 31 January 2024).

- Expressed our major concern that it is unclear how the Principles will be implemented in practice. Assuming State and Territory disability Ministers agree to the Principles, it will be the responsibility of their respective state and territory governments to implement them in their respective jurisdictions. That fragmented implementation process is unlikely to achieve the uniformity sought, and will likely only replicate problems with existing frameworks.
- Recommended, instead of the Principles, a comprehensive, national, legislated and binding framework to ensure consistency. Together with 11 national peak Disability Rights Organisations, we have called for a National Assistance Animal Framework ('Framework') to regulate and accredit assistance animals nationally, which would supersede the existing state and territory frameworks.<sup>98</sup>
- Recommended the Framework must be accessible to, and inclusive of, people with assistance animals ie not burdensome and protect people's choice, including animals provided or trained by any person or organisation, including self-trained animals. Similarly, the present Issues Paper recognises '[a]ny changes would need to ensure people who cannot access formal training and/or accreditation for their assistance animals due to their location or other circumstances are not unreasonably excluded from protection.'<sup>99</sup>
- Recommended the Framework be co-designed and, at a minimum regulate:
  - **Accreditation:** not impose requirements that are inaccessible or non-inclusive, such as requiring animals to perform specific arbitrary numbers of 'tasks', being limited to certain types of disability, or mandating specific forms of supply or training.
  - **Training:** not exclude self-trainers by imposing requirements that can only be met by organisations or particular people.
  - **Evidence:**
    - limited to what is necessary to prevent burden and privacy intrusion;
    - flexible and accepting of a broad range of possible evidence; and
    - only collected once by a national government agency, to remove the need for other public and private organisations doing any separate check.

It is our strong view that legislative changes are needed at a national level. While we do not recommend changes to the DDA itself, we urge the Department to give particular attention to the need for regulations to be made under the DDA governing the recognition and accreditation of assistance animals, as a priority reform. Regulations would appropriately balance the need for legal certainty with the need for flexibility.

### ***Recommendation 26 – A national legislated framework to govern assistance animals***

*A national framework should be established as regulations under the DDA to govern the recognition and accreditation of assistance animals. This framework should:*

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<sup>98</sup> Justice and Equity Centre et al, 'Joint Statement Calling for People with Disability's Access to Assistance Animals to be Protected' (Statement, 20 March 2025) <[https://pwd.org.au/wp-content/uploads/2025/03/Joint-Statement-calling-for-a-National-Assistance-Animal-Framework\\_20-March-2025.pdf](https://pwd.org.au/wp-content/uploads/2025/03/Joint-Statement-calling-for-a-National-Assistance-Animal-Framework_20-March-2025.pdf)>.

<sup>99</sup> Commonwealth Attorney-General's Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025) 85.

- *be accessible to all people with disability who need the rights and legal protections it confers, and not exclude people due to its cost, time or administrative burdens; and*
- *be inclusive of all people with disability who use assistance animals, respecting their choice of the most appropriate animal for them and how they obtain and/or train that animal.*

## 7.2 Disability Action Plans

Greater rigor is required if disability action plans are to advance the goals of the DDA. While public commitments by 'action planners' to promote inclusion and address discrimination are welcome, the lack of accountability currently associated with action plans means a weak, inappropriate or unimplemented action plan is not subject to any oversight or structural critique. This means they cannot serve as useful accountability and communication tools. Worse, if inadequate plans are published by the AHRC, their mandatory publication may create the impression the action planner has taken meaningful steps to promote the rights of people with disability, and these steps have been endorsed by the AHRC.

We support reform of the disability action plan process to require *approval* by the AHRC (and for s 67 of the DDA to be amended accordingly). Such approval should ensure action plans comply with minimum content requirements, in line with guidelines developed by the AHRC that ensure a plan sufficiently covers the action planner's activities, and commits to preventing discrimination against people with disability. In its assessment of action plans, the AHRC should be able (and be resourced) to provide feedback and guidance on a draft plan to assist action planners to meet minimum standards and best practice.

These reforms would ensure that action plans published by the AHRC represent meaningful commitments to disability access. They would also make action plans more relevant to the complaints process under the DDA. The requirement for plans to meet minimum standards would make them more relevant to assessments of unjustifiable hardship. Additionally, where parties wish to settle a complaint by agreeing on a review or future systemic responses to be developed by a respondent, assessment by the AHRC would provide an additional mechanism for reaching agreement. In our casework, we have seen matters where agreement for the respondent to develop an action plan that is acceptable to the AHRC would provide the necessary guarantees of meaningful action, as assessed by a third-party expert, to resolve the dispute.

Once a positive duty is introduced, disability action plans would also be a helpful tool in communicating how duty holders intend to uphold their obligations. Strong proactive enforcement of the positive duty will be necessary to ensure these obligations are met, and should correlate with improved quality of disability action plans. In this way, the objective of the disability action plan process should be achieved by the positive duty being properly enforced.

### ***Recommendation 27 – AHRC to approve Disability Action Plans***

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*The AHRC should be empowered to approve Disability Action Plans according to minimum requirements to be developed in guidelines by the AHRC. The AHRC should be able to provide feedback and guidance on a draft Disability Action Plan to assist action planners meet the minimum requirements and best practice.*

## 7.3 Disability Standards

### 7.3.1 Compliance and enforcement

There are at least four ways in which compliance and enforcement of the Disability Standards should be improved.

First, the DDA should clarify a breach of the Disability Standards is unlawful<sup>100</sup> and itself constitutes 'unlawful discrimination'.<sup>101</sup> It is not necessary for a person to claim that a breach of the Disability Standards is otherwise 'direct' or 'indirect' discrimination and exemption provisions in the DDA generally do not apply.<sup>102</sup> To avoid any confusion, this position should be clarified in the DDA, for example, via a legislative note to s 32.<sup>103</sup>

Second, it should not fall to individuals to enforce Disability Standards. Similar to our above recommendation regarding the implementation and enforcement of the proposed positive duty, an effective framework is needed to enforce compliance with the Disability Standards. This position is consistent with the AHRC's *Free & Equal Position Paper 2021* which said '[c]onsideration should...be given to the Commission having an oversight role with regulatory powers to enforce compliance' of the Disability Standards under the DDA.<sup>104</sup> At a minimum, this regulatory role could commence first with the DSAPT (and the proposed aviation disability standards) given these are technical compliance standards, as compared to the *Disability Standards for Education 2005* (Cth). Compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) is considered as part of building approval and certification processes, which provides at least some mechanism for ensuring compliance.

Third, we support Disability Voices Tasmania's recommendation that Expert Advisory Groups be established in respect of each Disability Standard as an ongoing governance mechanism to ensure standards remain fit for purpose. This is relevant, particularly in relation to the DSAPT, where operators and providers have failed to meet compliance target dates.<sup>105</sup> Such an advisory group should be established and resourced to include equal participation of people with disability.

Fourth, Australian Standards are used to create accessibility benchmarks in the DSAPT however those Australian Standards are not freely accessible to the public and can only be purchased at significant cost. Limiting access to information necessary for people to understand and enforce their legal rights in this way is disempowering, and is an impediment to holding transport

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<sup>100</sup> *Disability Discrimination Act 1992* (Cth) s 32. See also Explanatory Memorandum, Disability Discrimination Bill 1992, 15 confirming the intention that a complaint may be made to the Australian Human Rights Commission alleging a breach of the Transport Standards.

<sup>101</sup> See *Australian Human Rights Commission Act 1986* (Cth) s 3, definition of 'unlawful discrimination' which includes 'acts, omissions or practices that are unlawful under' Part 2 of the DDA.

<sup>102</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2016), ch 5, p 228.

<sup>103</sup> See, for example, the decision in *Haraksin v Murrays Australia* [2013] FCA 217, [86] in which the Court states that non-compliance with the Disability Standards does not constitute unlawful discrimination. This is, with respect, clearly wrong: see *Australian Human Rights Commission Act 1986* (Cth) (n 101).

<sup>104</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (Final Report, December 2021) 141.

<sup>105</sup> See, eg, Alison Xiao, 'Australia misses 20-year public transport accessibility target as many train and tram networks fail people with disabilities', *ABC News* (online, 16 January 2023) <<https://www.abc.net.au/news/2023-01-16/australia-misses-20-year-public-transport-accessibility-target/101858532>>.

operators and providers accountable. Access to relevant Australian Standards referred to in the Disability Standards should be made free for non-commercial use.

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***Recommendation 28 – A breach of the Disability Standards should be unlawful***

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*The DDA should be amended to clarify that a breach of the Disability Standards is unlawful and does not need to be made together with a claim of direct and/or indirect discrimination.*

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***Recommendation 29 – AHRC to enforce compliance with the Disability Standards***

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*The AHRC should be granted a full suite of powers to monitor and enforce compliance of the Disability Standards. If necessary to stagger enforcement, compliance could commence first in relation to the Disability Standards for Accessible Public Transport. The AHRC should receive adequate and sustainable funding to carry out this regulatory function.*

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***Recommendation 30 – Expert Advisory Groups to advise on Disability Standards***

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*Expert Advisory Groups be established in respect of each Disability Standard as an ongoing governance mechanism to ensure standards remain fit for purpose. The Expert Advisory Groups should be resourced to include equal participation of people with disability.*

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***Recommendation 31 – Free access to Australian Standards for non-commercial use***

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*Access to relevant Australian Standards referred to in the Disability Standards for non-commercial use should be made free.*

### **7.3.2 Reporting on compliance with Disability Standards**

The DDA should be amended to make it mandatory for public transport operators and providers to report data on their compliance with the DSAPT.

Article 33 of the CRPD creates a positive obligation on the Australian Government to establish an effective framework to monitor implementation of the CRPD. However, since the DSAPT were introduced over 20 years ago, there has been no national mechanism to monitor or manage the implementation of the DSAPT, or assess compliance by operators and providers. As a result, many target dates for compliance have not been met, and the DSAPT have not been effective at removing discrimination against people with disability. In the absence of a reporting framework, there is no mechanism for the Government to properly monitor transport accessibility as required under the CRPD.

A national reporting framework should compel operators and providers of transport services to report data on their compliance with the DSAPT to the Government. This is necessary to improve industry transparency and accountability, support the disability community to prioritise advocacy work, and assist all levels of government to meet their commitments under *Australia's Disability Strategy 2021-2031* and the CRPD.

The JEC has been involved in the Federal Department of Transport's development of a compliance reporting framework for operators and providers. In our view, the form and voluntary nature of that framework will not achieve the outcomes needed. Without mandatory compliance

reporting, there is no governance risk for transport operators and providers, and limited incentive for them to drive accessibility improvements to their services.

As a reporting framework has been developed for DSAPT, the AHRC would not need to provide additional guidance for providers to report on those standards. We defer to other stakeholders on whether AHRC guidance is required for self-reporting on the Education and Premises standards.

### ***Recommendation 32 – Mandatory reporting and publication of compliance with the DSAPT***

*The DDA should be amended to require public transport operators and providers to report data on compliance with the DSAPT. Reporting requirements should apply to all assets (existing, new, refurbished or upgraded) and to all sections of the DSAPT. All data should be provided in accessible formats and accompanied by plain English explanations prepared by the transport operator or provider.*

## **8. Further options for reform**

### **8.1 Victimisation**

The DDA should clarify that victimisation is unlawful even if it occurs for two or more reasons. This would ensure that where victimisation is partly motivated by a prohibited reason, such as a person's involvement in discrimination proceedings, it remains unlawful, even if other motivations are also present. This could be achieved by amending the DDA to state that a mixed motive does not prevent a finding of victimisation, ensuring consistency with modern anti-discrimination legislation and enhancing protection for complainants.<sup>106</sup>

### ***Recommendation 33 – Victimisation is unlawful even if it occurs for two or more reasons***

*The DDA should be amended to clarify that victimisation is unlawful even if it occurs for two or more reasons.*

### **8.2 Liability**

#### **8.2.1 Redefining employment**

The DDA does not account for the diversity of contemporary work arrangements. This includes voluntary workers, gig economy workers, and other non-traditional and emerging forms of labour that fall outside narrow legal definitions of employment.

Volunteers contribute significantly across numerous sectors and are often subject to the same power imbalances, difficult workplace dynamics, and risks of discrimination as paid employees. Excluding them from protection creates a serious gap in the law that leaves many individuals vulnerable, particularly in sectors such as health, aged care, disability and community services, where volunteering is common. Equally, the gig economy represents a major shift in the structure of work, characterised by task-based, on-demand jobs mediated through digital platforms.

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<sup>106</sup> *Discrimination Act 1991 (ACT) s 4A.*

The definition of employment in the DDA should be expanded to reflect the reality of contemporary work arrangements. This expansion would not only extend protections to people in diverse work arrangements, but it would also strengthen accessorial liability to ensure those in effective control of any type of worker can be held accountable. This could be done by adopting the term ‘person conducting a business or undertaking’, to be consistent with work health and safety laws and the SDA. This may also involve replacing the word ‘employee’ with ‘worker’ in the DDA.

### **8.2.2 Accessorial liability**

The traditional categories of direct, vicarious, joint and several and accessorial liability are grounded in conventional ‘employer-employee’ or ‘principal-agent’ relationships. However, many working people today, such as rideshare drivers, food delivery workers, and digital platform contractors do so under arrangements that potentially fall outside these traditional classifications.

To address this issue, the DDA should clarify and expand the scope of liability, particularly to ensure a person conducting a business or undertaking can be held liable for all workers under their control. This would ensure duty holders, including digital platforms and other non-traditional entities, can be held responsible for discrimination and harassment occurring within their systems or operations.

Further, accessorial liability could be strengthened to capture those in positions of control or influence by clarifying the meaning of the ‘permitting’ element in s 122. Section 122, and particularly the ‘permits’ element, has been subject to limited judicial consideration, creating uncertainty about its operation. In our view, the DDA should be amended to codify the common law’s inclusive approach to s 122,<sup>107</sup> such that a person ‘permits’ a particular act if they were able to prevent it and failed to do so.

Clearer guidance would be helpful for both claimants and duty holders, and would ensure more effective protection regardless of employment status.

### **8.2.3 The exceptions for liability**

The ‘actual or apparent authority’ exception available in s 123 of the DDA should be removed. The existing ‘took reasonable precautions and exercised due diligence’ defence is sufficient to protect organisations that have genuinely taken appropriate action to prevent discrimination or harassment.

Relying solely on a ‘took reasonable precautions and exercised due diligence’ exception better aligns with best practice by focusing on the proactive responsibilities of employers and principals, rather than denying liability simply because the conduct was not authorised. This approach would also better align with the proposed positive duty.

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<sup>107</sup> *Cooper v Human Rights and Equal Opportunity Commission* (1991) 93 FCR 481, 494 [41] citing with approval *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481, 490-491 (Issacs J); *Elliott v Nanda & Commonwealth* [2001] FCA 418, [161].

## 8.2.4 Liability and artificial intelligence

Liability under the DDA should account for the increasing use of artificial intelligence ('AI'), particularly where discriminatory outcomes (ie ability bias) arise from automated systems without direct human intervention. The use of AI should not result in duty holders avoiding responsibility.

To address this, the DDA should be amended to ensure liability for discriminatory conduct extends to AI systems that produce outcomes that would otherwise constitute unlawful discrimination. Liability should be attributed to those who control and/or benefit from AI systems, and the 'took reasonable precautions and exercised due diligence' defence should require proactive auditing and mitigation of discrimination risks in AI design and implementation. This would future proof the DDA by ensuring that the use of technology does not bypass human rights.

### ***Recommendation 34 – Expand the definition of employment***

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*The DDA should be amended to expand the definition of employment to reflect the diversity of contemporary work arrangements, including by adopting the term 'person conducting a business or undertaking' and replacing the word 'employee' with 'worker'.*

### ***Recommendation 35 – Expand the scope of accessorial liability***

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*The scope of accessorial liability should be expanded to ensure a person conducting business can be held liable for all workers under their control.*

### ***Recommendation 36 – Clarify the meaning of 'permitting' in section 122***

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*Section 122 of the DDA should be amended to clarify that a person 'permits' a particular act if they were able to prevent the act and did not take action to do so.*

### ***Recommendation 37 – Extend liability to capture those who control AI systems***

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*The DDA should be amended to ensure that liability for discriminatory conduct extends to individuals or organisations that control and/or benefit from AI systems.*

## 8.3 Expanding the definition of accommodation

The definition of 'accommodation' in the DDA should be expanded to expressly include all forms of housing, including caravans, mobile homes, boarding homes, group homes, and other non-traditional or informal living arrangements. This would provide better protection for low-income and vulnerable populations, which encompasses a significant proportion of people with disability.

### ***Recommendation 38 – Expand the definition of 'accommodation'***

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*The definition of accommodation should be expanded to expressly include all forms of housing, including caravans, mobile homes, boarding homes, group homes, and other non-traditional or informal living arrangements.*

## 8.4 Sport and competitions

The DDA does not define sport or sporting activities as used in s 28. To clarify its scope, we support adopting the ACT's approach, which covers both formally-organised (but not informal) sporting activities,<sup>108</sup> as well as other formally-organised competitions such as singing competitions.<sup>109</sup>

Noting the DDA contains exceptions to prohibitions on discrimination in sport, we recommend the exceptions be amended to adopt the language in s 57 of the *Discrimination Act 1991* (ACT) to ensure exceptions are limited to those that are 'reasonable, proportionate and justifiable in the circumstances'.

### ***Recommendation 39 – Defining sport and competitions and limiting exceptions***

*The DDA should define sport as formally-organised (but not informal) sporting activities, and should also prohibit discrimination in relation to formally-organised competitions. Exceptions to prohibitions on discrimination in sport and competitions (as recommended) should be 'reasonable, proportionate and justifiable in the circumstances'.*

## 8.5 Application of the DDA

The application of the DDA, particularly its lack of application in an extra-territorial context, has prevented complainants from receiving redress for actions by the Australian government. In *Brannigan v Commonwealth of Australia* [2000] FCA 1591, the Court held it did not have jurisdiction to hear the claim as the complainant alleged acts of discrimination at the Australian High Commission in London.

We are also aware of allegations of disability discrimination in the context of Australian citizens and residents seeking consular assistance overseas during international crises (eg being denied evacuation because of their disability).

While we acknowledge there may be reasons against wholesale extra-territorial application of the DDA, in our view, consideration should be given to ensuring Australian citizens and residents are not discriminated against in overseas consular settings, and ultimately not endangered because of such discrimination.

## 8.6 Removing barriers to making a complaint

Subsection 13(4) of the DDA prohibits a person making a complaint under the DDA if they have made a similar complaint under a state or territory law.

This provision unjustly captures a person who may have made a complaint in another jurisdiction, but has subsequently withdrawn their complaint prior to resolution, termination or referral to a state or territory tribunal (eg if an unrepresented complainant lodged their complaint before

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<sup>108</sup> *Discrimination Act 1991* (ACT) s 23A.

<sup>109</sup> *Discrimination Act 1991* (ACT) s 23B.

receiving legal advice). Subsection 13(4) poses jurisdictional difficulties and should be removed to improve access to justice.

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***Recommendation 40 – Remove subsection 13(4) to improve access to justice***

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*Remove subsection 13(4) to enable a complainant to make a complaint where they have made and withdrawn a similar complaint under a state or territory law.*

## **8.7 Clarifying the meaning of ‘refusal’**

The DDA should be amended to state the word ‘refusing’, as used for example in ss 23 and 24 of the DDA, includes a ‘deemed refusal’ or ‘constructive refusal’.

In our casework, respondents have attempted to defend claims on the basis they never engaged in an ‘act of refusal’. In such cases, the person with disability has requested the service (and/or adjustments) in correspondence with the respondent over a lengthy period, while the respondent continues to restate its policy requirements for the service and/or makes numerous requests for further information to be provided before the service is approved.

If the above scenarios would not amount to actual refusal, the DDA should provide for a complaint to be made based on a ‘deemed’ or ‘constructive’ refusal. A ‘deemed’ or ‘constructive’ refusal could be defined as a ‘failure to make a decision within a reasonable period of time’. This could be introduced through an interpretative provision, similar to s 4(2) of the DDA.

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***Recommendation 41 – Clarify the meaning of ‘refusal’***

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*Amend the DDA to clarify that ‘refusing’, as used for example in sections 23 and 24 of the DDA, includes a ‘deemed refusal’ or ‘constructive refusal’ where there has been a failure to make a decision within a reasonable period of time.*

## **8.8 Restricting the use of non-disclosure agreements**

The damaging impacts of non-disclosure agreements (‘NDAs’) are well-documented.<sup>110</sup> Those impacts apply equally to NDAs in the context of disability discrimination complaints. The DDA should be amended to introduce a legislative restriction, as is currently being considered in other jurisdictions.<sup>111</sup>

In our work, we have seen the overuse of NDAs by respondents in settlements of disability discrimination matters – they are a standard term of agreements. In addition to the terms of the settlement agreement being required to remain confidential, including the fact of financial and

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<sup>110</sup> See, eg, Regina Featherstone and Sharmila Bargon, *Let’s talk about confidentiality: NDA use in sexual harassment settlements since the Respect@ Work Report* (Final Report, 6 March 2024); Victoria Treasury and Finance Department, *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (Discussion Paper, 12 August 2024).

<sup>111</sup> Australian Human Rights Commission, *Speaking From Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025); Restricting Non-disclosure Agreements (Sexual Harassment at Work) Bill 2025 (Vic).

non-financial outcomes for our clients, respondents have also attempted to, or succeeded in, requiring our clients to keep confidential and/or not say anything disparaging in relation to:

- the complainant's personal circumstances related to the discrimination;
- the facts and circumstances leading to discrimination, including the respondent's policy or practice whether systemic or not;
- the steps taken by the complainant to complain about the alleged discrimination, such as any complaint made directly to the respondent, the specifics of a complaint to a human rights body, and any documents filed to pursue the complaint in a federal court;
- the complainant's suggestions for reforms to address the respondent's systemic policy or practice;
- the impact of the discrimination on the complainant; and
- the fact of coming to a settlement agreement.

Our clients oppose these confidentiality obligations, but respondents typically insist on an NDA in some form. Because of significant power imbalances in pursuing complaints against well-resourced government or corporate actors, our clients often feel compelled to agree to NDAs.

Clients of the JEC make disability discrimination complaints to redress systemic issues. NDAs can intimidate and silence our clients, limiting or preventing their advocacy to change the systemic discriminatory practice the subject of their complaint. For example, instead of being able to publicly hold the respondent to account to implement systemic outcomes agreed during settlement, a complainant's only recourse is to embark on a costly and time-consuming process to enforce the settlement agreement in court. NDAs not only stifle our clients' advocacy on systemic issues relating to their complaint, but instil fear of breaching confidentiality obligations in perpetuity.

In Australia, there has been a growing move to restrict the use of NDAs in the context of workplace sexual harassment.<sup>112</sup> The AHRC's 2022 National Survey found that one in three workers have been sexually harassed in the last five years, and confirmed that certain communities, including people with disability, experience sexual harassment at work at even greater rates.<sup>113</sup> In 2023-24, disability discrimination complaints under the DDA made up 43% of all complaints received by the AHRC.<sup>114</sup> When this data is examined together, people with disability are experiencing high rates of both disability discrimination, and sexual harassment, in the workplace and other areas of life. In 2023-24, the AHRC received 2,708 individual complaints containing 5,679 grounds of discrimination,<sup>115</sup> meaning on average each complaint had at least two grounds of discrimination. The data shows that any restriction on the use of NDAs should be broader than just workplace sexual harassment.<sup>116</sup> For present purposes, the DDA should be

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<sup>112</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 38; Australian Human Rights Commission, *Speaking From Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025); Restricting Non-disclosure Agreements (Sexual Harassment at Work) Bill 2025 (Vic).

<sup>113</sup> Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (Report, November 2022) 8.

<sup>114</sup> Australian Human Rights Commission, *2023-24 Complaint Statistics* (Report, November 2024) 2.

<sup>115</sup> Australian Human Rights Commission, *2023-24 Complaint Statistics* (Report, November 2024) 2.

<sup>116</sup> See, eg, *Non-disclosure Agreements Act*, RSPEI 1988, c N-3.02. cl 1(e) definition of 'party responsible', 4(1); *Stopping the Misuse of Non-Disclosure Agreements Act*, O 2023, cl 5.

amended to restrict the use of NDAs for any alleged conduct protected under the DDA and in any setting.

Relevantly, the AHRC's recent *Speaking from Experience* report finds that NDAs continue to be overused,<sup>117</sup> notwithstanding implementation of the Respect@Work recommendation to develop guidance on the use of NDAs. The AHRC is now recommending the SDA be amended to restrict the use of NDAs.<sup>118</sup> The experience from the workplace sexual harassment context shows that a legislated approach is necessary for change to occur.

Similar to overseas models, any framework to restrict NDAs should also include non-disparagement clauses, which have a similar effect of silencing our clients, and limiting or preventing their systemic advocacy. If non-disparagement clauses are not covered by NDA restrictions, it may create a loophole that has the same silencing effect on complainants.<sup>119</sup>

### ***Recommendation 42 – Restrict the use of non-disclosure agreements in settlements***

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*The DDA should be amended to restrict the use of NDAs in the settlement of any alleged conduct protected under the DDA, and in any setting.*

## **8.9 Empowering courts to order systemic outcomes**

Related amendments should be made to clarify and expand the range of remedies a court can order to prevent or deter future unlawful disability discrimination, recognising such changes would need to be made to the AHRC Act.

Many people who make disability discrimination complaints, including the JEC's clients, seek to ensure the discrimination does not happen again to them, or anyone else, and to change systems. This is particularly important given that policies or practices of organisations that discriminate on the basis of disability often impact not just the individual complainant, but other people with disability. In attempting to resolve their complaints or in pursuing outcomes in court, complainants often seek remedies to prevent or deter future discrimination. While such remedies are contemplated by our anti-discrimination framework, in our experience, such remedies are not well understood by respondents, their legal representatives or the courts.

The issue has been explained well by the Australian Law Reform Commission ('ALRC'), which said it is 'necessary to clarify the remedies':

14.128 ...a court is empowered under the *Australian Human Rights Commission Act* to make such orders 'as it thinks fit' if satisfied that an anti-discrimination law has been breached...The legislation lists a number of inclusive examples of the kind of orders that can be made. Some of the example orders focus on addressing damage or loss caused by the discrimination. Other types of orders seek to prevent or deter

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<sup>117</sup> Australian Human Rights Commission, *Speaking From Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025) 60.

<sup>118</sup> Australian Human Rights Commission, *Speaking From Experience: What needs to change to address workplace sexual harassment* (Final Report, June 2025) 11, Recommendation 8(a).

<sup>119</sup> See also, Victoria Treasury and Finance Department, *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (Discussion Paper, 12 August 2024) 20.

future discrimination, such as a direction by a court ‘not to repeat or continue’ the discrimination.

14.129 It seems sufficiently clear 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. The broad language of the power conferred (‘any order it thinks fit’) and the fact that an order with that objective is exemplified in s 46PO (a direction ‘not to repeat or continue’ the discrimination), make that apparent.

14.130 However, the availability of orders such as the first three kinds of orders listed in **Recommendation 50** would be better understood by both litigants, their legal representatives, and the court if the availability of those kinds of orders was made clearer by including them as examples of orders that can be made under s 46PO.<sup>120</sup>

In line with the ALRC’s Recommendation 50, the AHRC Act should clarify and expand the range of remedies available following a finding of unlawful discrimination, to empower the court to, where appropriate, make orders:

- restraining a respondent from continuing a particular policy or practice;
- requiring a respondent to take specific action eg engage in training or review a policy or practice;
- requiring a respondent to take corrective action to prevent further discrimination; and
- requiring a respondent to pay a civil penalty for a breach of anti-discrimination law (similar to the *Fair Work Act* regime).

Relevantly, the ALRC highlights many examples of statutory remedies available in civil proceedings which aim to deter or prevent future contraventions of the law, including the requirement to establish a compliance, education or training program for employees or other persons to ensure awareness of relevant responsibilities.<sup>121</sup>

Clarifying and expanding the range of remedies would maximise the intended purpose of the DDA, particularly in the context of the proposed positive duty.

### ***Recommendation 43 – Clarify and expand the range of remedies***

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*The AHRC Act should clarify and expand the range of remedies available on a finding of unlawful discrimination, to include the capacity for the court to make orders where appropriate:*

- *restraining a respondent from continuing a particular policy or practice;*

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<sup>120</sup> Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report, January 2025) 464 <<https://www.alrc.gov.au/wp-content/uploads/2025/02/JRSV-Final-Report-Book-for-Web-final-20250211.pdf>>.

<sup>121</sup> Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report, January 2025) 463, footnote 160.

- *requiring a respondent to take specific action eg engage in training or review a policy or practice;*
- *requiring a respondent to take corrective action to prevent further discrimination; and*
- *requiring a respondent to pay a civil penalty for a breach of anti-discrimination law.*

## **8.10 Regular review of the DDA**

The DDA should be subject to periodic statutory reviews. This would ensure the DDA remains effective and fit for its intended purpose, by dealing with any emerging or unforeseen issues in a timely way. This is consistent with the periodic statutory reviews of the Disability Standards.

### ***Recommendation 44 – Periodic statutory reviews of the DDA***

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*The DDA should be subject to periodic statutory reviews to ensure it remains fit for purpose.*

## **8.11 Consolidation of Commonwealth anti-discrimination laws**

Federal anti-discrimination protections are scattered across the DDA, SDA, RDA and *Age Discrimination Act*, as well as the AHRC Act which sets out procedural matters relating to complaints under the federal anti-discrimination laws. In contrast, state and territory anti-discrimination laws are contained in single Acts.

The JEC has consistently advocated for the consolidation of Commonwealth anti-discrimination laws into a single Act. This would increase public access to and understanding of rights under anti-discrimination legislation, and increase understanding of obligations by duty holders. Importantly, consolidation would also help to achieve consistency across anti-discrimination laws in terms of definitions, scope and exceptions. Harmonising tests and duties would build a more equitable and proactive anti-discrimination framework.

Consolidation would also better address the impact of intersecting identities. Practically, it would avoid the need for a complainant to ‘wrangle’ two or more legislative schemes when alleging intersecting forms of discrimination in pleadings.<sup>122</sup> It would also enable recognition and redress of intersectional discrimination by considering the impact of compounding attributes.

## **8.12 Human Rights Act**

Essential reforms to the DDA will be more effective in addressing and preventing discrimination experienced by people with disability if a federal Human Rights Act (‘HRA’) is introduced.

In Victoria, Queensland and the ACT where both discrimination laws and a HRA (in Victoria called a Charter) exist, the positive rights in a HRA improve the interpretation and operation of discrimination laws. Other relevant rights such as the right to equality before the law, the right to privacy, and the right to dignified treatment can be considered in determining whether a person has been discriminated against. An HRA implementing a ‘dialogue model’ can identify and

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<sup>122</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (Final Report, December 2021) 303.

challenge laws and regulations that may themselves be discriminatory. Modernised discrimination laws can then complement the operation of a HRA by ensuring that rights are enjoyed by all without discrimination.

The Disability Royal Commission recommended both positive rights and reforms to discrimination law.<sup>123</sup> Admittedly, the Disability Royal Commission was, due to its Terms of Reference, unable to consider a HRA and instead recommended a Disability Rights Act.<sup>124</sup> However, the July 2024 joint statement of 12 national disability representative organisations advocating for a HRA,<sup>125</sup> demonstrates uniform support for a HRA *alongside* reforms and modernisation of the DDA. A HRA was clearly recommended by the 2024 Parliamentary Joint Committee on Human Rights *Inquiry into Australia's Human Rights Framework*.<sup>126</sup> That recommendation should be supported as part of implementing the Disability Royal Commission's recommendations, alongside reforming the DDA.

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<sup>123</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4.

<sup>124</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 107.

<sup>125</sup> Strengthening protection of the rights of people with disability through a national Human Rights Act (HRA), Position Statement by Disability Representative Organisations (DROs) (19 July 2024) <<https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/>>.

<sup>126</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (May 2024), Recommendations 1 to 4.