



**Submission of the
Australian Discrimination Law Experts Group**

in response to the

**Commonwealth Attorney-General's Department
Review of the Disability Discrimination Act**

16 October 2025

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Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group ('ADLEG'), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on key questions raised in the Disability Discrimination Act Review Issues Paper ('the Issues Paper') released in August 2025 by the Commonwealth Attorney-General's Department, regarding amending the *Disability Discrimination Act 1992* (Cth).

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting altaylor@bond.edu.au.

This submission may be published.

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Executive Summary

Introduction

This submission is made in response to the Commonwealth Attorney-General's *Disability Discrimination Act Review Issues Paper* ('the Issues Paper') in relation to updating and amending the *Disability Discrimination Act 1992* (Cth) ('DDA').

We commend the Attorney-General's Department for ensuring this review provided sufficient time and information in a range of formats for effective engagement by organisations with limited resources and by people with disability. These are crucial pre-conditions of effective consultation, which is particularly important in an inquiry into disability discrimination law. There will be significant benefits if future consultations conducted by the Attorney-General's functions adopt this approach, understanding that those with disability and small community organisations are affected by many aspects of the Attorney-General's portfolio.

At the outset of our submission, we note that an overarching goal of discrimination laws is a society free from barriers to equality; for the DDA, this translates to achieving a society free from barriers to equality for people with disability. This is recognised in the objectives set out in section 3 of the DDA, and is reflected in the words of the sponsoring Minister, The Hon Brian Howe, in his Second Reading Speech to the Disability Discrimination Bill 1992 (Cth):¹

People with disabilities are entitled to the same rights and the same opportunities as all other Australian citizens. However, our society currently falls well short of realising this ideal. People are still subjected to discrimination purely on the basis of disability – discrimination which, I am sure all honourable members would agree, is socially damaging, morally unacceptable and a cost to the whole community.

Our submission has been prepared with the objective of making recommendations to the DDA that would achieve this aim. Based on our collective extensive expertise, we have responded directly to the questions in the Issues Paper and we have made further suggestions for reform.

Summary and overarching issues

The DDA will be more effective in achieving its objectives if amendments to the legislation reframe its primary focus away from prohibitions of direct and indirect discrimination. We advocate re-focusing the legislation from these prohibitions, which require individual enforcement, toward positive duties, adjustments, and mechanisms to enforce compliance. This would mean that regulatory effort would not be directed to determining whether or not there has been an instance of prohibited discrimination

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750 (The Hon Brian Howe, Minister for Health, Housing and Community Services).

affecting an individual, but instead promote equitable participation of all members of the community through a focus on positive duties and adjustments.

In this Summary section, we consider the limitations of the current DDA and a broad consideration of reforms that ADLEG recommends, including several key recommendations we make from the outset. A complete list of our recommendations is found below in the Recommendations section. Our submission then turns to responding in depth, one-by-one, to all 51 questions posed in the Issues Paper – this commences below from Part 1.1 onwards.

The DDA was developed with several innovative mechanisms to promote the achievement of a society free from barriers to equality for people with disability, including disability standards² and action plans.³ Both provide means to identify and address systemic barriers to equality for people with disability. Despite this, reliance on achieving removal of systemic barriers has fallen disproportionately on the process of individuals making complaints under the DDA and pursuing individual remedies through the complaint process.⁴ As a consequence, the regulatory burden under the DDA is primarily borne by people with disabilities. As the Productivity Commission observed, to the extent that there is a regulatory burden on organisations, that burden is unevenly distributed because organisations that ‘voluntarily’ comply carry a greater burden than those that don’t, those that can hide their non-compliance carry a lighter regulatory burden than those that hide non-compliance, etc.⁵

This uneven distribution of the regulatory burden contributes to the limited efficacy of the DDA in achieving its objective of facilitating equitable engagement of people with disabilities in our society. This is not unusual; commentators have consistently identified the reliance on complaints of prohibited discrimination as a significant barrier to achieving

² *Disability Discrimination Act 1992* (Cth) (‘DDA’) pt 2 div 2A.

³ DDA pt 3.

⁴ Originally the complaint provisions were located in the DDA in sections 68–111. As a result of the reforms to federal discrimination law flowing from the High Court’s decision in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10, in 1999 the complaint provisions for all of the federal discrimination Acts were removed and the (now) *Australian Human Rights Commission Act 1986* (Cth) (‘AHRC Act’) was amended to set out the complaint processes for all of those Acts: see AHRC Act pt IIB.

⁵ Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 142–43.

equality.⁶ Despite this, and the recognition by the Law Council of Australia in 2019 that people with disability face ‘significant economic and other disadvantage’ in the justice system⁷ which compounds this problem, legislative changes have not been made. As a result, the current systemic compliance and enforcement mechanisms are inefficient.

Reform is required to ensure organisations across Australia are active participants in the goal of achieving a society free of barriers for people with disability. To achieve this outcome, organisations need to be disability ready and responsive:⁸

The idea of disability ready and responsive services encompasses three key aspects. Firstly, organisations need to be pro-active in identifying and removing potential barriers facing people with disability accessing their services and having equality of opportunity in that access. Secondly, organisations need to develop knowledge and skills to be able to respond appropriately and inclusively when a person with disability seeks to access their services. Thirdly, all staff should be made aware of the procedures and a culture of service flexibility embedded in the agency (or agencies).

History has demonstrated that the DDA does not currently require organisations to act in these ways. Legislative change introducing proactive systemic mechanisms, such as the implementation of a positive duty and action plans, is key to requiring organisations to become disability ready. Both mechanisms would support the identification and planned removal of barriers to equality before individuals are affected by those barriers. In addition, and importantly, they would interact positively with the existing duty to make adjustments and comply with disability standards. The capacity to fulfil the duty to make

⁶ Margaret Thornton, *The liberal promise: Anti-discrimination legislation in Australia* (Oxford University Press, 1990) 37–38; Belinda Smith, ‘A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?’, in Christopher Arup, John Howe, Richard J Mitchell, Peter Gahan, Richard Johnstone & Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105; Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (The Federation Press, 3rd ed, 2018) 20 [1.4.31], 799 [15.1.8]; Beth Gaze and Belinda Smith, *Equality and discrimination law in Australia: An introduction* (Cambridge University Press, 2017) 175 [4]; Dominique Allen, *Addressing discrimination through individual enforcement: A case study of Victoria* (Monash University, 2019) 19; Julian Gardner, *An equality Act for a fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, Department of Justice, June 2008) 8, 39, 43; Beth Gaze, ‘The costs of equal opportunity’ (2000) 25(3) *Alternative Law Journal* 125, 126 and following; Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 135–37, 229.

⁷ Law Council of Australia, *The Justice Project: Final Report: Introduction and Overview* (Law Council of Australia August 2018) 7 and *The Justice Project: Final Report – Part 1: People with Disability* (Law Council of Australia) August 2018. It should be noted that other groups who experience significant discrimination are all listed in the report as being similarly disadvantaged in the justice system: see page 7 referred to above which includes in the list of those disadvantaged: LGBTI+ people, Aboriginal and Torres Strait Islander People, recent arrivals, children and young people, asylum seekers and older persons.

⁸ This approach was first described in Tasmanian Government, Minister for Education and Training, *Improved support for students with disability: Ministerial Taskforce Report* (August 2015). The quoted material is from Anti-Discrimination Commissioner, *Disability Framework for Action: 2018–2020: Submission by the Anti-Discrimination Commissioner (Tas)* (June 2017) 8–10. It has been incorporated into Departmental actions under the Accessible Island framework of action for Tasmania.

adjustments—an element of disability responsiveness—must be underpinned by organisations having effective mechanisms for identification of the need for adjustments and timely and appropriate mechanisms for responding to those identified needs. It is clear that, over time, effective work on disability readiness will reduce, but not completely remove, the need to make adjustments. We recommend that the reform of the DDA should introduce proactive systemic mechanisms.

Requiring and supporting organisations to become disability ready and responsive will result in a significant reduction in the current and inappropriate reliance on individuals to achieve the goal of equality. As stated above, reliance on individual complaints to achieve any form of equality is problematic. Compounding this, while individuals with disability are diverse, there are clearly systemic issues affecting either people with disability as a whole or one or more disability cohorts, which further problematise reliance on complaints in relation to the DDA. In order for the legislation to achieve substantive and positive change to the equal opportunities of people with disability in a more timely way than has been achieved to date, effective proactive and systemic mechanisms must be implemented.

Recommendation 1.0.1: The *Disability Discrimination Act 1992* (Cth) be amended to introduce proactive systemic mechanisms to minimise reliance on individual complaints, and to facilitate organisations becoming disability ready, including the introduction of a positive duty and action plans.

In addition, supporting organisations to become disability ready and responsive requires greater resourcing for the development and dissemination of guidance materials co-designed by the Australian Human Rights Commission (‘AHRC’), people with disability and subject matter experts. Consultation with people with lived experience of disability is vital because it provides unique, first-hand insights to inform the development of more effective, inclusive, and relevant approaches to achieving equality.

Recommendation 1.0.2: The Australian Human Rights Commission develop guidance materials on compliance with positive duties and action plan provisions, which are co-designed with people with disability and subject matter experts.

It is also important to observe that all discrimination laws at the federal level would be more effective if Australia had a federal human rights Act encompassing the internationally recognised human rights found in the human rights treaties to which

Australia is a party.⁹ The right to equality and the right to non-discrimination in respect of all of the rights in those treaties complement the prohibition of discrimination found in federal discrimination law.

Recommendation 1.0.3: Australia should enact federal human rights legislation.

It is also critical that all developments in relation to federal discrimination law protecting people with disability fully engage through co-design processes with disability representative organisations ('DROs').¹⁰ Consultation should also form the basis of an ongoing process for reviewing the effectiveness of the DDA and its related disability standards, and inform regular reform and amendments.

This process should also be regularly scheduled. The cyclical process of consultation, co-design, evaluation and reform needs to be fully resourced so that organisations can engage effectively with their communities and with subject matter experts to inform their input. The establishment of a body on an ongoing basis would ensure that scheduled reviews of the various disability standards and issues identified with the effectiveness of the DDA can be dealt with in a more timely and disability-informed way.

Recommendation 1.0.4: Formal reviews of the *Disability Discrimination Act 1992* (Cth) and standards be scheduled on a regular basis, at a minimum every 5 years.

Recommendation 1.0.5: Developments in relation to the *Disability Discrimination Act 1992* (Cth) fully engage through co-design processes with disability representative

⁹ Some of these treaties (and human rights declarations) are scheduled to the AHRC Act: Schedule 1—*Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, 362 UNTS 31, Australian Treaty Series 1974 No 12 (entered into force 15 June 1960, entered into force for Australia 15 June 1974) ('ILO 111'; Schedule 2—*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 999 UNTS 171; Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except article 41 which entered into force on 28 January 1993) ('ICCPR'); Schedule 3—*Declaration on the Rights of the Child*; Schedule 4—*Declaration on the Rights of Mentally Retarded Persons*; Schedule 5—*Declaration on the Rights of Disabled Persons*. The other human rights treaties to which Australia is a state party are: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1, Australian Treaty Series 1975 No 40 (entered into force 4 January 1969, entered into force for Australia 30 October 1975 except Article 14 which entered into force for Australia 28 January 1993) ('ICERD'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 993 UNTS 3, Australian Treaty Series 1976 No 5, UN Doc A/6316 (1966) (entered into force 3 January 1976, entered into force for Australia 10 March 1976) ('ICESCR'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1, Australian Treaty Series 1983 No 9 (entered into force 3 September 1981, entered into force for Australia 27 August 1983) ('CEDAW'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Australian Treaty Series 1991 No 4 (entered into force 2 September 1990, entered into force for Australia 16 January 1991) ('CRC'); and *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Australian Treaty Series 2008 No 4 (entered into force 3 May 2008, entered into force for Australia 16 August 2008) ('CRPD').

¹⁰ Consistent with this principle, members of ADLEG consulted with individuals with disability and DROs, about aspects of this submission.

organisations, ideally facilitated by a formal, permanent consultation body which can liaise with disability representative organisations and subject matter experts.

In addition, additional resources are required to ensure the DDA is effective. A number of the existing mechanisms in the DDA require, for their effective implementation and utilisation, adequate resources within the AHRC. At this time, the AHRC does not have sufficient dedicated funding in the Disability Rights area to achieve this. Its current levels of funding are less than it had from its establishment when the DDA came into force. From that period up until around 2010, the AHRC had sufficient staff in the Disability Rights Unit with high levels of disability, legal and policy expertise to, for example, work proactively with industry sectors to promote compliance and to engage in the various development processes for disability standards. The AHRC needs to be adequately funded to effectively utilise existing mechanisms in the DDA.

Resourcing should not, however, be restricted to adequately funding the AHRC's existing roles. This review considers, and we strongly recommend in this submission, the adoption of a range of additional mechanisms to fulfil the promise of the DDA, as well as the necessary powers and functions for the AHRC to make those mechanisms effective. This will require provision of additional dedicated resourcing to the AHRC Disability Rights Unit. The requirement to provide additional resources to support new regulatory functions is not anomalous. It is noted, for example, that when additional proactive functions and powers were legislated for the Canadian Human Rights Commission in the area of disability discrimination, significant additional funding was allocated to ensure these functions and powers would be effective.

Recommendation 1.0.6: The Australian Human Rights Commission be allocated significant additional funds to ensure it is able to actively engage with existing and new mechanisms and to effectively perform its functions and exercise its powers under the *Disability Discrimination Act 1992* (Cth), and that these funds be specifically earmarked for that work and not for any other area of the Commission's functions.

Finally, it is important to recognise that formal regulatory actions to minimise discrimination against those with disabilities and facilitate inclusion of all within the community cannot be achieved through the enforcement of legislation alone. While implementation of effective proactive and systemic mechanisms would complement and reinforce existing individual complaint-based enforcement, further steps will also be required. One action that could facilitate civic engagement would be the development of a system whereby data about compliance with the DDA prohibitions, positive duties, and progress on action plans is made publicly available. There is evidence that allowing access to data and increasing transparency can facilitate equitable outcomes. For example, transparency has been used by the Workplace Gender Equality Agency ('WGEA') in relation to pay equity, supported by evidence that it improves equality in pay.¹¹

¹¹ See, for example, Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas and Derek Messacar, 'Can Transparency Laws Fix the Gender Wage Gap?' (27 February 2020) *Harvard Business Review* <<https://hbr.org/2020/02/can-transparency-laws-fix-the-gender-wage-gap>>; Elizabeth Lyons and Laurina Zhang, 'Salary transparency and gender pay inequality: Evidence from Canadian universities' (2023) 44(8) *Strategic Management Journal* 2005; Tomasz Obloj and Todd Zenger, 'The influence of

A similar approach could be taken to data reported to the AHRC under the DDA, through the introduction of duties that compel or encourage organisations to reveal certain information, such as workforce composition data, progress on action plans, special measures implemented and complaints made. If such data were made publicly available, within the constraints of compliance with privacy legislation, compliance would be encouraged.¹² Fung and colleagues state:¹³

Targeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations. The ingeniousness of targeted transparency lies in its mobilization of individual choice, market forces, and participatory democracy through relatively light-handed government action.

Indeed, the Issues Paper notes: ‘Reporting frameworks can provide an important transparency and accountability mechanism and encourage greater compliance.’¹⁴ In addition, data sharing would assist in the identification of best practice approaches to reducing inequality, and hopefully maximise organisational efforts to comply with the DDA and be disability ready.

Recommendation 1.0.7: Data provided to the Australian Human Rights Commission by organisations pursuant to positive duty frameworks and/or progress on action plans be aggregated and made publicly available by the Australian Human Rights Commission in a manner similar to reporting by the Workplace Gender Equality Agency.

Recommendations

ADLEG’s responses to all 51 questions in the Issues Paper are set out below from Part 1.1 onwards, following this summary of our recommendations:

Executive Summary

RECOMMENDATION 1.0.1: The *Disability Discrimination Act 1992* (Cth) be amended to introduce proactive systemic mechanisms to minimise reliance on individual complaints, and to facilitate organisations becoming disability ready, including the introduction of a positive duty and action plans.

RECOMMENDATION 1.0.2: The Australian Human Rights Commission develop guidance materials on compliance with positive duties and action plan provisions, which are co-designed with people with disability and subject matter experts.

RECOMMENDATION 1.0.3: Australia should enact federal human rights legislation.

pay transparency on (gender) inequity, inequality and the performance basis of pay’ (2022) 6(5) *Nature Human Behaviour* 646.

¹² Alysia Blackham, ‘Positive Equality Duties: The Future of Equality and Transparency?’ (2021) 37(2) *Law in Context* 98.

¹³ Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007) 5.

¹⁴ Issues Paper, 92.

RECOMMENDATION 1.0.4: Formal reviews of the *Disability Discrimination Act 1992* (Cth) and standards be scheduled on a regular basis, at a minimum every 5 years.

RECOMMENDATION 1.0.5: Developments in relation to the *Disability Discrimination Act 1992* (Cth) fully engage through co-design processes with disability representative organisations, ideally facilitated by a formal, permanent consultation body which can liaise with disability representative organisations and subject matter experts.

RECOMMENDATION 1.0.6: The Australian Human Rights Commission be allocated significant additional funds to ensure it is able to actively engage with existing and new mechanisms and to effectively perform its functions and exercise its powers under the *Disability Discrimination Act 1992* (Cth), and that these funds be specifically earmarked for that work and not for any other area of the Commission's functions.

RECOMMENDATION 1.0.7: Data provided to the Australian Human Rights Commission by organisations pursuant to positive duty frameworks and/or progress on action plans, be aggregated and made publicly available by the Australian Human Rights Commission in a manner similar to reporting by the Workplace Gender Equality Agency.

Part 1 – Updating understandings of disability and disability discrimination

Part 1.1 – Definition of Disability

RECOMMENDATION 1.1.1: The form and approach taken in the definition of 'disability' in section 4(1) of the *Disability Discrimination Act 1992* (Cth) be retained, with further consideration given to whether some of the language of the definition in paragraphs (a) to (g) could be amended to achieve a more neutral tone such as replacing in (e) the term 'malfunction' with 'impairment to the functioning', the term 'malformation' with 'difference in the formation' and the term 'disfigurement' with 'visible irregularity'; replacing in (f) the term 'disorder or malfunction' with 'condition' in the two places it occurs, and replacing in (g) 'disorder, illness or disease' with 'condition'.

RECOMMENDATION 1.1.2: The definition of 'disability' in section 4(1) of the *Disability Discrimination Act 1992* (Cth) be amended to more comprehensively protect against discrimination on the grounds of current, future and imputed future disability related to genetic heritage.

Part 1.2 – Addressing Intersectionality

RECOMMENDATION 1.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to expressly identify that protections against discrimination encompass discrimination against people with multiple impairments (internal intersectionality) and the obligation to make adjustments extends to accommodating multiple impairments.

RECOMMENDATION 1.2.2: The *Disability Discrimination Act 1992* (Cth) be amended to expressly identify that protections against discrimination encompass intersectional discrimination against people with disability and other attributes identified in federal discrimination and industrial law.

RECOMMENDATION 1.2.3: The *Australian Human Rights Commission Act 1986* (Cth) be amended to require decision makers dealing with complaints to consider intersectional discrimination in terms of both whether or not unlawful discrimination took place and in the orders made when unlawful discrimination is found.

RECOMMENDATION 1.2.4: The proposed positive duty include requirements to consider and report against intersectional impacts and the removal of barriers to equal opportunity arising from intersectional impacts.

RECOMMENDATION 1.2.5: Action Plans made under the *Disability Discrimination Act 1992* (Cth) be required to include approaches to responding to intersectional impacts.

Part 1.3 – Direct Discrimination

RECOMMENDATION 1.3.1: A single definition of discrimination be used in the *Disability Discrimination Act 1992* (Cth), which is inclusive of direct and indirect discrimination as well as the failure to make adjustments.

RECOMMENDATION 1.3.2: In the alternative to Recommendation 1.3.1, the following definition be drawn on instead, based on the *International Labour Organization Discrimination (Employment and Occupation) Convention* and the *Convention on the Elimination of All Forms of Discrimination Against Women*, while in its terms clearly encompassing, in an inclusive approach, what has been known as direct and indirect discrimination:

Discrimination includes:

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of, and
- (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

RECOMMENDATION 1.3.3: That consideration be given to providing greater guidance to decision makers in the provisions of the *Disability Discrimination Act 1992* (Cth) as to what kinds of conduct constitute unfavourable treatment or barriers to equal opportunity. The framing of the sexual harassment prohibition in the *Sex Discrimination Act 1984* (Cth) provides a model for this.

RECOMMENDATION 1.3.4: The definition used to explain direct discrimination adopts the term ‘unfavourable’ rather than ‘less favourable’ to remove the requirement to identify a comparator.

RECOMMENDATION 1.3.5: The *Disability Discrimination Act 1992* (Cth) be amended to adopt the shifting burden of proof modelled on section 136 of the *Equality Act 2010* (UK).

Part 1.4 – Indirect discrimination

RECOMMENDATION 1.4.1: Due to the persistent challenges presented by the ‘reasonableness’ test in section 6 of the *Disability Discrimination Act 1992* (Cth), ‘reasonable’ be replaced with a legitimate and proportionate test.

Part 1.5 – Convention on the Rights of Persons with Disabilities

RECOMMENDATION 1.5.1: Reference to the *Convention on the Rights of Persons with Disabilities* be included in section 3—‘Objects’—of the *Disability Discrimination Act 1992* (Cth).

RECOMMENDATION 1.5.2: Consistent with Australia’s obligations as a State Party, the *Disability Discrimination Act 1992* (Cth) be amended to prohibit discrimination in all areas of life that are covered by the *Convention on the Rights of Persons with Disabilities*.

RECOMMENDATION 1.5.3: The inclusion of an express provision in the *Disability Discrimination Act 1992* (Cth) requiring all administrative and judicial decision makers to interpret the Act in a manner that best promotes compliance with the *Convention on the Rights of Persons with Disabilities*.

Part 2 – Positive duty to eliminate discrimination

RECOMMENDATION 2.1: A positive duty be introduced in the *Disability Discrimination Act 1992* (Cth).

RECOMMENDATION 2.2: The positive duty apply to all private and public organisations with responsibilities under the *Disability Discrimination Act 1992* (Cth), to all bodies exercising public power or delivering services that affect the lives of people with disability, and to all public authorities including Government Ministers, and consideration be given to using the term ‘Person Conducting a Business or Undertaking’ (‘PCBU’) to capture these duty bearers.

RECOMMENDATION 2.3: The positive duty in the *Disability Discrimination Act 1992* (Cth) encompass the duty to address all forms of unlawful conduct in all areas of activity under the Act, including non-compliance with disability standards.

RECOMMENDATION 2.4: The positive duty in the *Disability Discrimination Act 1992* (Cth) be a duty to prevent unlawful conduct by or against all people having any engagement with the enterprise.

RECOMMENDATION 2.5: The positive duty to be included in the *Disability Discrimination Act 1992* (Cth) include reporting obligations for duty bearers, and that this be done through the lodging of, and annual reporting against, action plans under the Act. The lodging and reporting against action plans should be implemented for all duty bearers with a schedule of compliance beginning with all organisations covered by the *Workplace Gender Equality Act 2012* (Cth) and state government agencies and enterprises.

RECOMMENDATION 2.6: The Australian Human Rights Commission work with disability representative organisations and industry sector bodies to develop disability equality indicators, and duty bearers should, under the positive duty in the *Disability Discrimination Act 1992* (Cth), be required to report against those indicators. The Commission should be resourced to have the capacity to analyse and aggregate that data to provide an evolving picture of the situation of people with disability in Australia.

RECOMMENDATION 2.7: The positive duty in the *Disability Discrimination Act 1992* (Cth) adopt the term ‘reasonable and proportionate measures to eliminate’ unlawful discrimination; make clear who is a ‘duty bearer’ and specify all of the relevant conduct to be prevented.

RECOMMENDATION 2.8: The positive duty in the *Disability Discrimination Act 1992* (Cth) expressly specify that duty bearers must actively work with disability rights organisations to develop and monitor their actions to prevent unlawful discrimination.

RECOMMENDATION 2.9: The positive duty in the *Disability Discrimination Act 1992* (Cth) expressly include a risk assessment of the cost of inaction on prevention of unlawful discrimination.

RECOMMENDATION 2.10: Application by the duty bearer of guidance materials developed to support the fulfilment of the positive duty in the *Disability Discrimination Act 1992* (Cth) be considered by a decision maker determining whether there has been compliance with the positive duty.

RECOMMENDATION 2.11: Guidance materials be developed to support the fulfilment of the positive duty in the *Disability Discrimination Act 1992* (Cth) be co-designed with disability rights organisations.

RECOMMENDATION 2.12: An appropriate agency be appointed to promote compliance with the positive duty and tasked with effective enforcement, and that agency be allocated resources and powers to enable it to effectively undertake these roles. We note that if the Australian Human Rights Commission is tasked with these roles they will require *additional* resources and powers, beyond those currently allocated.

RECOMMENDATION 2.13: The *Australian Human Rights Commission Act 1986* (Cth) be amended to ensure the Commission can review complaints made under the *Disability Discrimination Act 1992* (Cth) and share (give and receive) information with other federal state and territory statutory authorities and government agencies with appropriate safeguards for individual privacy and procedural fairness in order to determine matters of compliance with the positive duty.

RECOMMENDATION 2.14: A mechanism be established in the *Disability Discrimination Act 1992* (Cth) to empower the Australian Human Rights Commission to establish a specific mechanism for individuals and advocates to make reports of suspected non-compliance with the positive duty, and that such reports are to be deemed sufficient for the Commission to reasonably suspect non-compliance and take investigative action.

RECOMMENDATION 2.15: A mechanism be established in the *Disability Discrimination Act 1992* (Cth) to empower the Minister to designate disability representative organisations and selected rights organisations as ‘designated bodies’ entitled to lodge reports of ‘significant or systemic’ issues of non-compliance with the Act and any obligations under the Act. Organisations that are ‘designated bodies’ should receive appropriate funding to enable them to be active in this role as people with disability will be relying on this mechanism being effective. Further, the Australian Human Rights Commission should be empowered to inquire into systemic breaches of the Act.

RECOMMENDATION 2.16: Review of the legislated confidentiality obligations of the Australian Human Rights Commission to ensure it is able to work with other entities to identify non-compliance with the positive duty and that it provides transparency in respect of compliance and enforcement. This includes amending section 35A of the *Australian Human Rights Commission Act 1986* (Cth) to expressly permit the Commission to report on compliance and enforcement, and further amendments as needed to ensure the Commission can work with other enforcement agencies, including state and territory discrimination law statutory authorities, to identify patterns relevant to compliance with the positive duty.

RECOMMENDATION 2.17: The Australian Human Rights Commission be required by legislation to annually report on its enforcement activities and on aggregated data, and to utilise its data to develop evidence-based recommendations about how to develop an effective action plan and implement positive duties. These duties could be modelled on the actions of the Commission for Gender Equality in the Public Sector in Victoria.

RECOMMENDATION 2.18: The Australian Human Rights Commission maintain a public register of:

- the actions which led to complaints of disability discrimination being made to the Australian Human Rights Commission,
- conciliated outcomes of disability complaints,
- any findings made, compliance notices issued, or enforceable undertakings entered into with the Australian Human Rights Commission arising from any of its non-complaints functions under the amended *Disability Discrimination Act 1992* (Cth), and
- sanctions for non-compliance with the Act or arrangements entered into.

RECOMMENDATION 2.19: The Australian Human Rights Commission be given additional regulatory tools to effectively enforce a positive duty including the capacity to implement penalties; injunctions; procurement exclusions; and publicly identify non-compliant parties.

RECOMMENDATION 2.20: Any exceptions or limits to a positive duty should not undermine the purpose of the duty and should, instead, be framed as part of a proportionality assessment in evaluating compliance.

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

Part 3.1 – Adjustments

RECOMMENDATION 3.1.1: Amendment to the *Disability Discrimination Act 1992* (Cth) to create a stand-alone duty to provide adjustments.

RECOMMENDATION 3.1.2: The stand-alone duty to provide adjustments extend to duties of governments to ensure people with disability are able to fully engage in the fulfilment of civic duties such as voting, jury service and seeking election to parliament and being a member of parliament.

RECOMMENDATION 3.1.3: The *Disability Discrimination Act 1992* (Cth) and any disability standards made under section 31 of the Act be amended to replace the term ‘reasonable adjustment’ with adjustment wherever it occurs and revise the notes that refer to such adjustments to ensure they accurately reflect the scope of the obligation.

RECOMMENDATION 3.1.4: The *Disability Discrimination Act 1992* (Cth) include an ‘anticipatory’ duty with a duty to make adjustments as well as any positive duties of duty bearers, particularly public entities and service providers.

Part 3.2 – Unjustifiable hardship

RECOMMENDATION 3.2.1: An adaption of the approach suggested by the Disability Royal Commission and incorporating all of the principles embedded in section 4.1 of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be adopted in reframing unjustifiable hardship, such that in determining unjustifiable hardship, a decision maker should consider the extent of consultation with any person with disability and the available alternative measures to achieve improvements in equality for people with disability and eliminate or reduce hardship.

RECOMMENDATION 3.2.2: The definition of unjustifiable hardship in the *Disability Standards for Accessible Public Transport 2002* (Cth) and the *Disability Standards for Education 2005* (Cth) be amended to incorporate all of the principles adopted in an amended definition in section 11 of the *Disability Discrimination Act 1992* (Cth) and all of the notes in the disability standards that refer to unjustifiable hardship be reviewed to ensure they are consistent with the amended definition.

Part 3.3: Inherent Requirements

RECOMMENDATION 3.3.1: The inherent requirements exception found in the *Disability Discrimination Act 1992* (Cth) and disability standards made under that Act be narrowly defined and strictly construed as a genuine exception to fundamental equality rights, and be limited to those tasks, functions, or competencies that are truly essential to the core purpose of the job or course – not merely traditional, preferred, or convenient ways of performing the role.

RECOMMENDATION 3.3.2: The *Disability Discrimination Act 1992* (Cth) clearly set out that inherent requirements under the Act and under any relevant disability standards made under the Act be: (1) Necessary to the fundamental nature of the employment or educational program; (2) Incapable of being eliminated or modified without fundamentally altering that nature; and (3) Distinguished from marginal, peripheral, or traditional practices that could be modified without altering that nature.

RECOMMENDATION 3.3.3: The *Disability Discrimination Act 1992* (Cth) be amended to expressly require the employer or educational institution seeking to rely on a person's alleged incapacity to fulfil inherent requirements under the Act and under any relevant disability standards made under the Act bear the burden of proving that the requirement is genuinely inherent, in that the requirement is (1) necessary to the fundamental nature of the employment or educational program; (2) incapable of being eliminated or modified without fundamentally altering that nature; and (3) distinguished from marginal, peripheral, or traditional practices that could be modified without altering that nature.

RECOMMENDATION 3.3.4: The proper analytical sequence to be applied under the *Disability Discrimination Act 1992* (Cth) and disability standards made under the Act in relation to 'inherent requirements' must be clarified: duty bearers must (a) identify the inherent requirements; then (b) identify all adjustments that could enable the person to meet requirements, then (c) identify what resources are available to it to implement the adjustments, before (d) determining whether inherent requirements can be met without or with adjustments.

Part 3.4 – Exclusionary Discipline

RECOMMENDATION 3.4.1: The *Disability Discrimination Act 1992* (Cth) be amended to expressly include, in the context of the prohibition of discrimination in education found in section 22, 'exclusion' and 'exclusionary discipline' and define these terms broadly to include any temporary or permanent change to a student's enrolment and attendance and participation in educational activities.

Part 4 – Improving access to justice

Part 4.1 – Offensive Behaviour and Vilification

RECOMMENDATION 4.1.1: The *Disability Discrimination Act 1992* (Cth) be amended to repeal sections 35, 37 and 39 and add a provision broadly based on section 18C of the *Racial Discrimination Act 1975* (Cth). The provision should make it clear that:

- such conduct need not be repeated in order to be unlawful;
- the prohibition applies to conduct whether in public or private;
- the prohibition applies in all areas of life in which discrimination is unlawful under the *Disability Discrimination Act 1992* (Cth) and that people are protected from such conduct no matter what their role is in the particular situation;

- the prohibition should extend to conduct that is ridiculing, demeaning, derogatory and/or interferes with mobility, communication and disability aids and/or equipment.

RECOMMENDATION 4.1.2: Decision makers dealing with complaints under the *Disability Discrimination Act 1992* (Cth) be required to have an up-to-date knowledge of the forms and impacts of disability prejudice and that expert evidence on these matters should be available.

RECOMMENDATION 4.1.3: If provisions are implemented in the *Disability Discrimination Act 1992* (Cth) to protect against public and private disability prejudice (offensive and related conduct) and incitement on the basis of disability, a defence be provided modelled on the approaches in section 18D of the *Racial Discrimination Act 1975* (Cth) and section 55 of the *Anti-Discrimination Act 1998* (Tas).

RECOMMENDATION 4.1.4: The *Disability Discrimination Act 1992* (Cth) be amended to include a provision modelled on section 19(b) of the *Anti-Discrimination Act 1998* (Tas). Consideration should be given to whether such a provision should be included in Part 2, Division 4–Offences.

Part 4.2 – Policing and Justice

RECOMMENDATION 4.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to extend coverage to include all aspects of public life, including policing and justice.

RECOMMENDATION 4.2.2: No specific defences be provided in the *Disability Discrimination Act 1992* (Cth) in respect of the prohibition of discrimination in policing and justice administration.

Part 5 – Exemptions

RECOMMENDATION 5.1: The headings of section 21A and 21B in the *Disability Discrimination Act 1992* (Cth) be amended by replacing the word ‘Exception’ with the word ‘Defence’, and that the provisions be reworded to make it clear that the effect of the provision is to provide a defence to an allegation of discrimination.

RECOMMENDATION 5.2: The heading to section 29A in the *Disability Discrimination Act 1992* (Cth) be amended to read ‘Defence – Unjustifiable hardship’, and that the provision be reworded to make it clear that the effect of the provision is to provide a defence to an allegation of discrimination.

RECOMMENDATION 5.3: Part 2 Division 5 in the *Disability Discrimination Act 1992* (Cth) be amended to create two separate divisions: the first division to contain sections 45 to 54A inclusive, be renamed ‘Defences’ and the provisions all be amended to make it clear that the effect of each provision is to provide a defence to an allegation of discrimination; the second division to contain sections 55 to 58 inclusive and be named ‘Temporary Exemptions’.

RECOMMENDATION 5.4: The *Disability Discrimination Act* (1992) be amended to include a provision at the beginning of Part 2 that states:

X. Proof of defences

A defence referred to in this Act is a defence to a complaint alleging any acts, omissions or practices that are unlawful under Division 1, 2, 2A, 3 or 6 of Part 2 of this Act including any conduct that is an offence under Division 4 of Part 2 other than section 42 of this Act, and the person who relies on a defence must prove it on the balance of probabilities, and cannot rely on a defence to avoid its obligations under section Y [the new positive duty provision].

Consideration should also be given to whether or not a similar provision is needed in the *Australian Human Rights Commission Act 1986* (Cth) in respect of the complaints procedures.

RECOMMENDATION 5.5: Section 46 of the *Disability Discrimination Act 1992* (Cth) be amended to expressly incorporate the factors identified in *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 and *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

RECOMMENDATION 5.6: The cases determined under the defences found in section 44 to 54A of the *Disability Discrimination Act 1992* (Cth) should be reviewed in light of Australia's obligations as a State Party to the *Convention on the Rights of Persons with Disabilities* and the *Disability Discrimination Act 1992* (Cth) amended to ensure those obligations are not undermined by the framing of those sections.

RECOMMENDATION 5.7: Section 52 of the *Disability Discrimination Act 1992* (Cth) be repealed.

RECOMMENDATION 5.8: The *Disability Discrimination Act 1992* (Cth) and *Australian Human Rights Commission Act 1986* (Cth) should empower the Australian Human Rights Commission to grant 'special measures' certification.

RECOMMENDATION 5.9: 'Special measures' be defined in the *Disability Discrimination Act 1992* (Cth) to ensure that (a) only 'positive or affirmative measures that aim to accelerate or achieve de facto equality for persons with disability' can be considered special measures for the purposes of section 45 of the Act; and (b) a measure cannot be considered a special measure unless relevant disability rights organisations support this characterisation.

RECOMMENDATION 5.10: Section 55 of the *Disability Discrimination Act 1992* (Cth) be amended to make it a requirement that the Australian Human Rights Commission must, before determining an application for exemption, consult with disability representative organisations and state and territory discrimination statutory office holders.

RECOMMENDATION 5.11: Section 55 of the *Disability Discrimination Act 1992* (Cth) be amended to make it a requirement that the Australian Human Rights Commission require a successful applicant to give enforceable commitments in respect of the actions it will take and the timetable for taking those actions to achieve compliance with the Act and remove the need for further exemption.

Part 6 – Modernising the Disability Discrimination Act

Part 6.1 – Assistance Animals

RECOMMENDATION 6.1.1: The *Disability Discrimination Act 1992* (Cth) be amended to:

- clearly and positively specify that an assistance animal is to be under the control of their handler when in public spaces;
- include coverage of people with disability accompanied by an animal where the presence of the animal alleviates the effect of the person’s disability even where there has been no ‘training’ to achieve this effect, and clearly exclude companion animals more generally;
- positively require all assistance animals to have accreditation in respect of meeting hygiene standards;
- positively require all assistance animals and their handlers to have accreditation in respect of control and public access standards.

RECOMMENDATION 6.1.2: Urgent action be taken to identify all of those organisations that are accredited under international standards for assistance animals and list them in the regulations made under the *Disability Discrimination Act 1992* (Cth).

RECOMMENDATION 6.1.3: For the provisions relating to assistance animals in the *Disability Discrimination Act 1992* (Cth) to be effective nationally for both duty holders and people with disability, urgent action be taken to establish a national framework for accreditation of assistance animals. The framework needs to establish all of the following:

- What standards for hygiene (and what it encompasses – dirty and/or unhygienic habits re toileting, eating etc compared to poorly groomed) and public behaviour are to be met and how they will be assessed. The IGDF, for example, indicates that, in terms of public behaviour, dogs need to be assessed for distractibility, sensitivities, social behaviour, anxiety and reactivity, aggression and other qualities such as consistency, concentration, adaptability, etc.¹⁵
- How regularly an assistance animal needs to be reviewed to assess that it continues to meet the standards, proof of review and follow up. Guide dogs, for example, are generally reviewed by the training organisation annually and this assessment could include review against the standards.
- Proof of time-limited ‘licence’ or accreditation for assistance animals to be produced on reasonable request (possible inclusion of photo ID that would have dual benefit for people with disability who are unable to hold a driver’s licence).

¹⁵ International Guide Dog Federation, ‘[Section 8: Guide dog assessment and training](https://www.igdf.org.uk/about-us/starting-a-guide-dog-organisation/guide-dog-assessment-and-training/)’ (undated) <<https://www.igdf.org.uk/about-us/starting-a-guide-dog-organisation/guide-dog-assessment-and-training/>>.

- Mechanisms for making assessment available at a reasonable cost to individuals who rely on an assistance animal that has not been and cannot be trained and assessed by a specialist training body. Such assessments need to both assess the animal against the hygiene standards and the animal and its handler (the person with disability) against the public access/behaviour standards.
- If an entity is able to be delegated authority under the National Framework to accredit assistance animals, how regularly that entity is reviewed for its suitability to hold that delegation; and what the requirements are for this authority to be delegated including involvement of people with relevant disabilities in the training, quality control and accreditation of assistance animals.

Once the framework is in place, the *Disability Discrimination Act 1992* (Cth) should be amended to refer to that framework in respect of the protection against discrimination for people accompanied by an assistance animal.

RECOMMENDATION 6.1.4: The Framework recommended in Recommendation 6.1.3 be legislated (potentially through a combination of head and delegated legislation) and be accompanied by guidance materials where appropriate.

RECOMMENDATION 6.1.5: Until such time as the National Framework is in place, organisations (training and accreditation) be listed in regulations made under the *Disability Discrimination Act 1992* (Cth). Once the National Framework is in place, the *Disability Discrimination Act 1992* (Cth) should be amended to remove the reference to the regulations in section 9(2)(b), and other amendments made to this provision to refer to assistance animals having to be accredited under the National Framework. Consideration also needs to be given to whether or not the *Disability Discrimination Act 1992* (Cth) should expressly require people with assistance animals to carry their accreditation document with them and produce it on request.

Part 6.2 – Disability action plans

RECOMMENDATION 6.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to require all organisations with 100 employees or more (as defined in the *Workplace Gender Equality Act 2012* (Cth)), other organisations that are ‘relevant employers for the purposes of that Act and government departments and agencies (at all levels to the extent the federal government has power) to have a disability action plan, to lodge that plan with the Australian Human Rights Commission and to report annually against that plan and key disability equality indicators.

RECOMMENDATION 6.2.2: The Australian Human Rights Commission co-design, with disability representative organisations and people with other relevant expertise, disability equality indicators relevant to different areas of activity under the *Disability Discrimination Act 1992* (Cth) for use in reporting against action plans.

RECOMMENDATION 6.2.3: Action plans developed under the mandatory requirements recommended in Recommendation 6.2.1 include key disability equality indicators, the schedule for audits, review and amendment to the plan, evidence of co-design by and

ongoing involvement of people with disability, and accessible mechanisms for consultation with and feedback from people with disability.

RECOMMENDATION 6.2.4: Voluntary action plans be valid for 5 years unless there is a state or territory requirement for action plans that applies to the organisation that has a different legislated time frame.

RECOMMENDATION 6.2.5: Mandatory action plans be required to be updated annually and remain valid so long as the mandatory action planner complies with its reporting obligations.

RECOMMENDATION 6.2.6: Section 11(1)(e) of the *Disability Discrimination Act 1992* (Cth) be amended to specify that what must be taken into account is relevant current action plans given to the Australian Human Rights Commission under section 64 and evidence from the respondent of its fulfilment of its commitments under that action plan that are relevant to the complaint.

RECOMMENDATION 6.2.7: Section 67 of the *Disability Discrimination Act 1992* (Cth) be amended to include the Australian Human Rights Commission having functions:

- to review action plans against the requirements in section 61;
- to audit compliance with actions plans of mandatory action planners;
- to review reports made to it in respect of mandatory action plans; and
- to report publicly on data and other outcomes of mandatory action planners.

Part 6.3 – Disability standards

RECOMMENDATION 6.3.1: There be an independent prosecutorial power to pursue non-compliance which is granted either to the Australian Human Rights Commission and/or to a suitable independent or government body, such as the Attorney-General's Department, with associated additional and dedicated funding to support the relevant body in enabling the effective discharge of this responsibility.

RECOMMENDATION 6.3.2: The *Disability Discrimination Act 1992* (Cth) and *Australian Human Rights Commission Act 1986* (Cth) be amended to make clear that disability organisations are authorised to make complaints about non-compliance.

RECOMMENDATION 6.3.3: All relevant Australian Standards be made publicly available either through them being appended in accessible formats as schedules to the relevant disability standards or on a public-facing website maintained by Standards Australia or another appropriate body.

RECOMMENDATION 6.3.4: The *Disability Discrimination Act 1992* (Cth) be amended to include a clear disability standards review provision requiring reviews to be completed within 5 years of the adoption of a disability standard and further reviews to be completed within 5 years of the legislative completion requirement of the previous review.

RECOMMENDATION 6.3.5: Expert advisory groups be established in respect of each of the standards as an ongoing governance mechanism to ensure that the standards are kept up to date and are fit for purpose

RECOMMENDATION 6.3.6: In respect of all those aspects of the *Disability Standards for Accessible Public Transport 2002* (Cth) that were to achieve full compliance by 2022, the defence of unjustifiable hardship no longer be available.

RECOMMENDATION 6.3.7: The *Disability Standards for Accessible Public Transport 2002* (Cth) and/or the *Disability Discrimination Act 1992* (Cth) be amended to provide a mechanism whereby the operator of public transport facilities facing absolute barriers to compliance that was required to be achieved by 2022 can apply to the Australian Human Rights Commission for an exemption from the relevant provision either for the life of that particular transport element or permanently (such as where topography is involved).

RECOMMENDATION 6.3.8: The *Disability Standards for Accessible Public Transport 2002* (Cth) be amended to require an operator who is non-compliant with obligations scheduled to have been fulfilled by 2022 to apply for a time-limited exemption under section 55 of the *Disability Discrimination Act 1992* (Cth), provide an action plan setting out its timetable for achieving compliance and report to the Australian Human Rights Commission against that action plan.

RECOMMENDATION 6.3.9: Any non-compliance with the 2022 obligations in the *Disability Standards for Accessible Public Transport 2002* (Cth), in the absence of an exemption, be deemed to be unlawful discrimination with the defence of unjustifiable hardship clearly excluded.

RECOMMENDATION 6.3.10: Compliance with the *Disability Standards for Accessible Public Transport 2002* (Cth) be expressly embedded in the regulatory requirements administered by industry regulators.

RECOMMENDATION 6.3.11: Consistent with earlier Recommendation 3.1.3, the *Disability Standards for Education 2005* (Cth) be amended to remove the word ‘reasonable’ from this term and define adjustments consistent with articles 2 and 24 of the *Convention on the Rights of Persons with Disabilities* as ‘those necessary and appropriate modifications and adjustments ... needed ... to ensure to [people with disability] the enjoyment or exercise on an equal basis with others’ the right to non-discrimination in education.

RECOMMENDATION 6.3.12: All education regulators—state, territory and federal—be required to assess education providers that they regulate for compliance with the *Disability Standards for Education 2005* (Cth). A failure to comply with the *Disability Standards for Education 2005* (Cth) should be listed in the relevant legislation as grounds for suspension or cancellation of registration, or for registration to be made conditional on implementing actions that will achieve compliance and report against those actions.

RECOMMENDATION 6.3.13: In respect of the *Disability Discrimination Act 1992* (Cth) and the *Disability Standards for Education 2005* (Cth), mechanisms be legislated to require

both private and public education providers to report on compliance and provide relevant disability data for compilation and public availability nationally.

RECOMMENDATION 6.3.14: Universal design for learning be expressly included in the *Disability Standards for Education 2005* (Cth) particularly in relation to Part 6: Standards for curriculum development, accreditation and delivery.

RECOMMENDATION 6.3.15: Consideration be given to incorporating the principle of ‘disability ready and responsive’ in the *Disability Standards for Education 2005* (Cth).

RECOMMENDATION 6.3.16: *A Model Process to Administer Building Access for People with a Disability* be adopted in all states and territories through amendments to relevant building laws and the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) expressly reference the Protocol in the factors listed in the defence of unjustifiable hardship in section 4.1.

RECOMMENDATION 6.3.17: The *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to ensure that future scheduled reviews occur in alignment with the 3-yearly reviews of the *National Construction Code* with clear requirements to consult with people with disability. Alternatively, provision needs to be made for the National Construction Code to be updated consistent with changes to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) outside the usual *National Construction Code* review period.

RECOMMENDATION 6.3.18: Reporting by organisations on their compliance with applicable disability standards in disability action plans be part of the mandatory action planning and reporting obligations proposed elsewhere in this submission.

RECOMMENDATION 6.3.19: The matters listed in section 61 of the *Disability Discrimination Act 1992* (Cth) to be dealt with in all disability action plans should include specific identification of current non-compliance with relevant disability standards, actions to be taken under the action plan to achieve compliance and the timetable for taking those actions.

RECOMMENDATION 6.3.20: The *Disability Discrimination Act 1992* (Cth) be amended to make it mandatory for duty bearers to report data on key elements relevant to measuring both improvements for people with disability and compliance with the disability standards.

RECOMMENDATION 6.3.21: A dedicated body be established to develop, support and monitor accessibility standards similar to those established in the USA and Canada. One aspect of its mandate should be to review standards for accessibility established in other countries and implement them in Australia with appropriate modifications.

Part 7 – Further options for reform

RECOMMENDATION 7.1: The *Disability Discrimination Act 1992* (Cth) be amended to empower the Australian Human Rights Commissioner and/or the Disability Discrimination

Commissioner to conduct an investigation into a situation of potential breaches of the Act as if the Commissioner had received a complaint on that situation and, if the Commissioner is satisfied that the investigation discloses a prima facie case of a breach of the Act, for the Commissioner to commence proceedings in the Federal Court of Australia as if the Commissioner were a person aggrieved by that situation.

RECOMMENDATION 7.2: The new positive duty provision in the *Disability Discrimination Act 1992* (Cth) include a ‘super’ complaint provision similar to that of the Australian Competition and Consumer Commission, with key disability advocacy bodies being ‘designated’ bodies with additional powers to make complaints about significant or systemic issues and the Australian Human Rights Commission resourced to respond within a set timeframe to these ‘super’ complaints and empowered to conduct the same range of responses as the Australian Competition and Consumer Commission.

RECOMMENDATION 7.3: The *Disability Discrimination Act 1992* (Cth) be amended to empower the Australian Human Rights Commission to identify systemic issues regarding individual complaints and/or positive duty complaints, similar to the Administrative Review Tribunal, such that they can collaborate with other equality agencies to prevent recurring issues.

RECOMMENDATION 7.4: The Australian Human Rights Commission be funded to develop guidance materials via co-design principles with people with disability and subject matter experts for the community, including duty-holders regarding the application of the *Disability Discrimination Act 1992* (Cth) to AI and automated decision-making.

RECOMMENDATION 7.5: The *Disability Discrimination Act 1992* (Cth) be amended to include an attributed liability provision to the effect that:

any act done or omitted to be done by the operation of a computer program in contravention of this Act is taken to have been done or omitted by the person who authorised the deployment of that program.

‘Computer program’ should be defined to include ‘artificial intelligence models and systems, agentic artificial intelligence and computer software’.

RECOMMENDATION 7.6: The *Disability Discrimination Act 1992* (Cth) be amended to include an attributed liability provision to the effect that:

any act done or omitted to be done by the operation of a computer program in contravention of this Act is taken to have been done or omitted by the person who authorised the deployment of that program.

RECOMMENDATION 7.7: An ongoing review advisory body composed of disability community representatives and discrimination law experts be established to contribute to (a) discussions in preparation for reviews of the *Disability Discrimination Act 1992* (Cth) and disability standards made under the Act, (b) the development of guidance materials related to the positive duty, disability equality indicators and other compliance promotion mechanisms, and (c) the identification of systemic disability discrimination issues

requiring action, particularly in relation to people with disability who face particular barriers to accessing the justice system.

RECOMMENDATION 7.8: Sections 113 and 120 of the *Disability Discrimination Act 1992* (Cth) be amended to require that the person appointed to the role of Disability Discrimination Commissioner—whether as an acting appointee or otherwise—be a person who publicly identifies as a person with disability and has been active in promoting the right of people with disability to equality and freedom from discrimination.

RECOMMENDATION 7.9: Section 31(2) of the *Disability Discrimination Act 1992* (Cth) relating to the effect of disability standards be amended to make it clear that disability standards are not intended to affect the operation of state and territory discrimination laws.

RECOMMENDATION 7.10: The *Disability Discrimination Act 1992* (Cth) be amended to ensure that the principles of ‘supported decision making’ are adopted by all officers of the Australian Human Rights Commission exercising powers, carrying out functions or performing duties under the Act.

RECOMMENDATION 7.11: Consideration be given to what amendments could be made to the *Disability Discrimination Act 1992* (Cth) to reflect the discriminatory impacts of climate change on people with disability.

RECOMMENDATION 7.12: Consideration be given to amending section 123 of the *Disability Discrimination Act 1992* (Cth) to take a broader approach to liability of employers and principals, similar to that found in section 106 of the *Sex Discrimination Act 1984* (Cth).

Part 1.1: Definition of Disability

1. How should disability be defined in the Disability Discrimination Act?

2. What factors should be considered in developing a new definition of disability?

These questions consider the definition currently used in the DDA, whether it should continue as the legal definition of disability and whether there might be another more suitable and contemporary definition, including through modernisation of language. The focus in our response to these questions is on considering how the definition might better respond to modern experiences and expectations, particularly of people with disability.

Currently, the definition used is:¹⁶

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.”

This current definition of ‘disability’ is broad and inclusive and whilst it is impairment based, does not rely on a formal medical diagnosis. It also does not restrict protection only to those with permanent, long-term or severe conditions. Instead, the current definition within the DDA covers impairments that people have now, had in the past, may have in the future or which they are believed to have.

¹⁶ DDA s 4(1) (definition of ‘disability’).

It is notable that this definition was considered by the Productivity Commission in its review of the DDA. In its inquiry report, the Productivity Commission made the following finding:¹⁷

Finding 11.1

The *Disability Discrimination Act 1992* is based on a ‘social model’ of disability discrimination, but it uses a medically-based definition of disability. This integrated approach is appropriate...

We agree with this finding of the Productivity Commission.

The critically important thing to note is that the DDA definition is *not* the definition used in other pieces of legislation or by service providers or for people accessing government programs or services such as pensions. Those definitions often serve to exclude people, and reduce the numbers who are eligible for the program or service, by excluding some types of disability by excluding some impairments or levels of impairment. It is important that narrow definitions of that kind not be used in discrimination law, as the purpose of the DDA is to ensure that discrimination against people with disability is always covered, irrespective of the nature, cause or longevity of their disability or impairment.

This review does provide an opportunity to modernise the definition of disability in the Act and the review paper notes the commonly expressed view that the definition of disability found in that Act is seen by many as being a ‘deficit’ or ‘medical model’ definition. We acknowledge that while the language in the definition may seem outdated it is, in fact, a definition of a diverse range of physiological differences, conditions or impairments. Such a definition is necessary to ensure protection from discrimination for the diversity of people who have or are imputed to have such differences or impairments and who experience prejudice-based actions or face barriers to equality.

The definition is necessarily extremely broad to ensure it captures anyone who has a condition or impairment *and* who experiences discrimination related to that condition or impairment. So, for example it covers people with life-long conditions such as cerebral palsy or a person with acquired disabilities such as later-life depression or anxiety.

The issue under the DDA is not what condition a person has; the issue is whether they experience discrimination because of that condition. Therefore, an expansive definition, which is also capable of being applied, is required. The current definition serves this purpose.

In contrast, the UN *Convention on the Rights of Persons with Disabilities* (‘CRPD’) is a rights charter and not legislative discrimination law. It adopts a social model but does not define disability. Article 1 of the CRPD says that it includes ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

¹⁷ Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 304, Finding 11.1.

Adopting a definition of this kind, which borrows from the social model of disability, would likely result in significant negative outcomes for people with disability.

These negative outcomes would result because the social approach illustrated in the CRPD focuses on long-term conditions, which may exclude those with disabilities which are apparent for shorter periods. In addition, it is unclear whether or not it includes all people with disability, for example people who are neurodiverse. It also excludes people who are unable to demonstrate they experience barriers to participation. This could result in a definition which excludes many disabled people who experience barriers under certain conditions but not others, and those who have been able to take steps to reduce the barriers they face.

The social model of disability and the more recent human rights model of disability have been important developments in understandings of the experiences of people with conditions or impairments and supporting advocacy around their marginalisation and exclusion. Neither, however, provides a workable definition for the purposes of the DDA.

This is because, under the social model, disability (or ‘being disabled’) is the term used to describe the interactions of societal structures and practices on people with conditions or impairments – I am disabled by the interaction of my condition or impairment and structural barriers and attitudes in society. This is not dissimilar to describing the experience of the interaction of a condition or impairment with structural barriers and attitudes in society as discrimination. In some ways, ‘disability’ under the social model encompasses ‘discrimination’ under discrimination law.

To require a person to establish that they have a disability under the social model would be to add a further element to the test they have to satisfy to succeed with a discrimination claim. They would not only have to demonstrate they have an impairment, but also that they experience disadvantage because of the interaction of that impairment with societal structures and attitudes and that they have been treated less favourably because of that disadvantage. This becomes a circular and complex argument and would result in increased time, effort and costs to complainants and respondents under the DDA.

To our knowledge, the current approach to defining disability in the DDA has not resulted in people being excluded from protection on the basis they have been unable to satisfy the definition and establish the threshold of having disability. While some early cases may have tested this in relation to drug dependency and learning disorders, this has not been a focus of challenges.

Consideration may usefully be given to whether the language used to describe the diversity of physiological differences can be amended. For example, replacing the word ‘disorder’ with ‘condition’. However, it is vital that such amendments not reduce the range of physiological differences that are encompassed by the definition or exclude those currently protected by its breadth.

Another potential risk of fundamental changes to the approach taken to disability discrimination prohibitions is that it would move from an asymmetrical to a symmetrical discrimination law. As an asymmetrical law, the DDA provides protection for people with

disability and does not provide protection for people who do not have a disability. That is, a person without disability cannot use the DDA to argue they have been discriminated against because they do not have a disability. (This also facilitates proactive or affirmative measures to promote equality for people with disability, as those without disability cannot complain under the Act that they are being discriminated against in not benefiting equally from such measures.) In contrast, the *Sex Discrimination Act 1984* (Cth) ('SDA') is a symmetrical discrimination law as which protects all people from discrimination on the basis of their sex not just women. This means a man can use the SDA to argue they have been discriminated against because they are a man. Similarly, the *Racial Discrimination Act 1975* (Cth) ('RDA') is a symmetrical law as it provides protection for all people against discrimination on the basis of their race. A symmetrical model would not benefit people with disability and would remove the potential to focus on the structural and systemic nature of much of the discrimination experienced by people with disability.

Recommendation 1.1.1: The form and approach taken in the definition of 'disability' in section 4(1) of the *Disability Discrimination Act 1992* (Cth) be retained, with further consideration given to whether some of the language of the definition in paragraphs (a) to (g) could be amended to achieve a more neutral tone such as replacing in (e) the term 'malfunction' with 'impairment to the functioning', the term 'malformation' with 'difference in the formation' and the term 'disfigurement' with 'visible irregularity'; replacing in (f) the term 'disorder or malfunction' with 'condition' in the two places it occurs, and replacing in (g) 'disorder, illness or disease' with 'condition'.

Genetics and discrimination

Paragraph (j) of the definition of 'disability' in section 4(1) DDA was amended in 2009 to add '(including because of a genetic predisposition to that disability)'. This implemented one element of recommendation 11.1 of the Productivity Commission's 2004 Review of the DDA.¹⁸

The Australian Law Reform Commission ('ALRC') had previously recommended that the DDA be amended 'to clarify that the Act applies to ... discrimination on the ground of genetic status'.¹⁹

The UNESCO *Universal Declaration on the Human Genome and Human Rights*²⁰ seeks, in article 6, to achieve no 'discrimination based on genetic characteristics'. Similarly, the European *Convention on Human Rights and Biomedicine* ('the Ovideo Convention')²¹

¹⁸ Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 304, Rec 11.1.

¹⁹ Australian Law Reform Commission ('ALRC'), *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, ALRC, 2003) 301, rec 9–1.

²⁰ *Universal Declaration on the Human Genome and Human Rights*, UNESCO General Conference, 29th conf, UNESCO Doc 29 C/Resolutions + CORR (11 November 1987) art 6.

²¹ *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, ENTS No 164 (opened for signature 4 April 1997, entered into force 1 December 1999).

prohibits, in article 11, ‘any form of discrimination against a person on the grounds of his or her genetic heritage’.

The language of the Oviedo Convention is broader in scope than the current coverage in the DDA definition. The full protection against discrimination relating to a person’s actual or imputed genetics or genetic heritage in the DDA could be better achieved through amending the first elements of the definition to expressly include genetic variants: (c) and (d) to include ‘the presence in the body of ... genetic variants’ causing, with the potential to cause or capable of causing disease or illness; and paragraph (j) could usefully be amended to be: ‘may exist in the future (including because of a genetic predisposition to that disability or a genetic heritage including that disability); and/or’.

Recommendation 1.1.2: The definition of ‘disability’ in section 4(1) of the *Disability Discrimination Act 1992* (Cth) be amended to more comprehensively protect against discrimination on the grounds of current, future and imputed future disability related to genetic heritage.

Part 1.2: Addressing Intersectionality

3. Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?

The DDA should be amended to allow claims to be brought in respect of discrimination on multiple grounds. Such amendments would reflect the reality of experiences of discrimination by people with disability.

It is important to note that many people simultaneously have multiple conditions that fall within different elements of the definition of disability found in section 4 of the DDA. As noted above, we do not believe that substantive changes should be made to that definition. Therefore, to work effectively, the DDA needs to clearly provide protection where a person is experiencing discrimination (in whatever form) on the basis they have more than one condition (or impairment) that is included in the definition of ‘disability’. This could usefully be thought of as ‘internal intersectionality’.²² We note that, to date, internal intersectionality does not appear to have caused particular challenges in cases. Indeed, practical analysis makes it clear it would be absurd to exclude consideration of the overlapping attributes. Two examples of internal intersectionality which help to illustrate this point are set out below.

The first is Helen Keller (1880–1968) who was both deaf and blind. Ms Keller had two disabilities: loss of sight and loss of hearing, which are ‘disability’ for the purposes of the DDA under paragraph (a) of the definition in section 4: ‘total or partial loss of the person’s bodily or mental functions’.

However, if Ms Keller was forced to make a complaint that she had been discriminated against on the basis of one of these disabilities, eg, her deafness, in accessing services, the adjustments she would be offered would likely be ineffective. That is because Ms Keller’s communication needs differed from other people who are deaf, and provision of a sign language interpreter would not assist her because of her blindness. To require Ms Keller to make a claim pursuant to only one of her conditions would therefore result in the provision of adjustments that would not meet her needs. To effectively serve people with multiple impairments, like Ms Keller, the DDA must recognise that the combination of impairments gives rise to specific individual needs. This would be achieved by expressly enabling people to allege they have been discriminated against on the basis of multiple impairments, or a failure to make adjustments responding to those multiple impairments.

Another example of the importance of including instances of ‘internal intersectionality’ within the coverage of the DDA can be found in the experience of people affected by the drug, thalidomide. The ingestion of thalidomide during pregnancy caused a variety of

²² As opposed to external intersectionality between attributes, for example, the unique experiences of Ms Keller as a result of her status as a disabled woman.

impairments affecting the formation of limbs, hands and digits. In addition, according to The Thalidomide Trust.²³

38% of thalidomide affected individuals report hearing and ear related issues according to data collected for the Thalidomide Trust. These issues include sensorineural deafness and conductive deafness along with developmental problems of the inner and outer ear structures.

Deafness in combination with impairments to hands and digits would combine to create particular communication needs different to those of a Deaf person or those of a hearing person with such limb formation. A person with both impairments (both caused by thalidomide use during pregnancy) would have more limited capacity to use the sign language of their country and would need different communication adjustments. Similar to the example of Ms Keller above, any requirement that a claim of discrimination be made based on only one of these impairments would limit the utility of the DDA for a person with these dual issues. Similarly, adjustments made under the DDA need to be able to respond fully to the person's situation. Therefore, to ensure reasonable functionality consistent with common sense, the DDA needs to facilitate claims which encompass internal intersectionality.

As well as internal intersectionalities, people with disability, like all other members of society, have multiple personal characteristics, some of which are recognised as protected attributes under federal discrimination laws. Discrimination arising in respect of a combination of those attributes is the more commonly understood form of intersectional discrimination. This could usefully, in the context of federal discrimination laws in Australia, be thought of as external intersectionality as it requires consideration of attributes currently external to the protections under each of the separate federal discrimination laws.

The effects of intersectional discrimination—whether internal to 'disability' or external—and its impact on achieving equality and non-discrimination are important. These matter because of the differing nature of prejudice and discrimination experienced by people with different characteristics, including different disabilities. It is vital that a person with disability who is also Aboriginal, for example, can highlight their particular experiences of discrimination as resulting from the particular forms of prejudicial attitudes held towards Aboriginal people with disability. For example, it is likely that a non-Aboriginal person with cerebral palsy that affects both their speech and their movements or an Aboriginal person without cerebral palsy will be treated differently by police than an Aboriginal person with cerebral palsy. The latter is more likely to be detained for perceived public drunkenness. This inappropriate response arises from the common, false and harmful stereotypes of Aboriginal people and alcohol use. It is that

²³ The Thalidomide Trust, '[Why does my patient with Thalidomide Embryopathy have ear and hearing problems?](https://www.thalidomidetrust.org/wp-content/uploads/2024/02/Thalidomide_Ears_GP_Pack_2024.pdf)' (undated) <https://www.thalidomidetrust.org/wp-content/uploads/2024/02/Thalidomide_Ears_GP_Pack_2024.pdf>.

stereotype operating *in concert* with the effect of cerebral palsy on the person's speech and movement that gives rise to the discriminatory outcome. This is an intersectional effect.

The DDA does not currently expressly provide for internal intersectionality to be considered and remedied under the current complaint provisions or the adjustments provision. Amendment is necessary to avoid the possibility of any future problems with interpretation of the scope of protections. Further, external intersectionality should be expressly incorporated into the protections against discrimination in the DDA and the remedies provisions found in the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'). Such a provision in the DDA should, at minimum, refer to intersectionality in respect of all of the protected grounds under other federal discrimination laws. It could also extend to intersectionality on the grounds found in the *Fair Work Act 2009* (Cth) ('FWA').

Recommendation 1.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to expressly identify that protections against discrimination encompass discrimination against people with multiple impairments (internal intersectionality) and the obligation to make adjustments extends to accommodating multiple impairments.

Recommendation 1.2.2: The *Disability Discrimination Act 1992* (Cth) be amended to expressly identify that protections against discrimination encompass intersectional discrimination against people with disability and other attributes identified in federal discrimination and industrial law.

Recommendation 1.2.3: The *Australian Human Rights Commission Act 1986* (Cth) be amended to require decision makers dealing with complaints to consider intersectional discrimination in terms of both whether or not unlawful discrimination took place and in the orders made when unlawful discrimination is found.

4. Could any other changes be made to the Disability Discrimination Act to recognise and provide protection for people with disability who have intersecting identities, or addressing compounding discrimination?

In addition to amendment to the discrimination prohibitions in the DDA to incorporate both internal and external intersectionalities, a new positive duty should require duty bearers to address intersectional impacts in terms of identifying barriers to equality of opportunity. The provisions dealing with action plans should also expressly include identification and removal of such barriers.

We note two relevant examples of approaches that require proactive measures to deal with intersectionality, including disability: the work of the Public Sector Gender Equality Commissioner in Victoria, Dr Niki Vincent; and the requirements of federally regulated employers under the *Employment Equity Act* in Canada ('EEA Canada').²⁴

²⁴ *Employment Equity Act*, SC 1995, c 44 ('EEA Canada').

Dr Niki Vincent has been active in supporting defined entities under the *Gender Equality Act 2020* (Vic) to report on intersectional factors as part of their required reporting. To support that reporting, and defined entity progress on their Gender Equality Action Plans to achieve equality, Dr Vincent commissioned research on intersectional impacts.²⁵ In her 2023 *Intersectionality at work: Building a baseline on compounded gender equality in the Victorian public sector* report (‘Intersectionality at work Report’), Dr Vincent observed:²⁶

The collection and analysis of this [intersectional] data marks a crucial and long overdue shift in the maturity of how we understand gender inequality. This report shows that compounding forms of discrimination have notable impacts on career progression, pay inequality, and the experience of sexual harassment and discrimination at work.

Chapter 3 of that report focuses on gender and disability intersectionality and identifies key issues for women with disabilities identified through previous reporting and research, including:²⁷

- low labour force participation;
- gender-neutral workplace needs assessments;
- higher rates of gendered violence, sexual harassment and sexual assault;
- lack of workplace flexibility;
- challenges in accessing support;
- sharing information about disability and risks of stigma and ableism;
- the burden on the individual of and complexity of processes for an requesting reasonable adjustment;
- challenges of self-advocacy including the burden on the individual to address or challenge structural inequalities;
- importance of managers and impacts of bias and lack of manager engagement,
- importance of teams and risks to psychological safety;

²⁵ See, in particular, Jannine Williams, Maria H Khan and Robyn Mayes, Patricia Obst and Benjamin Lowe, *Getting on at work: Progression and promotion of women with disability in the Victorian Public Service* (Queensland University of Technology, 2023); Debbie Bargallie, Bronwyn Carlson and Madi Day, *Make us count: Understanding Aboriginal women's experiences in Victorian public sector workplaces* (Griffith and Macquarie Universities, 2023); Hyein E Cho and Marie Segrave, ‘*Victorian local councils and gender equality: Examining commitments to diversity and the experiences of women from migrant and refugee backgrounds*’ (Monash University, 2023); and Div Pillay and the MindTribes team, ‘*How defined entities can achieve gender equality for Culturally Diverse Women in the Victorian Public Sector*’ (Victorian Multicultural Commission and Mindtribes, 2022).

²⁶ Commission for Gender Equality in the Public Sector, *Intersectionality at work: Building a baseline on compounded gender inequality in the Victorian public sector* (Victorian Government, 2023) 5 <<https://www.genderequalitycommission.vic.gov.au/intersectionality-work>>.

²⁷ Commission for Gender Equality in the Public Sector, *Intersectionality at work: Building a baseline on compounded gender inequality in the Victorian public sector* (Victorian Government, 2023) 5 <<https://www.genderequalitycommission.vic.gov.au/intersectionality-work>> 48–51.

- visibility and mentorship including lack of visibility of disabled leadership;
- inconsistent application of policies;
- reliance on standard approaches; and
- the need for systemic change.

In relation to the intersectional impacts of disability and gender, the analysis of public sector data reported to the Commission indicates, for example:

- low levels of reporting by defined entities in relation to disability status (28%);²⁸
- very low levels of employees with disability recorded (6%);²⁹
- lower levels of people with disability in senior manager and supervisor roles;³⁰
- overrepresentation of women with disability in lower income brackets and underrepresentation in higher income brackets;³¹
- the highest gender pay gap existed between women with disability and men without disability (19%) while there was 10% pay gap between women with disability and men with disability;³² and
- women with disability experience higher rates of sexual harassment at work (12% compared to 6% for women without disability).³³

This work by Dr Vincent and her Commission provides a foundation on which to build an understanding of both the impacts of gender and disability intersectionality and the areas for attention in respect of positive duties and action plans under the DDA. It is vital that this approach is translated into the federal sphere in Australia to ensure systemic understandings and actions take place across the country and in respect of the range of intersection impacts, not simply those of gender and disability.

In Canada, at a federal level, EEA Canada requires ‘federally regulated employers’ to:

1. investigate their workplaces (including undertaking workforce analysis) and employment practices to identify barriers to employment equity facing women, Indigenous people, people with disability and ‘racialized’ people;
2. develop an employment equity plan and program; an
3. report annually to the administering Department.

²⁸ Ibid 52.

²⁹ Ibid.

³⁰ Ibid 53.

³¹ Ibid 53–54.

³² Ibid 54–56.

³³ Ibid 56.

The Employment and Social Development Canada ('ESDC') has overall responsibility for administration of the EEA Canada and prepares and publishes a range of reports (including annual reports) and guides.³⁴ The Canadian Human Rights Commission ('CHRC') is responsible for audits under the EEA Canada.

The most recently published annual report on employment equity in federally regulated workplaces reports against the four identified groups. The recent review of the EEA Canada identified, however, the need for data disaggregation to understand the particular experiences of sub-groups within and across those four identified groups. It made three recommendations in this regard:³⁵

Recommendation 2.8: The *Employment Equity Act* should specify that the collection of distinctions-based, disaggregated and intersectional data is authorized to meet the purpose of achieving and sustaining substantive equality for members of employment equity groups.

Recommendation 2.9: Distinctions-based, disaggregated and intersectional data should be collected whenever reasonably possible and with due regard to privacy protections, with the purpose of ameliorating the conditions of all equity groups and with special attention to members of the most underrepresented employment equity groups.

Recommendation 2.10: The *Employment Equity Regulations* or guidelines prepared under them should offer sustainable support to workplaces on how to prioritize employment equity initiatives on those employment equity groups and subgroups that are the most underrepresented in the workplace, while retaining responsibility for achieving employment equity for all employment equity groups.

The report observed that:³⁶

By paying attention to disaggregated and intersectional data, disadvantage across and within equity groups can become easier to identify. With the capacity to disaggregate, the focus should be placed on redressing persisting forms of disadvantage. Disaggregation allows us to focus on entrenched underrepresentation within and across equity groups.

This recommendation from Canada constitutes an important and modernising approach that would ensure that equity outcomes for members of marginalised groups do not overlook intersectional impacts and leave more marginalised sub-groups behind.

Recommendation 1.2.4: The proposed positive duty include requirements to consider and report against intersectional impacts and the removal of barriers to equal opportunity arising from intersectional impacts.

³⁴ Government of Canada, [Reports: Employment equity in federally regulated workplaces](https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports.html) (26 September 2024) <<https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports.html>>.

³⁵ Adelle Blackett, *A Transformative Framework to Achieve and Sustain Employment Equity: Report of the Employment Equity Act Review Task Force* (Employment and Social Development Canada, 2023) 64–65.

³⁶ Ibid 65.

Recommendation 1.2.5: Action Plans made under the *Disability Discrimination Act 1992* (Cth) be required to include approaches to responding to intersectional impacts.

Part 1.3: Direct Discrimination

The Issues Paper asks what test should be used for the definition of direct discrimination to ensure that it is easy to understand and implement for both duty holders and people with disability. The adoption of a single, inclusive definition of discrimination will provide a more accessible legal form for both duty bearers and people with disability. It should, though, be made clear that these two forms of discrimination are not mutually exclusive. One challenge faced by both people with disability and duty-bearers is formulating whether particular conduct constitutes ‘direct’ or ‘indirect’ discrimination. This distinction is conceptually difficult for parties to complaints and sometimes for decision makers. While in the past, discriminatory conduct may have been explicit, today, conduct is frequently implicit, making it challenging to determine whether the claim is better understood as a direct or indirect form of discrimination. Difficulty in determining which type of discrimination is applicable in a particular matter has led to complainants pleading both types, which adds unnecessarily to the complexity of formulating a complaint, responding to it, and subsequent litigation. Nor does the current definition of discrimination adequately cover systemic discrimination.³⁷

The distinction between direct and indirect discrimination has shown itself to be unworkable. It constitutes a costly and time-consuming technical barrier to an inquiry into what actually happened. The definition should be streamlined to express the general underlying idea of discrimination and make clear that the concepts of direct and indirect discrimination can overlap and are not mutually exclusive. The CRPD does not make a distinction between direct and indirect discrimination; the DDA would be consistent with the aims of the CRPD if it emphasised that the two forms of discrimination are not mutually exclusive.

There is also domestic precedent for eliminating the distinction between direct and indirect disability discrimination. The ACT does not distinguish between direct and indirect discrimination in the *Discrimination Act 1991* (ACT) (‘DA ACT’). Instead, the definition of discrimination in that Act clearly encompasses the concepts of both direct and indirect discrimination. That provision is as follows:³⁸

8. Meaning of discrimination

- (1) For this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else.

The accessibility and utility of such a provision for both duty holders and potential complainants is clear. It avoids the unnecessary complication of distinguishing between direct and indirect discrimination, or arguing both, and acknowledges that some conduct can reasonably be categorised as constituting either direct or indirect discrimination.

³⁷ Julian Gardner, *An equality Act for a fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, Department of Justice, June 2008) 11–12.

³⁸ *Discrimination Act 1991* (ACT) (‘DA ACT’) s 8(1).

To further maximise its utility, a definition of discrimination could go further and also include the requirement to make adjustments. Alternatively, we propose drawing on the following definition, based on the International Labour Organization *Discrimination (Employment and Occupation) Convention*³⁹ ('ILO 111') (which appears in section 3(1) of the AHRC Act) and the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'). This definition clearly encompasses, in an inclusive manner, what has been known as direct and indirect discrimination.⁴⁰

Discrimination includes:

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of, and
- (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

Recommendation 1.3.1: A single definition of discrimination be used in the *Disability Discrimination Act 1992* (Cth), which is inclusive of direct and indirect discrimination as well as the failure to make adjustments.

Recommendation 1.3.2: In the alternative to Recommendation 1.3.1, the following definition be drawn on instead, based on the International Labour Organization *Discrimination (Employment and Occupation) Convention* and the Convention on the Elimination of All Forms of Discrimination Against Women while in its terms clearly encompassing, in an inclusive approach, what has been known as direct and indirect discrimination:

Discrimination includes:

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of, and
- (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

Work needs to be done to achieve a comprehensive definition of discrimination that offers a much more sophisticated and nuanced understanding of the nature and scope of discriminatory conduct experienced by people with disability, including behaviours that are based in stereotypes and prejudice. Evidence from psychology indicates that prejudice-based conduct takes different forms depending on the attribute of the person

³⁹ ILO 111.

⁴⁰ CEDAW. See also *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (known as '*Meiorin*', after the applicant).

being exposed to the conduct.⁴¹ For example, for many people with disability, prejudice manifests in pity or low expectations, or in behaviours that are over-protective, patronising, over-managing and that exclude people from exercising agency and legal capacity. This conduct can result in segregation in the name of protection, limited access to the range of life experiences and opportunities (including work and education) and exclusion from consultation, collaboration, and decision-making in the design and implementation of systems and processes affecting them.

The one area of discrimination law where attempts have been made (largely successful) to provide greater explanation of the nature of the conduct that prohibited is sexual harassment law. Decision makers considering claims of sexual harassment are provided with a much clearer articulation of the kinds of conduct that are prohibited than in respect of other forms of prohibited conduct, including disability discrimination. Similar work can and should be done to achieve an equivalent level of guidance for decision makers considering the DDA, many of whom have limited experience of the day-to-day experiences of discrimination experienced by people with disability.

This idea has been explored in detail by Banks in her PhD thesis on reforms to discrimination law.⁴² Banks concluded that these contemporary understandings of the range of forms that discrimination takes could be incorporated into discrimination law through broader framing. These forms of discriminatory conduct, linked to the particular attributes in the context of which they arise, are explained below.

Table 1: Nature of discrimination experienced by people with protected attributes

Attribute	Character of discrimination – conduct that:
All	reflects commonly held stereotyped views of people with that attribute, including by responding negatively to people whose behaviour does not conform to those stereotypes results in barriers to equal opportunity because of deliberate or inadvertent failure to account for the specific needs of particular attribute groups

⁴¹ See, for example, Susan T Fiske, Steven L Neuberg, Ann E Beattie and Sandra J Milberg, 'Category-based and attribute-based reactions to others: Some informational conditions of stereotyping and individuating processes' (1987) 23 *Journal of Experimental Social Psychology* 399; Peter Glick and Susan T Fiske, 'The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism' (1996) 70(3) *Journal of Personality and Social Psychology* 491; Susan T Fiske, Jun Xu, Amy C Cuddy and Peter Glick, '(Dis)respecting versus (Dis)liking: Status and interdependence predict ambivalent stereotypes of competence and warmth' (1999) 55(3) *Journal of Social Issues* 473; Amy J C Cuddy, Susan T Fiske and Peter Glick, 'The BIAS map: Behaviors from intergroup affect and stereotypes' (2007) 92(4) *Journal of Personality and Social Psychology* 631.

⁴² Robin Banks, *A rose is a rose is a rose: but not all discrimination smells the same. An exploration of the capacity of the psychology of stigma, prejudice and discrimination to enhance discrimination law* (PhD Thesis, University of Tasmania, 2023).

Attribute	Character of discrimination – conduct that:
Disability	is over-protective indicates that the person is perceived to be less capable of engaging in the full range of activities over-rides a person’s decision-making choices separates or segregates the person from the broader community or group, irrespective of the stated intention of this separation limits a person’s opportunities to demonstrate new skills or capacities indicates a view that the person/group poses a threat of some kind

The manifestations of bias, prejudice and discrimination outlined above need to be better dealt with by contemporary prohibitions of discrimination.

Recommendation 1.3.3: That consideration be given to providing greater guidance to decision makers in the provisions in the *Disability Discrimination Act 1992* (Cth) as to what kinds of conduct constitute unfavourable treatment or barriers to equal opportunity. The framing of the sexual harassment prohibition in the *Sex Discrimination Act 1984* (Cth) provides a model for this.

5. What test should be used to ensure that the definition of direct discrimination is easy to understand and implement for both duty holders and people with disability, and why?

The inclusion of a comparator in the definition of direct discrimination has made the analysis of complaints cumbersome and has distorted the meaning of direct discrimination.⁴³ It is also likely to deter intersectional discrimination complaints.⁴⁴ Establishing that a comparator without disability has been treated more favourably is merely one way of providing evidence that a decision has been based on a prohibited ground or attribute. It should not obscure the real question, which is simply whether there has been discriminatory treatment. The benefit of utilising the ‘unfavourable’ construction in the test for discrimination test is that this construction is already utilised in the Victorian *Equal Opportunity Act 2010* (‘EO Act Vic’) and the DA ACT, and consequently, there is already significant jurisprudence on its usage that could be drawn on in developing an approach to discrimination pursuant to the DDA if this amendment was made.

⁴³ As a result of the High Court’s decision in *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92 (‘*Purvis*’), a court’s decision on whether the comparator must have the attribute-related features of the complainant now often determines whether a complaint of discrimination can succeed. This wrongly elevates an issue that, while relevant, should be only one of the factors considered in a discrimination case.

⁴⁴ See, for example, Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019).

However, we do still caution that the amendment of the test for discrimination to focus on ‘unfavourable’ rather than ‘less favourable’ treatment will not resolve all of the challenges illustrated in *Purvis v New South Wales* (*Purvis*).⁴⁵ The reasoning of the majority in that case created three challenges for complainants in disability discrimination complaints. Two of these are addressed through recommendations made in response to the Issues Paper (the comparator question and reformulating the duty to make adjustments). However, the third has, thus far, been left unaddressed.

In *Purvis*, the majority rejected the ‘but for’ reasoning adopted in the United Kingdom with respect to the question as to whether the conduct was ‘because of’ the complainant’s disability and instead concluded that the appropriate test for determining the reason for the duty-bearer’s conduct required the court to assess the basis for the decision.⁴⁶ The majority concluded that the basis for the conduct was not the complainant’s disability but instead was concerns about safety which arose from the complainant’s behaviour.⁴⁷ While the DDA currently explicitly states that manifestations of disability including behaviour are captured in the definition of disability,⁴⁸ and disability does not need to be the dominant or only reason for the duty-bearer’s conduct,⁴⁹ our analysis of the case law indicates that the ‘real reason’ or ‘true basis’ test is still utilised and complainants struggle to prove a causal connection between their disability and the unfavourable treatment. An analysis of cases from Victoria (where the unfavourable rather than less favourable test is used) indicates that similar reasoning is used in disability discrimination complaints in that jurisdiction and limits the capacity for claimants to prove their claims.⁵⁰

Recommendation 1.3.4: The definition used to explain direct discrimination adopt the term ‘unfavourable’ rather than ‘less favourable’ to remove the requirement to identify a comparator.

6. How should the burden of proof be addressed in the Disability Discrimination Act?

Currently, the burden of establishing that discrimination has occurred falls solely on a complainant. This leads to considerable uncertainty for both parties as in many cases most, sometimes all, of the relevant evidence is held by respondents. A lack of proof—and the

⁴⁵ *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92.

⁴⁶ *Ibid* (Gummow, Hayne and Heydon JJ).

⁴⁷ *Ibid* 163 (Gummow, Hayne and Heydon) and 102–3 (Gleeson CJ).

⁴⁸ DDA s 4(1) (definition of ‘disability’).

⁴⁹ DDA s 10.

⁵⁰ See for example *Ferris v Victoria* [2018] VSCA 240.

burden of proof—are major barriers to discrimination claims in Australia.⁵¹ Shifting the burden of proof could therefore be ‘incredibly beneficial’ to claimants.⁵²

Comparable jurisdictions such as Canada, the USA, the UK, and all of the European Union require a complainant to establish an arguable case, and then shift to the respondent the evidentiary burden of establishing the reason/s for the impugned conduct or conditions. They do so on the basis of the well-documented and widely appreciated difficulty of one party’s having to prove the other party’s reason for acting, where little or none of the evidence about reason is likely to be available to the complainant. A shifting onus of proof such as this has a long history in Australian industrial law and continues in sections 361 and 783 of the FWA.

In the UK, the burden of proof shifts once a claimant has established a *prima facie* case. The *Equality Act 2010* (UK) states:

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- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues, and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory, and will lead to clearer case law, which will provide better guidance for future complainants, duty holders, and decision makers.

To ‘show that A did not contravene the provision’ (as required in the *Equality Act 2010* (UK)), the respondent could provide evidence of a lawful reason for the treatment sufficient to rebut the presumption that disability was one of the reasons for the conduct, with a requirement that this lawful reason be the primary or sole reason for the treatment. In addition, the respondent could challenge the allegation that the behaviour was a form of discrimination, and would also have access to exemptions and defences.

A shifting burden of proof is only likely to be determinative in finely balanced cases with very particular fact scenarios. However, given that the respondent typically holds most information about the reason for their conduct, it is appropriate for the burden of proof about the reason to shift once a *prima facie* case has been established in all cases.

⁵¹ Alysia Blackham, ‘Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law’ (2020) 42(1) *Sydney Law Review* 1; Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

⁵² Ibid.

Recommendation 1.3.5: The *Disability Discrimination Act 1992* (Cth) be amended to adopt the shifting burden of proof modelled on section 136 of the *Equality Act 2010* (UK).

Part 1.4: Indirect Discrimination

7. How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?

8. Should the reasonableness element in the definition of indirect discrimination be: a. removed b. retained and supplemented with a list of factors to consider c. replaced by a legitimate and proportionate test. d. other. Please expand on your response.

9. Should the language of ‘does not or would not comply, or is not able or would not be able to comply’ be removed from the definition of indirect discrimination?

The wording of section 6(1) of the DDA is currently sufficient and fit for purpose, though we do not oppose efforts towards the simplification of the legislative definition. We neither recommend nor oppose the removal of ‘does not or would not comply, or is not able, or would not be able to comply’ from the definition of indirect discrimination. We appreciate that the removal would benefit the project of simplification. However, we note that, from individual members’ doctrinal research, this element does not appear to cause significant issues in interpretation for complainants and it does not appear to be a challenging element for complainants to prove. For example in *Hurst v State of Queensland*,⁵³ a disability discrimination claim involving the failure to provide Auslan interpretation in a deaf student’s schooling, the Full Court of the Federal Court accepted that being able to ‘cope’ was not sufficient to fulfil this element of an indirect discrimination complainant.

However, we propose that the reasonableness element section 6(3) be replaced by a legitimate and proportionate test. The reasonableness standard has been the subject of sustained criticism by discrimination law scholars because of the risk that it perpetuates the status quo. That is, it increases the likelihood that conditions, requirements or practices that are longstanding or widespread, will, by virtue of their entrenched nature, be found to be reasonable *even if* they disadvantage people with one or more protected attributes. This criticism can be seen, for example, in scholarship that highlights the considerable latitude granted to employers by courts when determining what constitutes reasonable conduct in sex discrimination claims.⁵⁴

⁵³ *Hurst v State of Queensland* [2006] FCAFC 100.

⁵⁴ This scholarship also concerns the approach of courts when considering the conduct of employers under industrial legislation; see, Barbara Ann Hocking, ‘Is the Reasonable Man the Right Man for the Job’ (1995) 17(1) *Adelaide Law Review* 77, 93–106; Anna Chapman, ‘Qantas Airways Ltd v Christie’ (1998) 22(3) *Melbourne University Law Review* 743, 759–60; Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26(2) *Melbourne University Law Review* 325, 345; Beth Gaze, ‘The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives’ (2004) 27(3) *UNSW Law Journal* 914, 918; Sara Charlesworth, ‘A Snapshot of Sex Discrimination in Employment: Disputes and Understandings’ in Sara Charlesworth, Maureen Fastenau, Kathy Douglas and S Cartwright (eds), *Women and Work 2005: Current RMIT University Research* (RMIT Publishing, 2006) 81, 82; Margaret Thornton, ‘Sex Discrimination, Courts and

Recommendation 1.4.1: Due to the persistent challenges presented by the ‘reasonableness’ test in section 6 of the *Disability Discrimination Act 1992* (Cth), ‘reasonable’ be replaced with a legitimate and proportionate test.

It should be noted, however, that in amending the justificatory element of indirect discrimination, care should be taken in its wording and the experience of other jurisdictions with a similar test should be considered. For example, the ‘legitimate and proportionate’ test is used when assessing indirect discrimination claims in the European Union and in the United Kingdom. A similar, proportionality test is used in Canada and South Africa. Based on the experiences in these different jurisdictions, any legitimate and proportionate test requires guidance as to what constitutes a legitimate end and what is a proportionate means to achieve that end. Both limbs of the ‘legitimate and proportionate’ test should also be required to be assessed consistently with the objects of the DDA and the CRPD more generally.

In terms of the onus of proof in indirect discrimination cases, consistent with the current approach of the DDA, the burden of proving that the requirement or condition is legitimate and proportionate should lie on the person who imposes or proposes the requirement or condition.

Corporate Power’ (2008) 36(1) *Federal Law Review* 31, 48–50; Anna Chapman, ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (2012) 33(1) *Adelaide Law Review* 39, 58; Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (The Federation Press, 3rd ed, 2018) 155.

Part 1.5: Convention on the Rights of Persons with Disabilities

10. Should the Disabilities Convention be included in the objects provision of the Disability Discrimination Act?

Recommendation 1.5.1: Reference to the Convention on the Rights of Persons with Disabilities be included in section 3—‘Objects’—of the *Disability Discrimination Act 1992* (Cth).

The CRPD represents a ‘paradigm shift’ away from the medical model of disability towards a social and human rights based approach which recognises that people with disability are rights holders.⁵⁵ It also recognises the importance of moving beyond formal equality and segregated services to the provision of both substantive and inclusive equality – an approach that requires ‘major transformation of institutions, organisations and governments’ and ‘widespread social change’.⁵⁶ The UN Committee on the Rights of Persons with Disabilities has emphasised that the fundamental principles of equality and non-discrimination interconnect with human dignity and that the Convention on the Rights of Persons with Disabilities is based on this principle of ‘inclusive equality’.⁵⁷

In response to its third Universal Period Review, Australia accepted recommendations from Canada and Zambia to ensure its international human rights obligations are enshrined in domestic law.⁵⁸ Despite this acceptance, the AHRC noted in July 2025 that ‘Australia’s Disability Strategy does not align with the CRPD or take a rights-based approach and has been ineffective’.⁵⁹ Similarly, the recently drafted Joint NGO Report on behalf of the Australian NGO Coalition to Australia’s fourth Universal Periodic Review notes serious implementation gaps with the CRPD resulting in segregation, institutionalisation, as well as ongoing ‘discrimination, violence, abuse, neglect and exploitation’.⁶⁰

⁵⁵ Rosemary Kayess and Phillip French, ‘Out of darkness into light - Introducing the *Convention on the Rights of Persons with Disabilities*’ (2008) 8(1) *Human Rights Law Review* 1, 3. See also Rosemary Kayess, Therese Sands and Shona Bates, *Convention on the Rights of Persons with Disabilities: Shining a Light on Social Transformation* (Report, UNSW Social Policy Research Centre, 1 June 2020) <http://hdl.handle.net/1959.4/unsworks_72971> 6–10.

⁵⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (‘Disability Royal Commission’), *Final Report: Executive Summary* (2023) 13.

⁵⁷ UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination* (2018) [4] & [11].

⁵⁸ A/HRC/47/8/Add.1 [14]. See Recommendations 48 (Canada) and 57 (Zambia).

⁵⁹ Australian Human Rights Commission, *Advancing human rights in Australia – Australia’s Fourth Universal Periodic Review* (July 2025) 13 (citations omitted) <https://humanrights.gov.au/sites/default/files/2025-09/The%20Commission%27s%20submission%20to%20Australia%27s%20Fourth%20Universal%20Periodic%20Review_0.pdf>.

⁶⁰ Australian NGO Coalition, *Joint NGO Report on behalf of the Australian NGO Coalition to Australia’s 4th Universal Periodic Review 2025–26* (12 July 2025)

Evidence of these implementation gaps is recorded in the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission'), which notes that 'domestic laws, policies and practices have not given effect to rights recognised in the CRPD that are capable of being implemented.'⁶¹ Here the Commission provides a range of examples, including that '[c]urrent Commonwealth, state and territory laws give limited legal protection to the rights recognised in the CRPD and do not provide effective remedies when CRPD rights are breached.'⁶²

In addition, it is notable that people with disability seeking equal opportunity to participate in a number of life activity areas covered by articles of the CRPD are not protected against discrimination under the DDA. This includes, for example, being able to go out in the community, participating in jury service, and more.

Recommendation 1.5.2: Consistent with Australia's obligations as a State Party, the *Disability Discrimination Act 1992* (Cth) be amended to prohibit discrimination in all areas of life that are covered by the *Convention on the Rights of Persons with Disabilities*.

11. Should the Disability Discrimination Act be expressly required to be interpreted in a way that is beneficial to people with disability, in line with human rights treaties?

Recommendation 1.5.3: The inclusion of an express provision in the *Disability Discrimination Act 1992* (Cth) requiring all administrative and judicial decision makers to interpret the Act in a manner that best promotes compliance with the *Convention on the Rights of Persons with Disabilities*.

A stand-alone provision requiring interpretation of the DDA in a way that is beneficial to people with disability, in line with human rights treaties, would align domestic law with international obligations and guide courts, duty bearers, and administrative decision makers to read the DDA consistently with Australia's international obligations. Although judicial discretion may allow courts to consider international law and purposive approaches to interpretation, the reality is that only a small proportion of matters under the DDA ever reach the courts. The framework relies on individualised complaints meaning disputes are resolved through administrative processes, conciliation, or internal decision-making by duty bearers. Without an explicit interpretive provision, there is no binding requirement for decision makers outside the courts to construe the DDA consistent with Australia's international human rights obligations. Embedding such a provision would therefore ensure that the DDA consistently operates as a proactive, rights-based instrument across all levels of decision making, not just in the rare cases that proceed to litigation.

<https://www.hrlc.org.au/app/uploads/2025/07/Report-UPR-2025-26-Joint-NGO-Australia-Submission.pdf>.

⁶¹ Disability Royal Commission, *Final Report: Executive Summary* (2023) 55.

⁶² Ibid 56.

As a party to core international treaties, including the CRPD and the *Convention on the Rights of the Child* ('CRC'), as well as their optional protocols, Australia is required to actively promote and progressively realise the rights and obligations contained within them. In fact, Australia is required at the international level to comply in good faith with its obligations under treaties it has ratified.⁶³ Further, by ratifying the optional protocols, Australia has accepted that aggrieved persons may bring individual complaints (called communications) to the relevant UN committees after all domestic avenues are exhausted.

Some may argue that the views of treaty bodies have limited domestic legal force. However, their political and legal impact can be significant, as shown in *Toonen v Australia*.⁶⁴ In that matter, the UN Human Rights Committee found Tasmania's criminalisation of consensual homosexual conduct violated the *International Covenant on Civil and Political Rights* ('ICCPR'). The Commonwealth responded to this international critique by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth), which gave effect to the Committee's findings in Australian domestic law and placed pressure on the Tasmanian parliament to repeal its discriminatory provisions.⁶⁵

The *Toonen* precedent demonstrates that adverse findings at the international level can catalyse domestic reform and expose governments to sustained political pressure. This matter underscores the importance of ensuring that the DDA is expressly interpreted in a manner consistent with international human rights law. Without such an interpretive provision, administrative decision makers and duty bearers risk perpetuating practices that leave Australia vulnerable to critical international scrutiny, individual complaints to UN committees, and political and legislative pressure to reform. By embedding an explicit interpretive clause, Parliament would not only ensure compliance with Australia's international obligations but also strengthen the DDA as a proactive, rights-based framework that promotes substantive and inclusive equality for people with disability across all areas of public life.

⁶³ *Vienna Convention on the Law of Treaties*, opened 23 May 1969, 1155 UNTS 331 (entered into force 27 Jan 1980) arts 26, 31.

⁶⁴ *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994).

⁶⁵ The Tasmanian Parliament did not repeal the provisions until there was a challenge, in the High Court of Australia, to the constitutionality of the provisions on the basis of a section 109 constitutional inconsistency: *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119. The challenge did not get finally determined because, after the High Court found that there was a case to answer, the Tasmanian Parliament took action on repeal.

Part 2: Positive Duty

Over the decades since discrimination laws were introduced in Australia it has become very apparent that the individual claims-based regulatory approach is not sufficiently effective at promoting non-discrimination and equality. This is why the AHRC,⁶⁶ the Disability Royal Commission, equality advocates and many academics⁶⁷ have all recommended a positive duty to complement the claims-based system. A regulatory system that relies on those who are traditionally disadvantaged and have been discriminated against to drive change is fundamentally flawed.⁶⁸ The existing claims-based system is focussed on redress for harm after the fact, and does too little to prompt attention to prevention. It then does even less to build the capacity of organisations to operate in an inclusive way. We acknowledge redress is important, so the claims system needs to be retained and reformed, but argue that a complementary positive duty is required to drive *prevention* of discrimination and harassment and promote equality for all.

While work health and safety ('WHS') laws have a role to play in preventing psychosocial hazards (including discrimination and harassment) at work,⁶⁹ this does not eliminate the need for a complementary positive duty in the DDA (an 'equality duty'). The purpose of an equality duty is broader than a WHS duty, because it is not merely focussed on safety or preventing harassment, but encompasses promoting equality in all its dimensions including dignity, pay, access, respect, opportunity, autonomy, participation and voice.⁷⁰

Recommendation 2.1: A positive duty be introduced in the *Disability Discrimination Act 1992* (Cth).

⁶⁶ Australian Human Rights Commission, [Respect@Work: Sexual Harassment National Inquiry Report](https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020) (Australian Human Rights Commission, 2021) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>; Australian Human Rights Commission, [Free & Equal: A reform agenda for federal discrimination laws](#) (AHRC, 2021).

⁶⁷ For example, Belinda Smith, 'It's About Time: For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 117 ('It's About Time'); Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can It Effect Equality or Only Redress Harm?', in Christopher Arup, John Howe, Richard J Mitchell, Peter Gahan, Richard Johnstone & Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) ('Regulatory Analysis').

⁶⁸ Ibid, Smith 'A Regulatory Analysis'.

⁶⁹ See Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32 *Australian Journal of Labour Law* 219; and Belinda Smith, 'Respect@Work Amendments: A Positive Reframing of Australia's Sexual Harassment Laws' (2023) 36 *Australian Journal of Labour Law* 145, 164–66 ('Positive Reframing').

⁷⁰ Ibid, Smith 'Positive Reframing' 165–6.

12. If there was a positive duty in the Disability Discrimination Act, who should it apply to?

A positive duty under the DDA should apply to all organisational duty bearers under the Act, including public and private sector entities, and any body exercising public power or delivering services that affect the lives of people with disability. This is consistent with the recommendation of the AHRC in its report *Free & Equal: A reform agenda for federal discrimination laws* ('Free & Equal Discrimination Report'):⁷¹

All organisations with responsibilities under discrimination laws would be required to comply with the duty, including employers and businesses, government entities, and providers of accommodation, education, or goods and services. This would set out a clear expectation that all these responsible organisations will always act in a non-discriminatory manner and pre-emptively consider and address risks of discrimination.

Those covered by a positive duty would include all organisations that are duty bearers under Part 2 of the DDA. It would also cover these organisations in respect of their duties to comply with disability standards (Division 2A), to not harass (Division 3), and to not victimise (in Division 4).

Consideration should also be given to introducing the term 'person conducting a business or undertaking' ('PCBU') as a duty bearer for the positive duty. This term, originally developed for WHS laws to extend duties beyond 'employers' has now been adopted in the SDA for protections against harassment and for the positive duty. We acknowledge that the term is not one currently used in the DDA and is not eloquent, but the merits of the term are its breadth and consistency with the SDA and WHS laws. The term could operate as an umbrella term, encompassing many (if not all) of the existing duty bearers under Part 2 and minimise the risks of unfairly imposing positive duty obligations on individuals (noted below).

The Disability Royal Commission recommended that the duty apply to all duty holders, including Commonwealth entities as defined under the *Public Governance, Performance and Accountability Act 2013* (Cth), and public authorities such as ministers, public servants, and government contractors.⁷² The goal of covering such a spectrum of actors is to prompt action by all persons whose decisions and conduct materially affect the rights and inclusion of people with disability, but we recommend further consideration be given to the merit and practicality of imposing such a duty on individuals.

⁷¹ Australian Human Rights Commission, [Free & Equal: A reform agenda for federal discrimination laws](#) (AHRC, 2021) 56.

⁷² Disability Royal Commission, *Final Report: Realising the human rights of people with disability* (2023, vol 4) 310 and following, recommendation 4.32.

Recommendation 2.2: The positive duty apply to all private and public organisations with responsibilities under the *Disability Discrimination Act 1992* (Cth), to all bodies exercising public power or delivering services that affect the lives of people with disability, and to all public authorities including Government Ministers, and consideration be given to using the term ‘Person Conducting a Business or Undertaking’ (‘PCBU’) to capture these duty bearers.

13. Are there lessons from the operation of the positive duty in the Sex Discrimination Act that could be incorporated into a positive duty in the Disability Discrimination Act?

Ideally, to implement Australia’s international obligations under the CRPD, a positive duty would require organisations to take proactive steps to *promote equality* not merely prevent discrimination, and guidance could be gleaned from the CRPD of ways to do this. This is the approach adopted in the Victorian *Gender Equality Act 2020* (Vic), which imposes a duty on public sector entities to ‘consider and promote gender equality’ in developing policies and programs and in delivering services that are to be provided to, or have a direct and significant impact on, the public.⁷³

However, if the more limited SDA model of positive duty is to be used for a DDA duty, there are important lessons that should be heeded. These have been grouped under four headings below: A Nature and scope of the duty; B Clarity and certainty for duty bearers; C Enforcement agency resourcing and powers; and D Compliance and enforcement functions and powers.⁷⁴

A Nature and scope of the duty

The nature and scope of the positive duty in the SDA was limited and complicated by the focus of the recommendations in the AHRC’s *Respect@Work: Sexual Harassment National Inquiry Report*⁷⁵ (‘Respect@Work Report’) about sexual harassment and the two-stage implementation of the amendments across 2021 and 2022. This led to a duty that only relates to work, only relates to specific types of wrong under the SDA rather than all prohibitions, and is extremely complicated in its drafting.⁷⁶ With this more systematic review of the DDA and an opportunity to learn lessons from the SDA we urge that a positive duty in the DDA be drafted in a more coherent, comprehensive and clear manner.

⁷³ *Gender Equality Act 2020* (Vic) s 7.

⁷⁴ Many of these concerns about the SDA duty are detailed in Belinda Smith, ‘Positive Reframing’ (2023) 36 *Australian Journal of Labour Law* 145, 163–67.

⁷⁵ AHRC, *Respect@Work: Sexual Harassment National Inquiry Report* (AHRC, 2021) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

⁷⁶ Belinda Smith, ‘Positive Reframing’ (2023) 36 *Australian Journal of Labour Law* 145, 163.

Recommendation 2.3: The positive duty in the *Disability Discrimination Act 1992* (Cth) encompass the duty to address all forms of unlawful conduct in all areas of activity under the Act, including non-compliance with disability standards.

To promote the goals of the DDA, a positive duty in the DDA should require proactive steps to prevent at least the range of wrongs that are prohibited under the Act, including discrimination, failure to comply with disability standards, harassment (under the current provisions, but also see the recommendations in Part 4.1 below) and victimisation—which could be referred to collectively as DDA ‘unlawful conduct’. In addition, a positive duty should not be limited to the sphere of work but extend also to the provision of services, education, accommodation and all other areas covered by the DDA. A positive duty should have three dimensions: a duty in respect of all people interacting with the organisation; a duty to protect all people interacting with the organisation; and a reporting obligation.

Duty in respect of all people interacting with the organisation

First, such a duty would primarily require organisations (such as government, businesses, hospitals and educational institutions) to take proactive steps to prevent their own workers⁷⁷ or agents from committing any of the forms of unlawful conduct against other workers or in respect of customers, patients, students, visitors etc. For governments this would extend to their own policies, processes and practices in the provision of government services, akin to the UK public sector equality duty. Duty bearers would have an obligation to anticipate possible breaches that could be committed by their workers and agents and take steps to prevent them.

Duty to protect all people interacting with the organisation

There is another aspect of the existing positive duty in the SDA duty that is very important yet obscured by the complicated drafting: the duty also requires each organisation to take steps to prevent harassment of its workers by third parties, such as customers, suppliers, patients, and students.⁷⁸ This is a duty to protect one’s own workers against harassment when they are doing their job. For example, to protect nurses being harassed by patients and servers getting harassed by customers. This is consistent with the duty under WHS laws to protect one’s own workers from harm by others. The AHRC has summarised the rationale for this in the *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984* (Cth):⁷⁹

⁷⁷ This needs to be widely interpreted to include employees, independent contractors, contracted (labour hire) workers, interns and volunteers.

⁷⁸ See SDA ss 47(1) and (4) and discussion in Belinda Smith, ‘Positive Reframing’ (2023) 36 *Australian Journal of Labour Law* 145, 163.

⁷⁹ AHRC, [Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984](https://humanrights.gov.au/our-work/sex-discrimination/positive-duty-sex-discrimination-act/guidance-materials) (Cth) (AHRC, August 2023) <<https://humanrights.gov.au/our-work/sex-discrimination/positive-duty-sex-discrimination-act/guidance-materials>>.

The extension of the positive duty to the conduct of third parties recognises the important role that organisations and businesses can play in protecting their workers from unlawful behaviour and providing safe, respectful and inclusive workplaces. This is because third parties can pose a significant risk to workers.

This argument is equally applicable to the context of disability harassment and other forms of unlawful conduct. As for the SDA duty, it can be more difficult to have control over third parties, but the obligation is only to take ‘reasonable and proportionate’ measures to protect workers from such third parties.

The existing protections against disability harassment in Part 2 Division 3 of the Act is also relevant, but we have separately (see Part 4.1) recommended the repeal of these provisions on the basis of their replacement with more comprehensive protections. Currently the Act only explicitly prohibits harassment in the *provision* of services, not the *receipt* of such services. This means there is no prohibition on customers harassing servers in a restaurant or attendants at the pool, patients harassing nurses and other health care providers, or university students harassing their teachers. While minors should be excepted, such harassment on the basis of disability should be prohibited (see discussion under Part 4.1 below).

Consideration should also be given to ways in which organisations, such as universities, might be expected to take steps to protect not only their workers from unlawful conduct (in all its forms) by others, but also their students. For example, those students who are doing required field work, placements or even internships might be exposed to discrimination, offensive conduct or some other form of unlawful conduct under the DDA yet not clearly be covered by the provisions above in respect of workers. Similarly, hospitals might need to take steps to protect not only their workers, but also their patients from such conduct by third parties (such as other patients or even hospital visitors). Those who manage prisons would need to take steps to ensure prisoners with disability are not harassed or subjected to other forms of unlawful conduct by other prisoners or visitors. Requiring business to anticipate such harm will not be entirely new, as all businesses and undertakings in Australia are already under a WHS positive duty to assess and respond to risks to health and safety not only of their workers but also customers, students, patients, etc, and others who might be affected by the business or undertaking. The DDA’s positive equality duty—covering more than harms to health and safety—would complement the WHS duty. The DDA’s positive equality duty should be framed broadly—similar to the WHS positive duty—to correspond to the capacity of businesses and undertakings to drive change in preventing disability discrimination and other forms of conduct that negatively target a person because of disability (see Part 4.1 below).

Recommendation 2.4: The positive duty in the *Disability Discrimination Act 1992* (Cth) be a duty to prevent unlawful conduct by or against all people having any engagement with the enterprise.

Reporting obligations

Finally, to avoid the regulatory gap in information about compliance, the positive duty should include a self-reporting obligation for duty bearers. As the Issues Paper notes: ‘Reporting frameworks can provide an important transparency and accountability mechanism and encourage greater compliance.’⁸⁰ This could be stand-alone reports, but we propose that the existing ‘action plan’ mechanism⁸¹ be used.⁸²

Action plans provide an opportunity for duty holders to publicly commit to prevent disability discrimination, increase inclusivity and promote the rights of people with disability.

Action plans currently allow organisations to set out the steps they are taking to do this and have these plans published by the AHRC.

This mechanism should be amended to *require* duty bearers to establish an action plan and submit it to the AHRC on a regular basis as a way to report on compliance with the positive duty. In acknowledgement of the initial burden this might impose on organisations, this could be limited at first to large duty bearers, such as government agencies and those organisations covered by the *Workplace Gender Equality Act 2012* (Cth) (‘WGE Act’) (namely, Commonwealth government bodies, tertiary educational institutions and those private sector employers with 100 or more employees). Many of these organisations will already have established and published action plans, so this would be an incremental step, serving a number of purposes of increasing transparency, structuring the positive duty response and allowing better information flow to the AHRC about compliance.

As with the reports that are required to be made to the Workplace Gender Equality Agency under the *Workplace Gender Equality Act 2012* (Cth), duty bearers should be required to also report against relevant disability equality indicators. These should be developed by the AHRC working with disability representative organisations with input from relevant industry sector bodies.

The agency empowered to enforce the positive duty, presumably the AHRC (see discussion below), would need to be given sufficient resources and powers to ensure it had capacity to review such reports and work with organisations to promote compliance. (See further discussion below about agency resourcing and powers.)

Recommendation 2.5: The positive duty to be included in the *Disability Discrimination Act 1992* (Cth) include reporting obligations for duty bearers and that this be done through the lodging of, and annual reporting against, action plans under the Act. The lodging and reporting against action plans should be implemented for all duty bearers with a schedule

⁸⁰ Issues Paper, 92.

⁸¹ See DDA, pt 3.

⁸² Issues Paper, 87.

of compliance beginning with all organisations covered by the *Workplace Gender Equality Act 2012* (Cth) and state government agencies and enterprises.

Recommendation 2.6: The Australian Human Rights Commission work with disability representative organisations and industry sector bodies to develop disability equality indicators and duty bearers should, under the positive duty in the *Disability Discrimination Act 1992* (Cth), be required to report against those indicators. The Commission should be resourced to have the capacity to analyse and aggregate that data to provide an evolving picture of the situation of people with disability in Australia.

B Clarity and certainty for duty bearers

The positive duty should be drafted as clearly as possible—in contrast to the SDA duty—and should include mechanisms to promote clarity and understanding of what is expected of duty bearers. Clarity and certainty are needed because they are fundamental principles of the rule of law and essential to compliance and enforcement. Three lessons are to be learned from the SDA and these relate to: 1 drafting the duty; 2 matters to be taken into account; and 3 guidance materials.

Ensure the duty is written clearly

As noted above, clarity of drafting was hindered in enactment of the SDA duty, but with good processes of consultation and reflection in this DDA review process such problems could be avoided. Laws should be written in plain English and not require expert lawyers to translate them for users.

For consistency, it would seem sensible to adopt the wording of the SDA in respect of the actual duty – ‘reasonable and proportionate measures to eliminate’ unlawful conduct. Good drafting is then required to explain who is a duty bearer and the relevant conduct that is to be prevented. It is relevant to note the definition of ‘unlawful discrimination’ that is found in the AHRC Act as it relates to the DDA.⁸³

unlawful discrimination means any acts, omissions or practices that are unlawful under:

(aa) ...

(a) Division 1, 2, 2A, 3 or 6 of Part 2 of the *Disability Discrimination Act 1992*; or

...

and includes any conduct that is an offence under:

(ca) ...

(d) Division 4 of Part 2 of the *Disability Discrimination Act 1992* (other than section 42).

⁸³ AHRC Act s 3 (definition of ‘unlawful discrimination’).

The provision should not, however, cross reference to this definition as this requires the reader to look elsewhere to understand a core concept in the duty.

For a duty to apply to the full spectrum of environments and situations, it necessarily needs to be drafted in a general way, as the SDA duty is – requiring ‘reasonable and proportionate measures’. But guidance on what this means must be included: in the Act; and further expanded on in guidance materials.

Recommendation 2.7: The positive duty in the *Disability Discrimination Act 1992* (Cth) adopt the term ‘reasonable and proportionate measures to eliminate’ unlawful discrimination make clear who is a ‘duty bearer’ and specify all of the relevant conduct to be prevented.

Guidance in the Act – matters to be taken into account

The SDA provides a list of matters ‘to be taken into account in determining whether a duty holder complies’ with the duty.⁸⁴

- (a) the size, nature and circumstances of the duty holder’s business or undertaking;
- (b) the duty holder’s resources, whether financial or otherwise;
- (c) the practicability and the cost of measures to eliminate [prohibited] conduct ...;
- (d) any other relevant matter.

These factors should be included in the DDA too. But there are at least three further fundamental matters that warrant explicit mention in the DDA: consultation; risk; and action plans.

- **Voice:** Including the experiences of people with disability is essential. The SDA model does not mandate consultation with affected communities. In contrast, the WHS framework includes consultation obligations and codes of practice, offering a more structured and participatory approach. A positive duty under the DDA should incorporate similar requirements, ensuring that compliance strategies are co-designed with people with disability and reflect their experiences. In determining, for example, whether the steps taken by a government agency are ‘reasonable and proportionate measures to eliminate’ disability discrimination and harassment in that organisation, the views of those disabled workers, clients or other stakeholders are critical to consider.

This is particularly significant for people with disability who experience intersecting forms of disadvantage, such as racism, gender-based violence, or economic insecurity. A positive duty under the DDA must therefore be structured in such a way as to create strong incentives to achieve systemic, structural change within organisations and duty-holder communities, including leadership

⁸⁴ SDA s 47C(6).

accountability, inclusive governance, and meaningful involvement of people with disability in recognition of their specialist expertise.

Ongoing research into sexual harassment in the workplace (for example, the Cultivating Systemic Safety to Prevent Workplace Sexual Harassment project;⁸⁵ and the AHRC's *Speaking from Experience*⁸⁶) suggests that co-design approaches to changing workplace systems and cultures is critical for achieving the protective and preventative goals of the positive duty, particularly for workers in high-risk industries – such as male-dominated fields, customer-facing roles, and hierarchical workplaces. While legislative reform can help drive this type of systemic change, it cannot be assumed that it will be achieved without holistic investment in behavioural and organisational change processes, directly informed by those with relevant personal experience as disabled people of the barriers to equal opportunity experienced. Lessons may also be drawn from WHS regimes that include co-design and mandatory consultation elements in their regulatory frameworks.⁸⁷

Recommendation 2.8: The positive duty in the *Disability Discrimination Act 1992* (Cth) expressly specify that duty bearers must actively work with disability rights organisations to develop and monitor their actions to prevent unlawful discrimination.

- **Risk of not preventing discrimination:** The matters listed in the SDA focus on size, nature and resources of the duty bearer and the cost of measures to eliminate discrimination and harassment, but there should also be an assessment of the risk *inaction* poses to people with disability. Assessing risk should take account of the *chance* or likelihood of harmful conduct and the possible *impact* of that conduct.
 - **Chance:** The chance or likelihood of unlawful conduct may depend on the nature of the organisation, the industry and past experiences. The chances of discrimination and harassment are likely to be higher in an organisation with a history of discrimination and harassment, for example. Previous incidents need to be openly considered, as well as research on causal factors. The starting point for assessing the chance of harmful conduct is the

⁸⁵ This is an [ARC Linkage Project](#) funded for the period 2005–08 and administered by the University of South Australia and led by Professor Michelle Tuckey.

⁸⁶ AHRC, [Speaking from Experience: what needs to change to address workplace sexual harassment](#) (AHRC, June 2025) <https://humanrights.gov.au/sites/default/files/Speaking%20from%20Experience%20Report_0_0.pdf>.

⁸⁷ Rachel Cox, 'Addressing sexual harassment in a work health and safety framework: Lessons from Belgium, Australia and Canada' (2024) 37(3) *Australian Journal of Labour Law* 243; Rachel Cox, [Addressing gender-based violence and harassment in a work health and safety framework](#) (ILO Working Paper 116, International Labour Office, 2024) <https://www.ilo.org/sites/default/files/2024-07/116_web.pdf>. See also Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing sexual harassment in work: exploring the promise of work health and safety laws' (2019) 32(2) *Australian Journal of Labour Law* 219.

identification of any discriminatory practices as part of a DAP review of the provision of goods, services and facilities, of information provision, of access to premises, and employment practices.

- **Impact:** How serious the potential impact of discrimination or harassment needs to be factored into the assessment of risk. The DAP review again can provide a mechanism for this assessment, considering the impact of decisions about medical treatment, educational access, and employment rights and more.

Recommendation 2.9: The positive duty in the *Disability Discrimination Act 1992* (Cth) expressly include a risk assessment of the cost of inaction on prevention of unlawful discrimination.

- Action plans: whether an organisation has an action plan under the DDA⁸⁸ and whether it has been implemented would clearly be relevant in assessing whether an organisation has taken reasonable and proportionate measures to prevent disability discrimination and harassment. As noted above, we recommend the DDA be amended to *require* action plans be developed by all large organisations bound by the Act, submitted to the AHRC for audit and evaluation before being published, reported against annually and updated. Such plans should form an ongoing element of the duty bearer's operations.

This last factor is further considered and addressed below and in Part 6.2.

Guidance materials

For a general duty to be effective, elaboration is required and this can be via guidance materials (as there will be little caselaw elaboration) produced by the AHRC. These guidance materials should serve dual purposes of: helping duty bearers to know what it is they are required to do to comply; and conversely be the measure of compliance by those seeking to enforce the duty. The DDA should provide two features that are missing from the SDA in respect of guidance materials: authority; and input from people with disability.

- Authoritative: Firstly, guidance materials must provide a high degree of certainty for duty bearers while providing an incentive for genuine innovation and progress in preventing discrimination. This is a challenging task, and a necessary one. The guidance materials should be authoritative, not merely educational. Duty bearers should know that if they follow the guidance, they will comply, and the enforcement agency should be able to identify non-compliance with confidence.

⁸⁸ DDA pt 3.

While the AHRC has issued guidance in respect of the SDA duty,⁸⁹ these materials are not legally binding and may have limited influence on judicial interpretation. To make the guidance materials authoritative, an explicit link is needed in the DDA between the duty and the guidance. The Act might provide that a court ‘may’ or ‘must’ take them into account in assessing compliance. The nature of the guidance materials would need to be examined to ensure that they do not encourage mere check-box compliance or operate as a bare minimum expectation. They should also not be prescriptive in a way that limits innovation and progress that an organisation might engage in to tailor effective responses to their workers and environment, but could be drafted as a performance standard that must be complied with unless the duty bearer can establish that its response is equivalent or better at meeting the DDA’s goals. Even when a positive duty is legislated, some employers and other duty holders may continue to look for (or employ) a “tick-box”, minimum compliance approach — drafting policies and conducting training — without addressing the structural and cultural drivers of inequality. There needs to be an effective way to identify such superficial compliance.

- **Co-design:** Applying the touchstone of ‘nothing about us, without us’ the development of guidance materials should explicitly require the AHRC to ensure the materials include the input of people with disability. Those affected by disability discrimination and related conduct are expertly placed to help organisations understand the risks and develop prevention solutions.

Recommendation 2.10: Application by the duty bearer of guidance materials developed to support fulfilment of the positive duty in the *Disability Discrimination Act 1992* (Cth) be considered by a decision maker determining whether there has been compliance with the positive duty.

Recommendation 2.11: Guidance materials be developed to support fulfilment of the positive duty in the *Disability Discrimination Act 1992* (Cth) be co-designed with disability rights organisations.

C Enforcement agency resourcing and powers

The third lesson that can be learnt from the SDA positive duty relates to the enforcement agency: For a positive duty to be effective, **there needs to be an agency adequately equipped with resources and powers to promote compliance and to enforce the duty.** Otherwise the ‘duty’ is little more than a suggestion and would add nothing to the existing regime that has for decades already prohibited discrimination and harassment, provided for attributed liability for those organisations that fail to take adequate steps to prevent the

⁸⁹ AHRC, [Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 \(Cth\)](https://humanrights.gov.au/our-work/sex-discrimination/positive-duty-sex-discrimination-act/guidance-materials) (AHRC, August 2023) <<https://humanrights.gov.au/our-work/sex-discrimination/positive-duty-sex-discrimination-act/guidance-materials>>.

conduct, and allowed for voluntary action plans. For a positive duty to be effective, the agency needs to be able to support compliance (through educational initiatives, guidance materials and capacity-building measures), monitor compliance (including reviewing reports and complaints), and take enforcement steps strategically, responsively, and publicly.

Recommendation 2.12: An appropriate agency be appointed to promote compliance with the positive duty and tasked with effective enforcement, and that agency be allocated resources and powers to enable it to effectively undertake these roles.

We note that if the Australian Human Rights Commission is tasked with these roles they will require *additional* resources and powers, beyond those currently allocated.

D Compliance and enforcement functions and powers

There are at least three lessons to be learnt from the SDA positive duty model about compliance and enforcement and these relate to: informing the agency; reporting *by* the agency; and sanctions for non-compliance.

Informing the agency to trigger investigation

Currently, in a circular fashion, the AHRC cannot inquire into whether a duty bearer has complied with the positive duty until it ‘*reasonably suspects* that the person is not complying’ with the duty.⁹⁰ Further, the Act does not explicitly provide the AHRC with functions, powers or a mechanism for reaching this threshold of reasonably suspecting non-compliance. The AHRC has established a ‘portal’ inviting reports, but lessons could be learned from this poor regulatory design.

The AHRC should have explicit powers for informing itself of possible non-compliance and four suggestions are made below including: duty bearer reporting through action plans; sharing knowledge within and between agencies; individual reporting; and reporting by representative bodies.

- Duty bearer reporting through action plans: As noted above in Part 6.1 below, we propose that, for at least large organisations and government agencies, the positive duty should include a reporting obligation, linked to a mandated action plan to be submitted to the AHRC for review, evaluation and publication. (Smaller organisations should be permitted to report in this way too and obtain AHRC review and support.⁹¹) The positive duty requires each duty bearer to identify and address the risks of discrimination and opportunities for improvement within their own organisation, and the action plan provides a way for the organisation to publicly demonstrate its commitment, initiatives and progress.

⁹⁰ AHRC Act s 35B(1) *emphasis added*.

⁹¹ This arrangement is akin to that used in the *Workplace Gender Equality Act 2012* (Cth).

- Sharing knowledge within and between agencies: Second, the AHRC should be empowered to use information it receives from the individual complaints of discrimination and harassment under Part 2 of the DDA (with adequate safeguards for procedural fairness). It should also be able to share its information with other agencies (such as state and territory equality agencies, agencies administering industrial law and WHS agencies).⁹² Even aside from confidential information, if an individual claim under the DDA is successful in a federal court, the public record of actual discrimination or related conduct should prompt an inquiry about compliance with the positive duty.

Recommendation 2.13: The *Australian Human Rights Commission Act 1986* (Cth) be amended to ensure the Commission can review complaints made under the *Disability Discrimination Act 1992* (Cth) and share (give and receive) information with other federal state and territory statutory authorities and government agencies with appropriate safeguards for individual privacy and procedural fairness in order to determine matters of compliance with the positive duty.

- Individual reporting: Third, a specific mechanism could be established for individuals and advocates to make reports of suspected non-compliance with the positive duty. This could be a standard reporting mechanism as used by the Australian Competition and Consumer Commission ('ACCC'). The ACCC is empowered to invite and receive reports to inform its education, compliance and enforcement work on various remits, including misleading and deceptive business conduct or false and misleading environmental claims.⁹³ Similarly, the Fair Work Ombudsman ('FWO') provides a mechanism for anyone to report a workplace issue (anonymously), allowing the FWO to gain information from the coalface (while also providing guidance on how to resolve workplace issues).

Recommendation 2.14: A mechanism be established in the *Disability Discrimination Act 1992* (Cth) to empower the Australian Human Rights Commission to establish a specific mechanism for individuals and advocates to make reports of suspected non-compliance with the positive duty and that such reports are to be deemed sufficient for the Commission to reasonably suspect non-compliance and take investigative action.

- Designated bodies reporting on significant or systemic concerns: Finally, like the ACCC's 'designated bodies' framework, a mechanism could be established whereby selected Disability Representative Organisations could be resourced and entitled to lodge reports about 'significant or systemic' issues of non-compliance.⁹⁴

⁹² See AHRC, [Speaking from Experience: What needs to change to address workplace sexual harassment](#) (AHRC, June 2025) 71, rec 11(a): to amend section 49 AHRC Act 'to enable better information sharing between regulators'.

⁹³ See the [ACCC website for its invitation and reporting mechanism in relation to environmental and sustainability claims](#): ACCC, 'Environmental and sustainability claims' (no date) <<https://www.accc.gov.au/consumers/advertising-and-promotions/environmental-and-sustainability-claims#toc--next-steps-if-you-see-a-false-or-misleading-environmental-claim->>>.

⁹⁴ See the [ACCC website for its explanation of the 'designated complaints' mechanism](#): ACCC, 'Designated complaints' (no date) <<https://www.accc.gov.au/about-us/designated-complaints->>>.

Under the ACCC framework, bodies apply and are designated by the Minister to play this role of identifying concerns about significant and systemic issues and report them. Such reports warrant specific attention by the ACCC, which is required to respond within a set time and responses can be education, research, engagement, advocacy or in-depth investigation leading to enforceable undertakings.

Such a framework would help the AHRC to gather information from the frontline of those with disability through their representatives, while alleviating the burden on individuals to report. This mechanism engages and harnesses the work of civil society actors that are so well placed through their work to identify significant and systemic concerns about barriers to equality, discriminatory processes, harmful practices and ways to address these. It should be recognised that, in being a designated body, such organisations are performing a function that is vital to achieving the public good that the DDA is designed for: a society in which people with disability are full and equal citizens, enjoying all of the benefits of all aspects of that society.

Recommendation 2.15: A mechanism be established in the *Disability Discrimination Act 1992* (Cth) to empower the Minister to designate disability representative organisations and selected rights organisations as ‘designated bodies’ entitled to lodge reports of ‘significant or systemic’ issues of non-compliance with the Act and any obligations under the Act. Organisations that are ‘designated bodies’ should receive appropriate funding to enable them to be active in this role as people with disability will be relying on this mechanism being effective. Further, the Australian Human Rights Commission should be empowered to inquire into systemic breaches of the Act.

Reporting by the agency

To have the greatest transformative effect, the positive duty enforcement agency must be permitted to publicise its enforcement activities (with appropriate procedural fairness protections). If the AHRC is given the enforcement role for the DDA (and in any event for the SDA positive duty), we recommend a review of the Commission’s confidentiality obligations to identify barriers these might pose to effective use of publicity and transparency for compliance and enforcement. If the AHRC has undertaken enforcement activities in respect of the SDA since it was introduced in 2022, there has been insufficient public disclosure of such, leaving the public legitimately to wonder if any enforcement is even occurring.⁹⁵ This apparent lack of enforcement undermines the credibility of the duty and weakens its impact, relegating it to being merely a suggestion rather than an enforceable duty. Publicly reporting on enforcement activities is not only critical for the duty’s legitimacy among those advocating for non-discrimination; it can also play a role in embedding a preventative approach in organisations by making clear that consequences of

⁹⁵ Karen O’Connell and Josh Bornstein, ‘[We have a great law to tackle workplace sexual harassers. Pity it’s never been used](https://www.theage.com.au/national/we-have-a-great-law-to-tackle-workplace-sexual-harassers-pity-it-s-never-been-used-20250703-p5mc82.html)’, *The Age* (online, 3 July 2025) <<https://www.theage.com.au/national/we-have-a-great-law-to-tackle-workplace-sexual-harassers-pity-it-s-never-been-used-20250703-p5mc82.html>>.

non-compliance include bad publicity. At a minimum, the AHRC Act could be amended to add a function to section 35A that explicitly permits the Commission to report on compliance and enforcement activities but associated confidentiality obligations will need to be considered as well.

Recommendation 2.16: Review of the legislated confidentiality obligations of the Australian Human Rights Commission to ensure it is able to work with other entities to identify non-compliance with the positive duty and that it provides transparency in respect of compliance and enforcement. This includes amendment to section 35A of the *Australian Human Rights Commission Act 1986* (Cth) to expressly permit the Commission to report on compliance and enforcement and further amendments as needed to ensure the Commission can work with other enforcement agencies, including state and territory discrimination law statutory authorities to identify patterns relevant to compliance with the positive duty.

In addition to *allowing* the AHRC to report on its enforcement activities, we propose that it be *required* to report at least annually and in some useful, accessible detail. There are numerous enforcement agencies, including the ACCC and FWO, that publicly perform and report on their enforcement activities, so models are available for the AHRC to develop its practice in this new role (if the role should be retained in the AHRC alongside its other roles).

Ideally, the AHRC should also be required and resourced to utilise its data to develop evidence-based recommendations about how to develop an effective action plan and implement positive duties.

A model for reporting and analysis of data of this kind can be found in the work of the Commission for Gender Equality in the Public Sector in Victoria.

Recommendation 2.17: The Australian Human Rights Commission be required by legislation to annually report on its enforcement activities and on aggregated data, and to utilise its data to develop evidence-based recommendations about how to develop an effective action plan and implement positive duties.

Another regulatory tool utilised in other fields governing business conduct is transparency in respect of findings made or arrangements entered into by the enforcement agency, such as compliance notices, infringement notices and enforceable undertakings. The ACCC, for example, is responsible for promoting compliance and enforcing the *Competition and Consumer Act 2010* (Cth) and in this role is able to issue ‘infringement notices’ when it has reasonable grounds to believe there has been a contravention of specific provisions of that Act. Relevantly, the ACCC then maintains a **public register** of these infringement notices⁹⁶ that can be searched by anyone on its website. Similarly, the FWO is required to make public all enforceable undertakings it enters into with businesses that have breached the *Fair Work Act 2009* (Cth). Such public registers provide to civil society actors,

⁹⁶ ACCC, ‘[Infringement notices register](https://www.accc.gov.au/public-registers/infringement-notices-register)’ (24 July 2025) <<https://www.accc.gov.au/public-registers/infringement-notices-register>>.

customers or others interested in engaging with a business a means of identifying potentially problematic or unlawful conduct.

Currently conduct that constitutes disability discrimination or other unlawful conduct under the Act is absent from any public register other than for the extremely rare case that a complaint about it makes it to court and is determined. Greater transparency of action, inaction and lack of adequate action to prevent discrimination could drive better practices.

Recommendation 2.18: The Australian Human Rights Commission maintain a public register of:

- the actions which led to complaints of disability discrimination being made to the Australian Human Rights Commission,
- conciliated outcomes of disability complaints,
- any findings made compliance notices issues or enforceable undertakings entered into with the Australian Human Rights Commission arising from any of its non-complaints functions under the amended *Disability Discrimination Act 1992* (Cth), and
- sanctions for non-compliance with the Act or arrangements entered into.

Sanctions for non-compliance

For the AHRC to be effective in enforcing a positive duty, there needs to be a serious sanction for non-compliance. Unless the enforcement agency has a ‘stick’ or serious sanction of some kind that it can use or at least threaten to use in enforcement activities, it will be hamstrung in garnering responses from those duty bearers that aren’t already committed to compliance.⁹⁷ To regulate responsively and strategically, an agency needs to have available a full armoury of responses, from the least intrusive or ‘soft’ measures (such as education) through to compliance notices, infringement notices and on to harsher sanctions, such as the threat of civil penalties being imposed or some infringement on liberty. The key point is that only with access to a ‘stick’ or the pointy end of the enforcement pyramid can the agency regulate responsively, utilising the soft approaches most of the time because the duty bearer knows that there are harsher sanctions available to which the enforcer can escalate if needed. A duty bearer who is not already committed to the law’s goal and not amenable to capacity building support to enable compliance, will not be driven to change by mere offers of guidance or inconsequential threats of compliance notices.

The AHRC currently does not have the tools it needs to effectively enforce its existing responsibilities for a positive duty under the SDA, and this needs to be addressed before it is given responsibility for trying to enforce another positive duty. As noted above, the

⁹⁷ Ian Ayres and John Braithwaite, [*Responsive regulation: Transcending the deregulation debate*](#) (Oxford University Press, 1992); John Braithwaite, ‘[Fasken Lecture: The essence of responsive regulation](#)’ (2011) 44 *University of British Columbia Law Review* 475.

power to inquire is hampered by the difficulty of meeting the trigger of reasonable suspicion of non-compliance and measures are suggested for addressing this. But giving the AHRC powers to issue compliance notices and enter into enforceable undertakings is of little if any value without a credible threat to a duty bearer that the AHRC can and will escalate to harsher threats if necessary. Without a risk of bad publicity, a financial penalty or some type of undesirable restriction being imposed for non-compliance, the enforcement framework imposes no pressure or incentive for an organisation to enter into an enforceable undertaking. There is no real threat to avoid.

There are various possible sanctions that could be introduced to address this regulatory flaw: penalties; injunctions; procurement exclusions; and publicity.

- **Civil Penalties:** The most obvious one is civil penalties, as used under the *Fair Work Act 2009* (Cth). This has been recommended by academics, the AHRC,⁹⁸ and the Australian Law Reform Commission.⁹⁹
- **Injunctions:** Another second type of sanction might be injunctive. Such orders could operate to deny duty bearers the original freedom to identify ways and means of fulfilling the positive duty and instead require them to work with expert bodies (such as the AHRC) to develop their action plans – to conduct audits, develop benchmarks and progress goals, develop training, policies and practices, and report regularly and publicly. This would limit the organisation’s freedom to tailor the positive duty response to their own environment, timeline and needs.
- **Procurement exclusion:** A third type of sanction might involve exclusion from public procurement, though this would not pose the same sort of risk to all duty bearers.
- **Public register:** Similarly, a threat of publicity—a public register of non-compliers—could pose a risk to some, but not all. Such public ‘shaming’ is only effective if there is a strong public norm that asserts this as wrong and the organisation might be harmed by such publicity.

Recommendation 2.19: The Australian Human Rights Commission be given additional regulatory tools to effectively enforce a positive duty including the capacity to implement penalties; injunctions; procurement exclusions; and publicly identify non-compliant parties.

⁹⁸ See, for example, AHRC, [Speaking from Experience: What needs to change to address workplace sexual harassment](#) (AHRC, June 2025) pt 7.5; AHRC, Fair and Equal Discrimination Report, reform 15.

⁹⁹ Australian Law Reform Commission, [Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence](#) (ALRC Report No 143, January 2025) 462, recs 50 and 51 <<https://www.alrc.gov.au/publication/jrsv-report-143/>>.

14. What costs, benefits and other impacts would duty holders experience in meeting a positive duty under the Disability Discrimination Act? If you are an existing duty holder under the Disability Discrimination Act, please specify how you think meeting a positive duty would impact you.

The DDA prohibition on disability discrimination and disability harassment has been in force since 1992, with attributed liability provisions that make clear organisations will be liable for the actions of their workers and agents unless they have taken ‘reasonable precautions and exercised due diligence to avoid the conduct’.¹⁰⁰ This means that all duty bearers have had ample opportunity to consider the risks of such unlawful conduct and identify steps they might take to prevent it. As a result, if duty holders have taken this opportunity over the past quarter century, any costs associated with identifying and eliminating potentially unlawful disability discrimination should already have been incurred and the benefits realised. For those organisations that have developed Action Plans to formally and publicly report on their initiatives, the proposed reporting costs should already have been incurred as well. Therefore, any costs of compliance in respect of the positive duty will primarily, and appropriately, fall on those organisations that have done little to date to acknowledge and address the risks of disability discrimination.

In respect of the existing obligation to not discriminate and its reflection in the disability standards made under the Act, all of these have been subjected to the federal government’s regulatory impact assessment process. As such, the costs to organisations of complying with the DDA has already been considered and accepted. As noted by the Productivity Commission,¹⁰¹ the current lack of effective regulatory enforcement means that the costs of compliance are unevenly spread, and are predominantly borne by those seeking to comply. In contrast, duty holders who have not proactively addressed their obligations have incurred minimal or no costs, instead arguing that the potential cost of subsequent complaints constitutes a cost of business.

The introduction of a positive duty would begin the work of smoothing out that unequal cost, ensuring that all duty holders carry a fair share of the costs of compliance.

When considering costs, we must always weigh these against the benefits of compliance, which would be substantial. Disability discrimination complaints have, for the majority of the years since enactment of the DDA, represented the largest number of complaints received by the AHRC. This first happened in the 1996–97 financial year, just over 3 years after the DDA came into full effect.¹⁰² This means that over the almost 35 years since the DDA came into force, a significant number of people with disability have borne the costs of seeking to enforce their rights under the Act. Each of those complaints represents a tiny

¹⁰⁰ DDA s123.

¹⁰¹ Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 142–43.

¹⁰² Human Rights and Equal Opportunity Commission (‘HREOC’), *Annual Report 1996–1997* (HREOC, 1997) 15.

percentage of the experiences of discrimination of people with disability and the enormous costs borne through both pursuing the right to non-discrimination and living with discrimination in a spectrum of life activities.

The Disability Royal Commission estimated that the cost of violence, abuse, neglect, and exploitation of people with disability in 2021–22 (thirty years after the DDA was enacted) was at least \$46 billion. Of that, \$27.7 billion was attributable to ‘systemic failures and neglect’, such as lack of access to employment and health services.¹⁰³ Addressing these failures through a positive duty could significantly reduce long-term economic and social costs.

The benefits of a positive duty include improved service delivery, enhanced public trust, and reduced legal liability. Inclusive practices often benefit a wider range of people, including older Australians, culturally and linguistically diverse communities, and those with temporary impairments. Organisations that comply with the duty are better positioned to attract and retain diverse talent, improve staff morale and performance, and protect their reputations. Compliance with positive duty obligations under discrimination law can also help organisations comply with complementary obligations under WHS laws, the FWA, and Workplace Gender Equality Agency reporting requirements.

We also note that almost half of federal discrimination complaints in Australia arise under the DDA.¹⁰⁴ A benefit of a positive duty would be to reduce this load on the Australian Human Rights Commission, whereby requests and informal complaints can be used as guidance for improvements that reduce the need for formal complaints.

15. Should there be exceptions or limits to the application of a positive duty?

If framed like the SDA duty, limits are inherent in the duty in that only ‘reasonable and proportionate’ measures are required to be taken pursuant to a positive duty. This wording ensures that the duty is contextual and flexible, taking into account the size, nature, and resources of the duty bearer, the practicability and cost of compliance measures, and any competing legal obligations. These factors are already embedded in the SDA, the ACT and Victorian models. They should be replicated—and improved upon, as noted above—in the DDA to ensure consistency and legal certainty.

Importantly, exceptions or limits should not undermine the purpose of the duty. They should be framed as part of a proportionality assessment, not as blanket exemptions. The

¹⁰³ Disability Royal Commission, *Final Report: Realising the human rights of people with disability* (2023, vol 3) 19, citing James Vincent, Dennis McCarthy, Hugh Miller et al, *Research Report – The economic cost of violence, abuse, neglect and exploitation of people with Disability* (Taylor Fry, 2022) 3–5, which notes ‘it is also likely that \$46.0 billion is an underestimate’.

¹⁰⁴ AHRC, *2022–23 Complaints Statistics* (AHRC, 2024) <https://humanrights.gov.au/sites/default/files/document/publication/ar_2022-23_complaint_stats_tables.pdf> 2.

duty must remain a robust and enforceable mechanism for driving systemic change, not a merely symbolic gesture.

Recommendation 2.20: Any exceptions or limits to a positive duty should not undermine the purpose of the duty and should, instead, be framed as part of a proportionality assessment in evaluating compliance.

Part 3.1: Adjustments

16. Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?

17. Should the scope of the duty to provide adjustments apply only to the existing areas of public life covered by the Disability Discrimination Act, or extend to other contexts?

18. Would removing the word ‘reasonable’ from the term ‘reasonable adjustments’ to align the language with the legal effect create any unintended consequences?

We support the creation of a stand-alone duty to provide adjustments and that a failure to provide an adjustment should be defined as unlawful discrimination (the latter is discussed above in Part 1.3–4). Such an approach will better assist people with disability as well as duty holders in understanding their rights and obligations pursuant to the DDA. The scope of the duty should also be expanded to capture all aspects of public life including expressly capturing civic duties such as making adjustments to enable people with disability to participate with their peers in jury service and voting. Such an approach would encourage and capture the purpose of the DDA in expanding and enhancing public participation of people with disability in all aspects of public life.

We agree that removing the term ‘reasonable’ from existing provisions of the DDA and any proposed provision will support clarity and understanding from the general public as to what is required and we cannot foresee any unintended and problematic consequences of such an amendment. Each of these recommendations are also consistent with the recommendations of the Disability Royal Commission.

Recommendation 3.1.1: Amendment to the *Disability Discrimination Act 1992* (Cth) to create a stand-alone duty to provide adjustments.

Recommendation 3.1.2: The stand-alone duty to provide adjustments extend to duties of governments to ensure people with disability are able to fully engage in the fulfilment of civic duties such as voting, jury service and seeking election to parliament and being a member of parliament.

Recommendation 3.1.3: The *Disability Discrimination Act 1992* (Cth) and any disability standards made under section 31 of the Act be amended to replace the term ‘reasonable adjustment’ with adjustment wherever it occurs and revise the notes that refer to such adjustments to ensure they accurately reflect the scope of the obligation.

However, while these changes will overcome some of the challenges created by the Full Court of the Federal Court in *Sklavos v Australasian College of Dermatologists*,¹⁰⁵ these changes will not create sufficient clarity for duty bearers and courts as to the obligations that duty bearers have with respect to formulating and considering adjustments. In the more recent case law, judicial interpretations have raised a number of issues, as summarised below.

- Burden of identifying adjustments precisely: The courts have concluded that the provisions place the obligation in formulating the precise nature of the adjustment that needs to be made almost entirely on the person with the need for the adjustment. Employers and service providers have limited obligations to support a person in determining what adjustments should be made and the request needs to be made with a high degree of specificity.

An example is found in *EIX20 v Western Australia*,¹⁰⁶ a case involving the provision of education to a young person with disability in a youth correctional facility. In that case, the complainant argued a number of adjustments should have been made, such as an obligation to ‘deliver the curriculum using explicit instruction, visual supports, technology and computer aided instructions’ and ‘provide the applicant with a calm, distraction-free learning environment’ The court determined that the majority of these were not sufficiently particularised to articulate precisely the adjustment that should have been made and consequently were struck out.

Similar findings were made in *Izzo v Victoria*,¹⁰⁷ *Connor v Queensland*¹⁰⁸ and *Varasdi v Victoria*.¹⁰⁹ In each of those cases, the complainant in a disability discrimination matter in an education context was determined to have failed to sufficiently articulate with precision how a student with their disability could have been effectively educated by the state.

The difficulty in each of these cases is that it places a significant and heavy burden on the person making the complaint to articulate the solution that would enable their inclusion. This is problematic in a context, such as education, where the complainant may not have sufficient professional expertise to identify precisely the adjustment/s that should be made. Education is a specialist discipline, and a student may not be aware how their educational needs can be appropriately met while accommodating their disability.

¹⁰⁵ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

¹⁰⁶ *EIX20 v State of Western Australia* [2022] FCA 1357.

¹⁰⁷ *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770.

¹⁰⁸ *Connor v State of Queensland (Department of Education and Training) (No 3)* [2020] FCA 455.

¹⁰⁹ *Varasdi v State of Victoria* [2018] FCA 1655.

A person with disability also will not necessarily have all the information about the organisation of which it is requesting an adjustment. Consequent to this lack of information, they may not be able to formulate the most appropriate adjustment that should be made.

- Adjustments for the person or position: Another reason courts have concluded that businesses and organisations have not needed to make adjustments is because the adjustment that the person is requesting is not ‘for’ them but instead changes the ‘position’ that the person has in a workplace. Where a court or tribunal has concluded the adjustment would change the position that a person holds, they have determined that there is no requirement to make the adjustment. Courts have further determined that, as adjustments are only required to keep people in their current positions, a reasonable adjustment cannot be to transition a person to a different or more appropriate position in the workplace.

Clarity around the obligations that a duty bearer has and how the requirement to make adjustments operates consistently with the positive duty would be beneficial both for people with disability and duty bearers. In particular, it would be beneficial to require consultation and collaboration where a person requires an adjustment so that the obligation to construct the adjustment is not solely placed upon the person seeking the adjustment.

Additionally, the review could look to the approach adopted in the United Kingdom in the *Equality Act 2010* (UK). The *Equality Act 2010* contains both a duty to make reasonable adjustments, as well as what is understood as an ‘anticipatory duty to make adjustments’ which applies to public entities and service providers.¹¹⁰ Lawson and Orchard describes the anticipatory duty as a duty to ‘continually to identify any possible disability-related disadvantage, and to take reasonable steps to avoid or remove it – failure to do so constituting unlawful discrimination’.¹¹¹

The provision has been successful in requiring public entities to amend their practices and procedures to better serve people with disability in a variety of areas of public life. For example, the provision was used successfully to require the police to change their practices and procedures when interacting with autistic people.¹¹² In 2017, the Supreme Court of the UK concluded that the requirement to make reasonable adjustments required all public transport providers to have clear policies and practices in place for ensuring that disabled seating areas were accessible on public transport.¹¹³ Further, as Bunbury has highlighted, the provision has been useful in ensuring public events support the use of British Sign

¹¹⁰ *Equality Act 2010* (UK) ss 20–22 when read with sch 2 and 3.

¹¹¹ Anna Lawson and Maria Orchard, ‘The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?’ (2021) 80(2) *Cambridge Law Journal* 308, 309.

¹¹² *ZH v Commissioner of the Metropolitan Police* [2012] EWHC 604 (QB); EqLR 425.

¹¹³ *First Group v Pauley* [2017] UKSC 4; WLR 423.

Language prior to any requests for sign language being made by participants.¹¹⁴ Including such an ‘anticipatory’ duty with a duty to make adjustments would complement existing obligations within the DDA as well as any positive duties that are required by duty bearers by giving people with disability an avenue to enforce such obligations, particularly when interacting with public entities and service providers.

Recommendation 3.1.4: The *Disability Discrimination Act 1992* (Cth) include an ‘anticipatory’ duty with a duty to make adjustments as well as any positive duties of duty bearers, particularly public entities and service providers.

¹¹⁴ Stephen Bunbury, ‘An Analysis of the Service Provider’s Legal Duty to Make Adjustments: The Little Mix Saga Intervention’ (2020) 18 *Entertainment and Sports Law Journal* 1.

Part 3.2: Unjustifiable Hardship

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

The concept of unjustifiable hardship represents a critical threshold in disability discrimination law, determining when the legal obligation to not discriminate, including the obligation to provide adjustments, has been legitimately refused.¹¹⁵ However, the current judicial approach to assessing unjustifiable hardship suffers from significant conceptual and practical deficiencies that undermine both legal certainty and the substantive rights of people with disability. Most fundamentally, courts often fail to recognise that a finding of unjustifiable hardship does not eliminate costs; it merely shifts them. It is a finding that the government, business or other duty bearer should not bear the costs of entirely removing barriers to equality and instead the costs of exclusion or limited inclusion are to remain the burden of people with disability themselves, other businesses and employers, the broader public, and the state.

It also does not alleviate the duty to remove discrimination up to the point of unjustifiable hardship. Without progressive implementation of changes towards achieving equality for people with disability, the cost of achieving equality in a single step is much more likely to be burdensome.

Courts often focus narrowly on immediate financial costs to the duty bearer without examining broader economic and social implications. Judges may consider whether a particular employer or service provider can afford to make the changes needed to remove discrimination or to make a specific adjustment, but rarely analyse the systemic consequences of sustaining discriminatory systems or denying that adjustment or an adjustment short of unjustifiable hardship.¹¹⁶ This myopic focus ignores the reality that costs denied at the point of removing discrimination or implementing a ‘reasonable adjustment’ do not disappear—they are simply transferred elsewhere in society. Judicial assessments frequently lack rigour in examining whether less costly alternatives exist that would either entirely eliminate the discrimination or significantly reduce it, whether the respondent considered those alternatives before making a decision to maintain the

¹¹⁵ See DDA s 4(1) (definition of ‘reasonable adjustments’), s 11 setting out the test for unjustifiable hardship, s 21A: requiring ‘reasonable adjustments’ to factored into the defence of inherent requirements), s 21B: defence of unjustifiable hardship in respect of work-related matters; and s 29A: defence in respect of discrimination in other areas. Reasonable adjustment provisions are also found in the *Disability Standards for Education 2005* (Cth) (‘Education Standards’) pt 3, s 4.2(3), 5.2(2), 6.2(2) & 7.2(4). Unjustifiable hardship is also used in the disability standards: *Disability Standards for Accessible Public Transport 2002* (Cth) (‘Transport Standards’) s 33.7; Education Standards, s 10.2 *Disability (Access to Premises – Disability) Standards 2010* (Cth) (‘Premises Standards’) s 4.1.

¹¹⁶ See for example *King v Jetstar Airways Pty Ltd* [2012] FCAFC 115; *Tropoulos v Journey Lawyers Pty Ltd* [2019] FCA 436; *Gordon v St Vincent Hospital Sydney Ltd* [2023] FCA 1188. See also: Alice Taylor, *Interpreting Discrimination Law Creatively* (Hart Publishing, 2023) 141–3.

discrimination, or whether the claimed hardship is genuinely unjustifiable rather than merely inconvenient or requiring organisational change. Without structured factors to consider, courts may too readily accept assertions of hardship without demanding sufficient evidence of both alternatives and proper consideration of alternatives or exploring creative solutions.

Perhaps the most significant failure in judicial reasoning concerns the economic reality of unjustifiable hardship determinations. When a court finds that acting without discrimination or providing an adjustment would impose unjustifiable hardship on a duty bearer, it does not eliminate the costs associated with disability—it simply shifts those costs onto others.

The person with disability bears the most immediate consequences. Unable to access employment, education, goods, services, or facilities without discrimination, they face reduced economic and societal participation and diminished life opportunities. They may need to seek more expensive alternatives, travel longer distances, or simply go without. The financial burden of their exclusion falls directly on them, compounding existing disadvantage. They may require additional support services, assistive technology, or personal assistance that would have been unnecessary if the duty bearer had removed the discriminatory barrier or a ‘reasonable adjustment’ had been made.

Other businesses and employers also incur costs when one duty bearer is excused from fulfilling their obligation to ensure non-discrimination for a person with disability or from making adjustments. If an employer refuses to remove discriminatory barriers or make workplace adjustments, disability employment services and social support systems are called on to provide alternative pathways. The cost has not been eliminated; it has been externalised to other parts of the economy, often to organisations less equipped to bear it.

Ultimately, the state absorbs many of these transferred costs. Government disability support systems, healthcare services, income support programs, and specialised service providers must compensate for the exclusion that unjustifiable hardship findings permit. The public funds what private duty bearers have been excused from providing. Paradoxically, the state often pays more to support exclusion than it would have cost to mandate inclusion through organisations fulfilling obligations to not discriminate either through systemic reform to their policies and practices or through the provision of adjustments.

This cost transfer dynamic reveals a fundamental flaw in how unjustifiable hardship is conceptualised. Courts treat the question as binary—either the duty bearer bears the cost or they are excused—without recognising that excuse merely redistributes rather than eliminates the burden. A proper assessment of unjustifiable hardship must account for these transferred costs and consider whether it is more just and efficient for costs to fall on duty bearers who create barriers or on people with disabilities and society at large. Further, the finding of unjustifiable hardship resulting from the achievement of full equality fails to address the incremental improvements short of unjustifiable hardship that could spread the cost burden for the duty holder over time.

Factors to be considered in determining unjustifiable hardship

As noted in the Issues Paper, the Disability Royal Commission suggested two additional factors be added to those to be considered in determining whether or not the defence of unjustifiable hardship applies in the circumstances of the case. The two factors indicated by the Disability Royal Commission were:

- how much the person with disability has been consulted; and
- what alternative options were available to remove or reduce hardship.

Section 11(1) of the DDA currently provides an inclusive list of factors that may be relevant circumstances to be considered:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person;
- (e) any relevant action plans given to the Commission under section 64.

Below in Part 6.2 of this submission, we have made recommendations for amendments to section 11(1)(e) to ensure that it is not sufficient to have an action plan lodged with the AHRC under section 64.

Given Australia's obligations under the CRPD, attention should be required to be given to the extent to which the measure being considered would fulfil one or more of the human rights of the person with disability and other people with disability, and how a failure to implement the measure in full or part would hinder the enjoyment of human rights for the person with disability and other people with disability.

It is also notable that the framing of unjustifiable hardship in the Premises Standards provides much more fulsome guidance to duty bearers and decision makers.¹¹⁷ These should be fully considered to identify which of the elements in section 4.1 of the Premises standards could be adapted to the more general unjustifiable hardship defence in section 11 of the DDA. For example:

- The extent to which the first person's operations have been or will be financed by any government funding and, as such, can be characterised as a public good: based on section 4.1(3)(c);
- The extent to which the first person's operations perform any public or community function: based on section 4.1(3)(d);

¹¹⁷ *Disability (Access to Premises – Buildings) Standards 2010* (Cth) s 4.1.

- Financial, staffing, technical, information and other resources reasonably available to the first person, including any grants, tax concessions, subsidies or other external assistance provided or available: based on section 4.1(3)(h)
- Benefits reasonably likely to accrue, including benefits to people with disability, to other individuals and organisations interacting with the first person, and detriments likely to accrue if the first person is relieved of its obligations under the Act: based on section 4.1(3)(j);
- Any evidence regarding efforts made in good faith to eliminate the discrimination, including consulting relevant disability experts and disability representative organisations: section 4.1(3)(m).

Recommendation 3.2.1: An adaption of the approach suggested by the Disability Royal Commission and incorporating all of the principles embedded in section 4.1 of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be adopted in reframing unjustifiable hardship, such that in determining unjustifiable hardship, a decision maker should consider the extent of consultation with any person with disability and the available alternative measures to achieve improvements in equality for people with disability and eliminate or reduce hardship.

Recommendation 3.2.2: The definition of unjustifiable hardship in the *Disability Standards for Accessible Public Transport 2002* (Cth) and the *Disability Standards for Education 2005* (Cth) be amended to incorporate all of the principles adopted in an amended definition in section 11 of the *Disability Discrimination Act 1992* (Cth) and all of the notes in the disability standards that refer to unjustifiable hardship be reviewed to ensure they are consistent with the amended definition.

We also agree that further transparency of the steps taken by the duty-bearer in considering any adjustments or changes to policy are necessary including requiring documentation of consideration of the facts outlined in the legislation and evidence of unjustifiable hardship at the time any request for an adjustment is made.

Part 3.3: Inherent Requirements

20. What are your views on amending the Disability Discrimination Act to consider the nature and extent of any adjustments made and encourage consultation between prospective or current employers and prospective or current employees before making employment decisions?

21. Are there other amendments to the Disability Discrimination Act that could support engagement between prospective or current employers and prospective or current employees to better understand the inherent requirements of a job?

22. Should any other amendments be made to the definition of inherent requirements, including factors that should be considered when deciding whether a person could carry out the inherent requirements of a job?

The Disability Royal Commission identified significant flaws in how the ‘inherent requirements’ exception operates under the DDA. This exception allows discrimination in employment and education where a person with disability cannot meet the inherent requirements of a job or course, even with reasonable adjustments. However, the Commission found that this provision is frequently misapplied, creating barriers to inclusion rather than serving as a narrowly-tailored, legitimate limitation on discrimination protections.

There are currently a number of difficulties with the approach to inherent requirements by courts and duty bearers. Courts and duty bearers often interpret ‘inherent requirements’ too broadly, treating preferences, conveniences, or traditional practices as essential requirements rather than limiting the exception to genuinely necessary elements.¹¹⁸ Decision-makers frequently determine that a person cannot meet inherent requirements without first seriously exploring what reasonable adjustments could enable them to do so, reversing the proper analytical sequence. Rather than engaging in individualised assessment, decision-makers rely on generalisations and assumptions about what people with particular disabilities can or cannot do.

Claims that particular requirements are ‘inherent’ often lack rigorous evidence demonstrating their necessity to the fundamental nature of the role or course. Inherent requirements are sometimes conflated with occupational health and safety concerns, creating circular reasoning where safety requirements—the means by which safety is to be achieved—that haven't been adapted for people with disability are treated as inherent. The cumulative effect of these flawed applications is systemic exclusion of people with disability from employment and educational opportunities that should be accessible with appropriate adjustments.

¹¹⁸ See for example: *X v Commonwealth* (1999) 200 CLR 177.

Drawing on the Disability Royal Commission's findings, a reformed approach to inherent requirements should incorporate the following principles and requirements:

Legislation should explicitly require that inherent requirements be:

1. necessary to the fundamental nature of the employment or educational program;
2. incapable of being eliminated or modified without fundamentally altering that nature; and
3. distinguished from marginal, peripheral, or traditional practices that could be modified.

Recommendation 3.3.1: The inherent requirements exception found in the *Disability Discrimination Act 1992* (Cth) and disability standards made under that Act be narrowly defined and strictly construed as a genuine exception to fundamental equality rights, and be limited to those tasks, functions, or competencies that are truly essential to the core purpose of the job or course – not merely traditional, preferred, or convenient ways of performing the role.

Recommendation 3.3.2: The *Disability Discrimination Act 1992* (Cth) clearly set out that inherent requirements under the Act and under any relevant disability standards made under the Act be: (1) Necessary to the fundamental nature of the employment or educational program; (2) Incapable of being eliminated or modified without fundamentally altering that nature; and (3) Distinguished from marginal, peripheral, or traditional practices that could be modified without altering that nature.

Duty bearers should bear the burden of proving with credible evidence that a requirement is genuinely inherent. This should include:

- detailed position or course analysis identifying core functions;
- evidence of why each claimed requirement is essential rather than merely traditional or convenient;
- documentation of the consequences of not performing the specific requirement;
- consideration of whether technology, work redesign, or alternative methods could eliminate the requirement;
- extent of consultation with the person seeking to undertake the position as to how they could undertake the position; and
- evidence of enquiries into what adjustments could be implemented to enable the person with disability to fulfil the inherent requirements and into the cost of those adjustments.

Recommendation 3.3.3: The *Disability Discrimination Act 1992* (Cth) be amended to expressly require the employer or educational institution seeking to rely on a person's alleged incapacity to fulfil inherent requirements under the Act and under any relevant disability standards made under the Act bear the burden of proving that the requirement is genuinely inherent, in that the requirement is (1) necessary to the fundamental nature of the employment or educational program; (2) incapable of being eliminated or modified without

fundamentally altering that nature; and (3) distinguished from marginal, peripheral, or traditional practices that could be modified without altering that nature.

Assertions, assumptions, or general statements should be insufficient. Courts should demand rigorous proof.

Recommendation 3.3.4: The proper analytical sequence to be applied under the *Disability Discrimination Act 1992* (Cth) and disability standards made under the Act in relation to ‘inherent requirements’ must be clarified: duty bearers must (a) identify the inherent requirements; then (b) identify all adjustments that could enable the person to meet requirements, then (c) identify what resources are available to it to implement the adjustments, before (d) determining whether inherent requirements can be met without or with adjustments.

Only after exhausting reasonable adjustment possibilities can inherent requirements justify different treatment. Decision-making must be based on individualised assessment of the particular person's abilities with appropriate adjustments. Each person must be assessed on their own merits with their own adjustment needs considered.

Work health and safety concerns should be addressed separately from inherent requirements and should not be used to expand what can properly be characterised as inherent. Further, what constitutes an inherent requirement is not static. As technology evolves, social practices change, and innovative practices and adjustments emerge, requirements previously considered inherent may become obsolete or modifiable. Legislation should recognise this dynamism. Transparency enables accountability and reveals whether the exception is being appropriately limited or broadly applied to exclude people with disability.

The inherent requirements assessment should align with positive duties to make adjustments and eliminate discrimination. Rather than being a broad shield against inclusion efforts, inherent requirements should operate only as a last resort after proactive efforts to enable participation have been genuinely exhausted.

Part 3.4: Exclusionary Discipline

23. Should the concepts of exclusion and exclusionary discipline be defined in the Disability Discrimination Act?

We support the need for the DDA to define the concepts of ‘exclusion’ and ‘exclusionary’ discipline in the context of education, notwithstanding that these concepts may already come within the definition of ‘other detriment’ pursuant to section 22(2)(c) of the DDA.

The concept of ‘exclusion’ can cover a wide range of disciplinary measures, and differs in the different education contexts. In compulsory education for example, this concept extends beyond formal suspensions and expulsions to include informal practices such as ‘take-home’ requests, where parents and other caregivers are asked to collect their child from school before the end of the school day. These practices often fall outside formal reporting frameworks and, therefore, may not be captured in official suspension or expulsion data. However, in a 2020 independent review of South Australian Government School practice, Graham and colleagues considered the use of exclusionary discipline, which included take-home.¹¹⁹ Graham and colleagues concluded that students with disability are ‘disproportionately impacted by these disciplinary measures’ when compared to non-disabled peers.¹²⁰

Informal ‘take-home’ practices are of particular concern. They are often framed as voluntary and/or temporary, but they effectively constitute forced removals from the classroom without procedural safeguards, formal documentation, or appropriate consideration of whether or not adjustments needed to enable the student to fully and equitably participate in education have been fully implemented. Further, take-homes are often imposed without adequate regard to the student’s ongoing educational outcomes. The Graham and colleagues’ 2020 report suggests that the prevalent use of exclusionary discipline towards students with disability ‘may be driven, at least in part, by gaps in understanding of student need and failures to provide appropriate educational adjustments to support a student’s access to the curriculum and participation in education programs’.¹²¹ Additionally recent analyses confirm that exclusionary discipline not only begins as early as the first year of schooling, often through informal ‘take home’ requests, but also escalates over time: ‘short informal exclusions quickly progress to longer, formal

¹¹⁹ Linda J Graham, Tony McCarthy, Callula Killingly, Haley Tancredi and Shiralee Poed, *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian Government Schools: Final Report* (The Centre for Inclusive Education, QUT; 2020) 1, 61.
<<https://www.education.sa.gov.au/docs/support-and-inclusion/engagement-and-wellbeing/student-absences/report-of-an-independent-inquiry-into-suspensions-exclusions-and-expulsions-in-south-australian-government-schools.pdf>>.

¹²⁰ Ibid.

¹²¹ Ibid.

suspensions ... one suspension can become many'.¹²² Empirical data from South Australia shows that four in five students suspended ten or more times in one year had a disability.¹²³ Further, the data shows how '[t]he use of take homes and suspensions often lead to further escalation in the use of take homes, suspensions and exclusions, indicating take homes and suspensions are being used in a manner that does not address the drivers of problem behaviours but likely reinforces it'.¹²⁴ Indigenous students and children in out-of-home care are also 'massively overrepresented' in suspension statistics.¹²⁵ These patterns highlight that exclusionary discipline compounds disadvantage and contributes to what has been described as the 'school-to-prison pipeline'.

Greater clarity is needed in the DDA, through the use of an express provision or sub-provisions, to prevent duty bearers from relying on both broad and vague disciplinary measures too quickly which in effect discriminate against students with disability. This amendment to the DDA must align with human rights standards under the CRPD. Importantly, this amendment should require that meaningful attempts to meet a student's needs through the provision of adjustments are made and documented before any exclusionary discipline is contemplated. Further, any decision to vary the basis of a student's enrolment, such as requiring them to enrol on a part-time basis or to participate only or predominantly in e-Learning approaches, should be carefully considered and documented to ensure it is not being made as a disciplinary measure in respect of the student's disability and/or the manifestations of their disability. It should also be subject to period review. To avoid any doubt, all forms of exclusionary discipline should be used as a last resort and only in response to a real and legitimate safety risk. The DDA should require that all uses of exclusionary discipline are documented, including what attempts were made to ensure the student was supported in the education setting.

Recommendation 3.4.1: The *Disability Discrimination Act 1992* (Cth) be amended to expressly include, in the context of the prohibition of discrimination in education found in section 22, 'exclusion' and 'exclusionary discipline' and define these terms broadly to include any temporary or permanent change to a student's enrolment and attendance and participation in educational activities.

¹²² Linda J Graham, Callula Killingly, Kristin R Laurens and Naomi Sweller, '[Suspensions and Expulsions Could Set Our Most Vulnerable Kids on a Path to School Drop-Out, Drug Use and Crime](https://theconversation.com/suspensions-and-expulsions-could-set-our-most-vulnerable-kids-on-a-path-to-school-drop-out-drug-use-and-crime-166827)', *The Conversation* (Online, 15 September 2021) <<https://theconversation.com/suspensions-and-expulsions-could-set-our-most-vulnerable-kids-on-a-path-to-school-drop-out-drug-use-and-crime-166827>>.

¹²³ Ibid.

¹²⁴ Linda J Graham, Tony McCarthy, Callula Killingly, Haley Tancredi and Shiralee Poed, *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian Government Schools: Final Report* (The Centre for Inclusive Education, QUT, 2020) 1, 22 <<https://www.education.sa.gov.au/docs/support-and-inclusion/engagement-and-wellbeing/student-absences/report-of-an-independent-inquiry-into-suspensions-exclusions-and-expulsions-in-south-australian-government-schools.pdf>>.

¹²⁵ Ibid 1, 107–9.

24. Should there be exceptions or limits on when exclusion is unlawful?

We accept that there should be exceptions or limits on when exclusion is unlawful, but it is important to stress the need to ensure that any such limits are framed narrowly. In particular, exceptions should be framed to avoid duty bearers undermining the rights of students with disability to access education on the same basis as their non-disabled peers. As such, any exception or limitation should ensure that exclusionary discipline is exercised as a last resort and only after all available strategies have been exhausted. This includes the provision of adjustments and other de-escalation approaches.

To these points, Down and colleagues identify nine critical ‘silences’ in current policy discourses surrounding school exclusions, which underscore the necessity for narrowly defined exceptions.¹²⁶ These silences include the neglect of underlying socio-economic and systemic causes of student behaviour, the tendency to blame the student alone for behavioural issues without acknowledging broader systemic or contextual factors, and the lack of procedural fairness and meaningful student participation in exclusion decisions.¹²⁷ Such omissions can lead to disproportionate impacts on vulnerable groups, including students with disabilities, Indigenous students, and those from socio-economically disadvantaged backgrounds. Therefore, any exceptions to the unlawfulness of exclusion must be framed within a comprehensive policy that addresses these silences, ensuring that exclusions are not only legally justified but also contextually appropriate and equitable.

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

The Issues Paper notes that the concept of exclusionary discipline is subject to varying interpretations across the eight Australian jurisdictions. While this situation may exist, these existing education frameworks apply to all students – while the purpose of the DDA in respect of education is, by contrast, a framework aimed at ensuring that students with disability have non-discriminatory access to all aspects of education. In other words, the point of the DDA is to provide a legal framework for duty bearers to comply with to promote the rights of people with disability. As such, legislators cannot simply adopt or transplant provisions from general education legislation into the DDA. Instead, any exclusionary discipline under the DDA must be carefully designed to operate in concert with the principles of adjustments and the right to non-discriminatory education. For example, safety risks must be treated as genuine and proportionate and disciplinary measures must not unfairly prevent the student with disability accessing education free from discrimination. Suspension, expulsion or other forms of exclusion should only be allowed where all available alternatives have been exhausted and the decision is reasonable

¹²⁶ Barry Down, Anna Sullivan, Neil Tippet, Bruce Johnson, Jamie Manolev and Janean Robinson, ‘What is Missing in Policy Discourses About School Exclusions?’ (2024) 65 *Critical Studies in Education* <<https://www.tandfonline.com/doi/full/10.1080/17508487.2024.2312878#abstract>>.

¹²⁷ Ibid.

in light of all the circumstances, ensuring that disciplinary action is both proportionate and balanced.

Relatedly, the QUT Centre for Inclusive Education recently made recommendations to the South Australian Government to ‘include the stipulation that ‘any form of exclusionary discipline may only be used as a last resort, and only for serious behaviours to be described in the [*Education and Children’s Services Act 2019 (SA)*]’.¹²⁸ This peak research body also recommended the South Government amend the *Education and Children’s Services Act 2019 (SA)* to:¹²⁹

[i]mprove clarity and reduce subjectiveness of interpretation by revising and making explicit the grounds permissible for the use of exclusionary discipline, as per international best practice examples, including through: (i) the introduction of levels of incident severity (lower level and severe), and (ii) providing a list of approved responses for each level, (iii) proscribing the use of all forms of exclusionary discipline for lower level (minor) incidents, (iv) proscribing the use of any form of exclusionary discipline—for any reason—to children in Reception through to end Grade 2.

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

Given the fact that access to educational environments differs in compulsory settings compared to higher education and vocational education and training sectors, it might be the case that a different approach to exclusionary discipline is warranted. Notwithstanding this, the importance of ensuring procedural safeguards, such as clear reasons for the exclusionary decision, opportunities for review, and considerations of adjustments is relevant to all educational environments.

¹²⁸ QUT Centre for Inclusive Education, *Submission to the South Australian Government: [Inclusive Education: Implementing Recommendations of the Disability Royal Commission](https://research.qut.edu.au/c4ie/wp-content/uploads/sites/281/2025/08/C4IE-Submission_SA_IE_Implementing-Recommendations.pdf)* (2025) 1, 5 <https://research.qut.edu.au/c4ie/wp-content/uploads/sites/281/2025/08/C4IE-Submission_SA_IE_Implementing-Recommendations.pdf>.

¹²⁹ Ibid 5.

Part 4.1: Offensive Behaviour and Vilification

27. How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?

We support the amendment of the DDA to include a prohibition similar to, but more comprehensive than, section 18C of the RDA. That provision provides a clear standard of conduct which is transferable to the disability context.

Such conduct is a form of discrimination as defined. That is, it is less favourable or unfavourable treatment on the basis the person has a particular characteristic or characteristics. There is significant benefit, however, of expressly prohibiting such conduct in discrimination law given the low levels of understanding of the breadth of discrimination, and the limitation of most discrimination prohibitions to organisational duty bearers rather than individuals. This benefit has, to some extent, been achieved in respect of the articulation of sexual harassment in the SDA and state and territory discrimination laws. Not only does it mean that those who experience the treatment can readily see that what they have experienced is unlawful, but also that those required to comply with the law understand that such conduct is clearly prohibited.

Problems with the current prohibitions of harassment in the DDA

As noted in the Issues Paper, the DDA currently prohibits harassment only in three specific contexts: employment (section 35), education (section 37) and the provision of goods and services (section 39). In comparison to the RDA s18C provision, these are narrower in scope in terms of areas of life activity, but they provide broader and more appropriate protections as they are not limited to conduct ‘otherwise than in public’ as is the case in the RDA.

Despite this, the current provisions in the DDA concerning harassment are largely ineffective. The provisions have been interpreted as requiring conduct which is ‘both persistent and harrying’,¹³⁰ and ‘a series of actions causing vexation and worry’.¹³¹ Thus, single incidents, no matter how serious or harmful, have been interpreted as not falling within the prohibition.

This interpretation fails to understand the impact of prejudice-based conduct on those who experience it repeatedly at the hands of different people. Much has been written by social psychologists about the ‘negative mental ... and physical health outcomes’¹³² of stigma,

¹³⁰ *Sluggett v Commonwealth of Australia* [2011] FMCA 609, [674].

¹³¹ *Berry v State of South Australia* [2017] FCA 702, [11].

¹³² Robin Banks, ‘A rose is a rose: But not all discrimination smells the same: An exploration of the capacity of the psychology of stigma, prejudice and discrimination to enhance discrimination law’ (PhD Thesis, University of Tasmania, 2024) 208.

discrimination and prejudice.¹³³ A single act by the perpetrator is not experienced as that by the target. Rather it acts as a reminder that the person is seen as different and ‘other’ and that they cannot escape such acts in any aspect of their lives. This impact needs to be understood and to inform the framing of discrimination law provisions to avoid any acts that perpetuate the stigma of people with disability experience.

The framing of section 18C of the RDA avoids the problem of requiring repeated conduct, it provides clarity around the prohibition of conduct that ‘is likely, in all the circumstances, to offend, insult, humiliate or intimidate’ a person or group of people on the basis of a protected attribute.

Scope of the conduct to be prohibited

The scope of conduct prohibited under section 18C should, however, be expanded in the provision in the DDA to reflect the ways in which discriminatory, stigmatising and prejudice-based conduct is *experienced* by people with disability.

Firstly, it should be expanded to include ‘ridicule’ as this is a, sadly all too common, form of conduct targeting people with disability. This term is included in section 17(1) of the *Anti-Discrimination Act 1998* (Tas) that prohibits such conduct in relation to people with disability, and others. In the inclusion of ‘ridicule’, section 17(1) mirrors the language used in section 17(3) which defines sexual harassment as another form of prohibited conduct. The inclusion of this term also reflects an understanding of the types of stigmatising conduct people with disability are exposed to.¹³⁴

¹³³ See, for example, Kimberly T Schneider, Suzanne Swan and Louise F Fitzgerald, ‘Job-related and psychological effects of sexual harassment in the workplace: Empirical evidence from two organizations’ (1997) 82(3) *Journal of Applied Psychology* 401; Janet K Swim, Laurie L Hyers, Laurie L Cohen and Melissa J Ferguson, ‘Everyday sexism: Evidence for its incidence, nature, and psychological impact from three daily diary studies’ (2001) 57(1) *Journal of Social Issues* 31; Jennifer Crocker and Brenda Major, ‘Social stigma and self-esteem: The self-protective properties of stigma’ (1989) 96(4) *Psychological Review* 608; Kevin W Allison, ‘Stress and oppressed social category membership’ in Janet K Swim and Charles Strangor (eds), *Prejudice: The target’s perspective* (Academic Press, 1998) 145, 160–63; Naomi C Priest, Yin C Paradies, Wendy Gunthorpe, Sheree J Cairney and Sue M Sayers, ‘Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth’ (2011) 194(10) *Medical Journal of Australia* 546; Elizabeth A Pascoe and Laura Smart Richman, ‘Perceived discrimination and health: A meta-analytic review’ (2009) 135(4) *Psychological Bulletin* 531; Saffron Karlsen, ‘Relation between racial discrimination, social class, and health among ethnic minority groups’ (2002) 92(4) *American Journal of Public Health* 624; Mark L Hatzenbuehler, Jo C Phelan and Bruce G Link, ‘Stigma as a fundamental cause of population health inequalities’ (2013) 103(5) *American Journal of Public Health* 813; Stephenie R Chaudoir, Valerie A Earnshaw and Stephanie Anel, ‘“Discredited” versus “Discreditable”: Understanding how shared and unique stigma mechanisms affect psychological and physical health disparities’ (2013) 35 *Basic and Applied Social Psychology* 75; Larissa A McGarrity, David M Huebner and Ryan K McKinnon, ‘Putting stigma in context: Do perceptions of group stigma interact with personally experienced discrimination to predict mental health?’ (2013) 16(6) *Group Processes & Intergroup Relations* 684.

¹³⁴ An infamous example of ridiculing of a person with disability is the mocking mimicry by President Donald Trump in November 2015 of *New York Times* journalist, Serge Kovalski, a person with a physical disability. Other examples were considered by the Disability Royal Commission and are reported in *Nature and extent of violence, abuse, neglect and exploitation: Final Report* (volume 3, Commonwealth of Australia, 2023).

In order to provide greater clarity to decision makers about the range of conduct that people with disability regularly experience, the provision should also include conduct that is derogatory and/or demeaning, and/or interferes with mobility, communication and disability aids and/or equipment. All of these are the effects and forms of ableism experienced regularly by people with disability.¹³⁵

Who should be protected

The protections in the DDA against harassment are also insufficient to ensure people who experience such conduct have protection. It is not enough to only prohibit such conduct when it is experienced by an employee at the hands of the employer or a supervisor, or by a student at the hands of staff of the education institution, or by a client at the hands of staff of a service provider. These are not the only circumstances in which people with disability are exposed to disability prejudice. For example, an employee should be protected against such conduct by a third party who is interacting with them in the context of their employment, whether a client, a contractor, a patient, etc. Similarly a staff member or student should be protected against such conduct by another student or a third party interacting with them in the context of their education. This could be achieved by mirroring the language found in section 22 of the ADA Tas, which specifies that it is unlawful to engage in particular conduct.¹³⁶

... by or against a person engaged in, or undertaking any, activity in connection with any of the following:

- (a) employment;
- (b) education and training;
- (c) provision of facilities, goods and services;
- (d) accommodation;
- (e) membership and activities of clubs;
- (f) administration of any law of the State or any State program;
- (g) awards, enterprise agreements or industrial agreements.

The ‘by or against’ means that the conduct is prohibited whether it is perpetrated by a person or against a person in the relevant area of activity. The ‘in connection with’ ensures a broad reading of the areas of activity. So a person who is working on a retail counter who experiences disability prejudice from a customer has protection as it is conduct ‘against’ them ‘in connection with’ their employment.

¹³⁵ Michelle R Nario-Redmond, *Ableism: The causes and consequences of disability prejudice* (Wiley-Blackwell, 2019); and Maria Palacios, ‘Ableism – A Poem’ fully reproduced in pages 34–36.

¹³⁶ DDA s 22(1).

Private and public acts

It is also not sufficient to only provide a prohibition of such conduct ‘other than in private’. The scope of the protection in the ADA Tas makes it clear that conduct need not be ‘otherwise than in private’.

It is clear, however, that many people with disability currently experience disability prejudice in public places.¹³⁷ As with other abusive conduct (whatever form it takes) experienced by people with disability, such treatment:¹³⁸

... in public places has a material impact on the health and wellbeing of people with disability. It can cause individuals to modify their behaviours, such as by not going out in public alone and avoiding particular places, activities and people. This includes avoiding travelling on public transport, going to places where alcohol is consumed, and avoiding groups of teenagers and young adults. The overall effect is of limiting people’s lives and reducing their participation in the community.

This effect clearly breaches internationally recognised human rights found in the CRPD, in particular Article 30. It is important that such public acts also be prohibited under the DDA. Limiting the protection to the specified areas of activity within the DDA would fail to achieve this. In the event that the areas of activity identified in the DDA are not expanded to include public life generally, amendment to the DDA will be needed to make such conduct in public unlawful.

28. If the Disability Discrimination Act were to prohibit offensive behaviour and/or harassment, how should these terms be defined?

As noted above, the terms used in section 18C of the RDA provide a suitable starting point for provisions to be included in the DDA. The language ‘reasonably likely in all the circumstances to ...’ is well understood by courts, lawyers and the general public. These terms import an objective standard which is based on the response of a reasonable member of the target audience.¹³⁹ Courts have stated that the provisions only prohibit conduct having ‘profound and serious effects’.¹⁴⁰

In order for decision makers to apply such a provision appropriately it is necessary that they keep themselves informed of the profound harms caused by disability (and other prejudice). Unless decision makers have this knowledge there is a very real risk that conduct that seems to them relatively ‘low level’, but which has a profound effect on the person with disability, will not be found to be unlawful.

¹³⁷ Disability Royal Commission, *Final report: Executive Summary, Our vision for an inclusive Australia and Recommendations* (Commonwealth of Australia, September 2023) 49.

¹³⁸ Ibid 50.

¹³⁹ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

¹⁴⁰ *Creek v Cairns Post Pty Ltd* (2001) 11 FCR 352, 356-7 [16] (Kiefel J).

Recommendation 4.1.1: The *Disability Discrimination Act 1992* (Cth) be amended to repeal sections 35, 37 and 39 and add a provision broadly based on section 18C of the *Racial Discrimination Act 1975* (Cth). The provision should make it clear that:

- such conduct need not be repeated in order to be unlawful,
- the prohibition applies to conduct whether in public or private;
- the prohibition applies in all areas of life in which discrimination is unlawful under the *Disability Discrimination Act 1992* (Cth) and that people are protected from such conduct no matter what their role is in the particular situation;
- the prohibition should extend to conduct that is ridiculing, demeaning, derogatory and/or interferes with mobility, communication and disability aids and/or equipment.

Recommendation 4.1.2: Decision makers dealing with complaints under the *Disability Discrimination Act 1992* (Cth) be required to have an up-to-date knowledge of the forms and impacts of disability prejudice and that expert evidence on these matters should be available.

29. Should there be exemptions for any behaviour, similar to the Racial Discrimination Act?

We support the inclusion of defences similar to those found in section 18D of the RDA. These defences strike an appropriate balance between prohibiting harmful conduct, on the one hand, and permitting legitimate discussion and debate which serves the public interest and which is done reasonably and in good faith, on the other.¹⁴¹ This is consistent with other areas of speech regulation, such as defamation law.¹⁴²

The approach taken in the ADA Tas to defences in respect of the relevant provisions is also useful to consider. Section 55 states that:

The provisions of section 17(1) and section 19 [discussed below] do not apply if the person's conduct is –

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) any purpose in the public interest.

¹⁴¹ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, 135 FCR 105. See also Bill Swannie 'The Influence of Defamation Law on the Interpretation of Australia's Racial Vilification Laws' (2020) 26 *Torts Law Journal* 34.

¹⁴² *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

The prohibitions in section 17(1) and the defence under section 55 were considered by Brett J of the Tasmanian Supreme Court in *Durston v Anti-Discrimination Tribunal (No 2)*¹⁴³ in the context of both freedom of religion and the implied freedom of political communication. The Court held that section 17(1) was not invalid on the basis that section 17(1), read in conjunction with section 55, did not infringe these rights. In reaching this conclusion, the Court considered section 55¹⁴⁴ and the decisions of French J in *Bropho v Human Rights and Equal Opportunity Commission*¹⁴⁵ and Bromberg J in *Eatock v Bolt*.¹⁴⁶

Recommendation 4.1.3: If provisions are implemented in the *Disability Discrimination Act 1992* (Cth) to protect against public and private disability prejudice (offensive and related conduct) and incitement on the basis of disability, a defence be provided modelled on the approaches in section 18D of the *Racial Discrimination Act 1975* (Cth) and section 55 of the *Anti-Discrimination Act 1998* (Tas).

30. Given the recent legislative developments, are there any further gaps in the legislative framework that could be addressed by amendments to the Disability Discrimination Act to protect people with disability from vilification?

There have been examples of public figures inciting negative views of people with disability through their public statements. One notorious example is the on-air comments of Prue MacSween that ‘children with disabilities should not be in classrooms with “normal” kids’.¹⁴⁷ More recently the conflation of people with disability and fraud committed by NDIS providers has caused backlash against this vital national program.

The ADA Tas prohibits conduct that has the potential to incite negative views of particular attribute groups including people with disability. Section 19 of the ADA Tas states that:

[a] person, by a public act, must not incite hatred towards, severe contempt for, or severe ridicule of a person or group of people on the ground of ... any disability of the person or any member of the group.

This provision was used successfully by a person with intellectual disability to challenge the public statements made by MacSween. That complaint resulted in a public apology from MacSween. Given such conduct is arguably more serious because of its public nature, consideration could be given to whether it should be characterised as an offence under the Part 2, Division 4 of the DDA.

¹⁴³ *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

¹⁴⁴ *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, [70]–[76].

¹⁴⁵ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16.

¹⁴⁶ *Eatock v Bolt* [2011] FCA 1103.

¹⁴⁷ TV Tonight, ‘[Sunrise regular offends families living with disabilities](https://tvtonight.com.au/2010/07/sunrise-regular-offends-families-living-with-disabilities.html)’ (20 July 2010) <<https://tvtonight.com.au/2010/07/sunrise-regular-offends-families-living-with-disabilities.html>>. See, also, the example of President Trump discussed in n 231 above, which had the potential (given his status) of making it seem socially acceptable to ridicule people with disability.

Recommendation 4.1.4: The *Disability Discrimination Act 1992* (Cth) be amended to include a provision modelled on section 19(b) of the *Anti-Discrimination Act 1998* (Tas). Consideration should be given to whether such a provision should be included in Part 2, Division 4—Offences.

Part 4.2: Policing and Justice

31. How could the Disability Discrimination Act be amended to ensure that it covers policing?

All aspects of policing and justice should be captured by the DDA. The simplest way to ensure that all aspects of policing and justice are covered is to prohibit disability discrimination in all aspects of public life. Such an approach would be consistent with the approach adopted in section 9 of the RDA, which prohibits racial discrimination in all aspects of public life.¹⁴⁸ This would also be consistent with Australia's obligations under the CRPD.

Recommendation 4.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to extend coverage to include all aspects of public life, including policing and justice.

32. Are there any specific circumstances or situations relating to policing or justice that should be excluded from the application of the Disability Discrimination Act?

There should not be any specific circumstances or situations that relate to policing or justice that should be entirely excluded from the application of the DDA. Policing and justice should be administered in a non-discriminatory manner. The DDA already provides and will continue to provide the capacity to justify conduct that could be indirectly discriminatory. In terms of providing adjustments, the police and other agencies administering justice systems should provide adjustments for people with disability unless it would cause unjustifiable hardships. There are no circumstances in which directly discriminatory behaviour should be justified.

Recommendation 4.2.2: No specific defences be provided in the *Disability Discrimination Act 1992* (Cth) in respect of the prohibition of discrimination in policing and justice administration.

¹⁴⁸ RDA s 9.

Part 5: Exemptions

In considering the approach to ‘exemptions’ in discrimination law, there are two aspects that we urge to be given consideration. The use of the language of ‘exceptions’ and ‘exemptions’ in discrimination law in Australia adds to confusion about what is permitted and what is a defence to a claim of discrimination. The framing of the exemptions in the DDA perpetuates this confusion. It sets out various ‘exceptions’ such as those in Part 2 Division 1 – Discrimination at work: section 21A provides an ‘exception’ relating to inherent requirements; section 21B provides an ‘exception’ relating to unjustifiable hardship. In Part 2 Division 2 – Discrimination in other areas, the DDA sets out in section 29A the application of unjustifiable hardship. It then, Part 2 Division 5 sets out a range of ‘exemptions’ that have ongoing application—sections 45 to 54A—then provides that the Commission may grant ‘exemptions’ on a temporary basis.

Unlike some of the other discrimination laws in Australia, neither the DDA nor the complaint provisions in the AHRC Act specify who bears the burden of proof in relation to the exception of inherent requirements or the exemptions.

Reforms to the DDA could begin the work of making clear the distinction between exceptions and ongoing ‘exemptions’ on one hand and temporary exemptions on the other. The first category are all forms of defence to a claim of unlawful discrimination. They all contain elements that require a determination of fact before they can protect the respondent to a complaint. Perhaps the classic example of this is the exemption found in section 46 – Superannuation and insurance. For that exemption to apply to conduct—say a refusal to provide accident insurance cover to a person with disability¹⁴⁹—the insurer must demonstrate on the balance of probabilities that:

- (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
- (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

The use of the term ‘exemption’ to describe such provisions is unhelpful. Section 46 is clearly a defence that the respondent must establish applies to it in the circumstances of the case. To the lay person, to exempt a person from having to do something is to protect the person from having the obligation to do it. To avoid this likely misunderstanding all of the provisions that operate in this way should be clearly termed ‘defences’.¹⁵⁰

¹⁴⁹ DDA s 46(1).

¹⁵⁰ It is notable that the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) identifies three situations as ‘concessions’. These mean particular technical standards do not apply in those situations because a decision was made in the development of the standards that in those situations the

Recommendation 5.1: The headings of section 21A and 21B in the *Disability Discrimination Act 1992* (Cth) be amended by replacing the word ‘Exception’ with the word ‘Defence’, and that the provisions be reworded to make it clear that the effect of the provision is to provide a defence to an allegation of discrimination.

Recommendation 5.2: The heading to section 29A in the *Disability Discrimination Act 1992* (Cth) be amended to read ‘Defence – Unjustifiable hardship’, and that the provision be reworded to make it clear that the effect of the provision is to provide a defence to an allegation of discrimination.

Recommendation 5.3: Part 2 Division 5 in the *Disability Discrimination Act 1992* (Cth) be amended to create two separate divisions: the first division to contain sections 45 to 54A inclusive, be renamed ‘Defences’ and the provisions all be amended to make it clear that the effect of each provision is to provide a defence to an allegation of discrimination; the second division to contain sections 55 to 58 inclusive and be named ‘Temporary Exemptions’.

In addition, the DDA should make it clear that the burden of establishing the facts necessary for the provision to apply (and therefore to relieve the obligation to comply with the Act) lies with the respondent seeking to rely on that provision.¹⁵¹ It is important that a lay person (including an organisation with obligations under the Act) understand what the ‘defences’ mean in the context of both the obligations of organisations and of a claim of discrimination.¹⁵² Usefully, some legislation in Australia, for example, the ADA Tas includes a provision that specifies the onus of proof in respect of exceptions.¹⁵³ Unfortunately, that provision is not found in the part of the Act that deals with exceptions but much later in the Act.

Recommendation 5.4: The *Disability Discrimination Act 1992* (Cth) be amended to include a provision at the beginning of Part 2 that states:

X. Proof of defences

application of the technical standard would constitute an unjustifiable hardship. This means that responsible entities can rely, without more, on the concession.

¹⁵¹ While this has been the effect of jurisprudence—see, for example, *Rigon v CAMS Ltd* [2000] HREOCA 32—expressly stating this burden makes it clear to those with obligations under the Act that they can’t simply rely on an exemption being applied or on the complainant having to disprove the exemption.

¹⁵² It is notable that the original framing of the DDA made it clear that the then HREOC in determining complaints under the Act was ‘not required to have regard to any exception of exemption ... unless there is evidence before the Commission that the exception or exemption is or may be applicable’: DDA s 99 (now repealed).

¹⁵³ ADA Tas s 101.

A defence referred to in this Act is a defence to a complaint alleging any acts, omissions or practices that are unlawful under Division 1, 2, 2A, 3 or 6 of Part 2 of this Act including any conduct that is an offence under Division 4 of Part 2 other than section 42 of this Act, and the person who relies on a defence must prove it on the balance of probabilities, and cannot rely on a defence to avoid its obligations under section Y [the new positive duty provision].

Consideration should also be given to whether or not a similar provision is needed in the *Australian Human Rights Commission Act 1986* (Cth) in respect of the complaints procedures.

33. Could any of the permanent exemptions be narrowed or updated, while balancing other policy considerations?

It is of note that there are, overall, relatively few cases under the DDA that go to determination where an exemption under sections 45 to 54A has been argued to apply. The exemption relating to the provision of insurance and superannuation has been considered and determined in several cases.¹⁵⁴ Those cases have clarified the scope of the defence and understanding of the DDA's operation in relation to superannuation and insurance would be enhanced through the elements set out in those cases being incorporated into the factors required to be established to rely on the defence.

Recommendation 5.5: Section 46 of the *Disability Discrimination Act 1992* (Cth) be amended to expressly incorporate the factors identified in *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 and *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

The exemption relating to combat duties was considered in several early cases. To the extent these exemptions have been considered, the relevant decisions should be reviewed to consider whether or not the interpretation is consistent with the rights of people with disability under the CRPD and legislative amendments made to clarify the scope of such exemptions.

Recommendation 5.6: The cases determined under the defences found in section 44 to 54A of the *Disability Discrimination Act 1992* (Cth) should be reviewed in light of Australia's obligations as a State Party to the *Convention on the Rights of Persons with Disabilities* and the *Disability Discrimination Act 1992* (Cth) amended to ensure those obligations are not undermined by the framing of those sections.

The 'permanent' exemption that has, arguably, raised the greatest level of concern in the community is the exemption found in section 52, broadly exempting matters relating to migration. The discriminatory treatment of the migration system of immigrant families with disabled members (often children born in Australia) regularly meets with community campaigning for the Minister to intervene to grant visas. This discrimination has often arisen because of migration health requirements under the *Migration Act 1958* (Cth). We welcome the recent amendment to the *Migration Regulations 1994* (Cth) to remove the

¹⁵⁴ DDA s 46. See, *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15; *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

discriminatory impact of health criteria in relation to children ‘born in Australia and ... ordinarily resident in Australia.’¹⁵⁵ This does not, however, alleviate the impact of the health criteria on migrant adults who, for example, acquire disability in Australia, for example, the situation of Devarshi Deka, an international student at the University of Tasmania, who now has paraplegia, vision loss and an acquired brain injury as a result of being assaulted in Hobart in November 20023. Mr Deka would, without a widespread community campaign, have been left with no medical or other support services and be required to return to India. This refusal could not have been challenged under the DDA despite his change of situation in migration terms being as a result of disability acquired in Australia. The community campaign resulted in Mr Deka being granted permanent residency in July 2024. The fundamental rights to be protected against disability discrimination of people who come to Australia should not be different to those of others.

Recommendation 5.7: Section 52 of the *Disability Discrimination Act 1992* (Cth) be repealed.

34. Should the Australian Human Rights Commission be given the power to grant special measures certificates?

Empowering the AHRC to grant ‘special measures’ certification would provide greater clarity for both people with disability and duty holders. It would provide an educative function about the particular nature of special measures that would be beneficial generally and promote pro-active compliance with the Act through duty holders having to turn their mind to the question of how a measure they propose to implement benefits a particular group of people with disability.

Such a grant of power should, however, make clear that the AHRC must not exercise the power unless the people with disability purported to benefit from the special measure are consulted with through their disability representative organisations and agree that the measure is beneficial to them.

Recommendation 5.8: The *Disability Discrimination Act 1992* (Cth) and *Australian Human Rights Commission Act 1986* (Cth) should empower the Australian Human Rights Commission to grant ‘special measures’ certification.

35. Should a definition for special measures be added to the Disability Discrimination Act?

Yes, the definition should follow the approach taken at international law under the CRPD. Differential treatment does not constitute unlawful discrimination under the CRPD if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means

¹⁵⁵ *Migration Amendment (Public Interest Criteria 4005 and 4007) Regulations 2024* (Cth).

of achieving that objective.¹⁵⁶ Further, article 5(4) of the CRPD provides that specific measures are not to be regarded as discrimination if they can be characterised as positive or affirmative measures that aim to accelerate or achieve de facto equality of persons with disabilities. However, the UN Committee on the Rights of Persons with Disabilities have clarified that:¹⁵⁷

[s]pecific measures adopted by States parties under article 5(4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discriminate against persons with disabilities.

This means that, as noted above, special measures must be closely assessed, in consultation with relevant disability rights organisations, to ensure that they are in fact ‘positive or affirmative measures that aim to accelerate or achieve de facto equality for persons with disability’.

Recommendation 5.9: ‘Special measures’ be defined in the *Disability Discrimination Act 1992* (Cth) to ensure that (a) only ‘positive or affirmative measures that aim to accelerate or achieve de facto equality for persons with disability’ can be considered special measures for the purposes of section 45 of the Act; and (b) a measure cannot be considered a special measure unless relevant disability rights organisations support this characterisation.

36. Should a definition for temporary exemptions be added to the Disability Discrimination Act?

As noted above, exemptions granted under section 55 of the DDA should be the only mechanisms referred to as exemptions in the Act. There is, however, no need to further define such exemptions.

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

We note the approach taken by the AHRC in considering applications for exemptions under the DDA.¹⁵⁸ The DDA Exemption Guidelines provide clear information about how the AHRC will process applications for exemptions including the fact that it invites ‘persons who may be affected by the Commission’s decision’ and state and territory discrimination statutory authorities to make submissions/comments on the application.

¹⁵⁶ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]. See also *Althammer v Austria*, UN Human Rights Committee Communication No 998/01 (2003) [10.2].

¹⁵⁷ UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination* (2018) [29].

¹⁵⁸ AHRC, ‘[Temporary exemptions under the Disability Discrimination Act 1992 \(Cth\): COMMISSION GUIDELINES](https://humanrights.gov.au/our-work/legal/temporary-exemptions-under-disability-discrimination-act-1992-cth)’ (no date) (‘DDA Exemption Guidelines’).
<<https://humanrights.gov.au/our-work/legal/temporary-exemptions-under-disability-discrimination-act-1992-cth>>.

We note that the equivalent provision in the Premises Standards—section 5.1(4)—which states that the AHRC ‘(a) must consult with the Accessible Public Transport Jurisdictional Committee’ and ‘(b) may consult with any other body or person that the Commission considered appropriate to consult’. The body referred to in paragraph 5.1(4)(a) continues to exist as a sub-group of the National Accessible Public Transport Advisory Committee.¹⁵⁹ It is not, however, possible to ascertain anything more than what is stated in the Government Directory. For example, there is no listing on the relevant federal government department’s website about the National Accessible Public Transport Advisory Committee, its terms of reference, current membership or current work. This gap suggests the need for more general requirements regarding consultation before determining an application for exemption.

Recommendation 5.10: Section 55 of the *Disability Discrimination Act 1992* (Cth) be amended to make it a requirement that the Australian Human Rights Commission must, before determining an application for exemption, consult with disability representative organisations and state and territory discrimination statutory office holders.

Further, it is generally the case that exemptions are sought to provide the applicant with time to achieve compliance with specific provisions of the DDA. Given this, much stronger commitments should be required from applicants before an exemption is granted and successful applicants should be required to report to the AHRC on fulfilment of those commitments. This could be achieved through either specific provisions in the applicant’s DAP or through providing a mechanism for the AHRC to receive and monitor binding undertakings.

Recommendation 5.11: Section 55 of the *Disability Discrimination Act 1992* (Cth) be amended to make it a requirement that the Australian Human Rights Commission require a successful applicant to give enforceable commitments in respect of the actions it will take and the timetable for taking those actions to achieve compliance with the Act and remove the need for further exemption.

At Australia’s third Universal Period Review, it was recommended that Australia ‘[e]nsure that all children with disabilities have access to inclusive education in mainstream schools’,¹⁶⁰ ‘[c]onduct consultations with organizations of persons with disabilities with a view to developing a national action plan for inclusive education’,¹⁶¹ and ‘[e]nsure that all children with disabilities have access to inclusive education’.¹⁶²

¹⁵⁹ Australian Government, ‘Directory: [National Accessible Public Transport Advisory Committee](https://www.directory.gov.au/portfolios/infrastructure-transport-regional-development-communications-sport-and-arts/departments/infrastructure-transport-regional-development-communications-sport-and-arts/national-accessible-public-transport-advisory-committee)’ (26 June 2024) <<https://www.directory.gov.au/portfolios/infrastructure-transport-regional-development-communications-sport-and-arts/departments/infrastructure-transport-regional-development-communications-sport-and-arts/national-accessible-public-transport-advisory-committee>>.

¹⁶⁰ Recommendation 241 by Montenegro, noted by Australia – A/HRC/47/8/Add.1 [42].

¹⁶¹ Recommendation 238 by Bulgaria, responded to with a ‘noted and will consider further’ by Australia – A/HRC/47/8/Add.1 [42].

¹⁶² Recommendation 240 by Timor-Leste, noted by Australia – A/HRC/47/8/Add.1 [42].

In line with this recommendation and its international human rights obligations, Australia should be moving as expeditiously as possible towards a fully inclusive model of education at all levels. Article 23(3) of the CRC states that assistance must be provided to ensure that a child with disability has ‘effective access to and receives education ... in a manner conducive to the child’s achieving the fullest possible social integration and individual development’.¹⁶³ Article 24 of the CRPD also guarantees the right of persons with disabilities to education through an inclusive education system, at all levels, without discrimination and on the basis of equality of opportunity.¹⁶⁴ Achieving this requires that persons with disabilities are not excluded from the general education system on the basis of disability.¹⁶⁵ In explaining the importance of inclusive education, the UN Committee on the Rights of Persons with Disabilities states:¹⁶⁶

... the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation.

This is supported by the Office of the High Commissioner on Human Rights, which states that inclusive education fulfils the guarantee of universality and non-discrimination in the right to education.¹⁶⁷

The UN Committee on the Rights of Persons with Disabilities has also stated:¹⁶⁸

... progressive realisation means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 24. This is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.

¹⁶³ CRC art 23(3).

¹⁶⁴ CRPD art 24.

¹⁶⁵ Ibid art 24(2)(a).

¹⁶⁶ UN Committee on the Rights of Persons with Disabilities, *General Comment No 4, Article 24: Right to inclusive education* (2016) [11] & [13].

¹⁶⁷ Office of the High Commissioner on Human Rights, *Thematic Study of the Rights of Persons with Disabilities to Education*, A/HRC/25/29 (2013) [3].

¹⁶⁸ UN Committee on the Rights of Persons with Disabilities, *General Comment No 4, Article 24: Right to inclusive education* (2016) [39].

Part 6.1: Assistance Animals

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

The current provisions of the DDA in respect of assistance animals have been inadequate to address the diverse range of circumstances in which people with disability have assistance animals. From very early in the history of the DDA, industries—particularly transport industry operators—have raised the need for a nationally consistent approach to assistance animals including an effective accreditation system.

Currently, the DDA specifies that it is unlawful to discriminate against a person with disability who has a carer, assistance animal and/or disability aid. Section 9 of the DDA sets how ‘carer’, ‘assistance animal’ and ‘disability aid’ are to be understood.

9 Carer, assistant, assistance animal and disability aid definitions

Meanings of carer or assistant, assistance animal and disability aid

- (1) ... [deals with carers or assistants]
- (2) For the purposes of this Act, an assistance animal is a dog or other animal:
 - (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or
 - (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
 - (c) trained:
 - (i) to assist a person with a disability to alleviate the effect of the disability; and
 - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Note: For exemptions from Part 2 for discrimination in relation to assistance animals, see section 54A.

- (3) ... [deals with disability aids]

Having a carer, assistant, assistance animal or disability aid

- (4) The following table has effect:

Having a carer, assistant, assistance animal or disability aid

Item	For the purposes of this Act, a person with a disability has ...	if the person ...
1	a carer or assistant	(a) is presently accompanied by the carer or assistant; or (b) was previously accompanied by the carer or assistant; or (c) may be accompanied by the carer or assistant in the future; or (d) is imputed to be accompanied by the carer or assistant.
2	an assistance animal or disability aid	(a) is presently accompanied by, or possesses, the animal or aid; or (b) was previously accompanied by, or possessed, the animal or aid; or (c) may be accompanied by, or possess, the animal or aid in the future; or (d) is imputed to be accompanied by, or to possess, the animal or aid.

This means that ‘assistance animal’ is not limited to guide or assistance dogs. To be an assistance animal, the animal must therefore be either:

- accredited as an animal trained to assist a person with disability ‘to alleviate the effect of the disability’; accreditation can be by a state or territory accreditation scheme or by an animal training organisation that has been listed in a regulation made under the DDA; **OR**
- trained to assist a person with disability ‘to alleviate the effect of the disability’ **AND** meet hygiene and behaviour standards ‘appropriate for an animal in a public place’; no accreditation process is set out or apparently required.

There are several aspects of these requirements that have caused problems. The first relates to the accreditation approach and there are two difficulties:

- Not all states and territories have systems for accrediting animals as assistance animals.
- No regulation has been made under the DDA that lists animal training organisations.

This means that assistance animals of people who live in states and territories that do not have assistance animal accreditation schemes cannot be accredited under the first option. As a consequence they must rely on the second option: the animal is trained to assist and meets relevant standards. That option is relatively uncontentious for people with guide dogs, seeing eye dogs, seizure or epilepsy assistance dogs and some other dogs trained by reputable training bodies. It does not, however, deal with other animals or dogs trained by a person with disability themselves or trained by other organisations. It also does not deal

with animals that, by simply being with a person with disability, ‘alleviate the effect of the disability’. This includes, for example, people with post-traumatic stress disorder, anxiety and similar conditions. These are generally referred to as ‘companion animals’ or ‘emotional support animals’. It should be noted, however, that not all companion animals ‘alleviate the effect of disability’.

A further gap in the current DDA provision relates to there being a lack of clarity in respect of the requirement that the animal is, when in public, under the control (physically or otherwise) of the person with disability. For example, it would be inappropriate for an animal to wander away from their handler to the meat display area of a supermarket. This requirement is not found in the substantive provision relating to assistance animals, but rather is found in the exemptions division: section 54A(2). This framing as an ‘exemption’, along with various other aspects relating to assistance animals—such as hygiene, behaviour and proof of status—is unhelpful. People who rely on assistance animals and who have rights under the DDA should be able to read the provision relating to assistance animals to understand their obligations.

It is important that organisations providing services to the public, employing people or providing public transport can have confidence that an animal accompanying a person as an assistance animal meets public hygiene standards and is trained to behave safely in diverse public situations. Those organisations have a duty to take reasonable steps to ensure the safety of people coming into the spaces they control. It is clear that the current patchwork of accreditation and training in Australia is insufficient to provide organisations with confidence they can fulfil that duty and ensure non-discriminatory access for people with disability accompanied by assistance animals.

The gaps highlighted above in the DDA provisions need to be addressed and urgent work is needed to develop a national framework for accreditation of both assistance animal training organisations and accreditation of testing of animals to ensure they meet the hygiene and public behaviour (often referred to as ‘public access’) standards.

Recommendation 6.1.1: The *Disability Discrimination Act 1992* (Cth) be amended to:

- clearly and positively specify that an assistance animal is to be under the control of their handler when in public spaces;
- include coverage of people with disability accompanied by an animal where the presence of the animal alleviates the effect of the person’s disability even where there has been no ‘training’ to achieve this effect, and clearly exclude companion animals more generally;
- positively require all assistance animals to have accreditation in respect of meeting hygiene standards; and
- positively require all assistance animals and their handlers to have accreditation in respect of control and public access standards.

It is clear that some training organisations that exist should already be listed in regulations because they meet international standards, such as training organisations accredited under the International Guide Dogs Federation (‘IGDF’) (there are eight accredited in Australia).

Recommendation 6.1.2: Urgent action be taken to identify all of those organisations that are accredited under international standards for assistance animals and list them in the regulations made under the *Disability Discrimination Act 1992* (Cth).

Recommendation 6.1.3: For the provisions relating to assistance animals in the *Disability Discrimination Act 1992* (Cth) to be effective nationally for both duty holders and people with disability, urgent action be taken to establish a national framework for accreditation of assistance animals. The framework needs to establish all of the following:

- What standards for hygiene (and what it encompasses – dirty and/or unhygienic habits re toileting, eating etc compared to poorly groomed) and public behaviour are to be met and how they will be assessed. The IGDF, for example, indicates that, in terms of public behaviour, dogs need to be assessed for distractibility, sensitivities, social behaviour, anxiety and reactivity, aggression and other qualities such as consistency, concentration, adaptability, etc.¹⁶⁹
- How regularly an assistance animal needs to be reviewed to assess that it continues to meet the standards, proof of review and follow up. Guide dogs, for example, are generally reviewed by the training organisation annually and this assessment could include review against the standards.
- Proof of time-limited ‘licence’ or accreditation for assistance animals to be produced on reasonable request (possible inclusion of photo ID that would have dual benefit for people with disability who are unable to hold a driver’s licence)
- Mechanisms for making assessment available at a reasonable cost to individuals who rely on an assistance animal that has not been and cannot be trained and assessed by a specialist training body. Such assessments need to both assess the animal against the hygiene standards and the animal and its handler (the person with disability) against the public access/behaviour standards.
- If an entity is able to be delegated authority under the National Framework to accredit assistance animals, how regularly that entity is reviewed for its suitability to hold that delegation; and what the requirements are for this authority to be delegated including involvement of people with relevant disabilities in the training, quality control and accreditation of assistance animals.

Once the framework is in place, the *Disability Discrimination Act 1992* (Cth) should be amended to refer to that framework in respect of the protection against discrimination for people accompanied by an assistance animal.

¹⁶⁹ International Guide Dog Federation, ‘Section 8: [Guide dog assessment and training](https://www.igdf.org.uk/about-us/starting-a-guide-dog-organisation/guide-dog-assessment-and-training/)’ (undated) <<https://www.igdf.org.uk/about-us/starting-a-guide-dog-organisation/guide-dog-assessment-and-training/>>.

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

Recommendation 6.1.4: The Framework recommended in Recommendation 6.1.3 be legislated (potentially through a combination of head and delegated legislation) and be accompanied by guidance materials where appropriate.

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

Recommendation 6.1.5: Until such time as the National Framework is in place, organisations (training and accreditation) be listed in regulations made under the *Disability Discrimination Act 1992* (Cth). Once the National Framework is in place, the *Disability Discrimination Act 1992* (Cth) should be amended to remove the reference to the regulations in section 9(2)(b), and other amendments made to this provision to refer to assistance animals having to be accredited under the National Framework. Consideration also needs to be given to whether or not the *Disability Discrimination Act 1992* (Cth) should expressly require people with assistance animals to carry their accreditation document with them and produce it on request.

Part 6.2: Disability Action Plans

Part 3 of the DDA supports the development of action plans by organisations to achieve the objects of the Act. These can cover all activities of organisations including employment, service provision (including information provision and education), access to premises and other facilities, and provision of goods. Under the current provisions, action plans are voluntary for all organisations and can be given to the AHRC, which will make the plan public through its disability action plan ('DAP') register (the 'DAP Register').¹⁷⁰

Section 61 of the DDA sets out what action plans must include:

61 Provisions of action plans

The action plan must include provisions relating to:

- (a) the devising of policies and programs to achieve the objects of this Act; and
- (b) the communication of these policies and programs to persons within the action planner; and
- (c) the review of practices within the action planner with a view to the identification of any discriminatory practices; and
- (d) the setting of goals and targets, where these may reasonably be determined against which the success of the plan in achieving the objects of the Act may be assessed; and
- (e) the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and
- (f) the appointment of persons within the action planner to implement the provisions referred to in paragraphs (a) to (e) (inclusive).

The DDA also states in section 11 that DAPs given to the AHRC are relevant in considering whether or not the defence of unjustifiable hardship is available to a respondent.¹⁷¹ This means the existence of a DAP can be one of the factors that can be considered as part of the respondents' defence when faced with a complaint.

Since the DDA came into effect, some sectors have provided guidance to their members to encourage the development of action plans under the DDA. A good example of this is the local government sector; the Australian Local Government Association worked with the AHRC in the early years after the enactment of the DDA to develop a guide for local government. More recently, this has been amended to guide the development of Disability Inclusion Action Plans relevant to obligations under the National Disability Strategy and

¹⁷⁰ AHRC, '[Register of Disability Discrimination Act Action Plans](https://humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans)' (no date) <<https://humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans>>.

¹⁷¹ DDA s 11(1)(e).

under various other federal, state and territory laws.¹⁷² While the DDA is mentioned, the *Disability Inclusion Planning: A Guide for Local Government* does not refer to the option of giving the resulting plan to the AHRC or the requirements of action plans under section 61. The AHRC has also issued guidance materials on developing action plans.¹⁷³

The DAP Register lists and links plans, categorising them under private and not for profit sectors, governments (federal departments, states and territories, and local government) and by education. There are currently almost 640 plans listed. It is notable, however, that the majority of these plans are for periods that have now passed; for example, the NBN Co plan is dated 2019–21; or have a single year date such as TassieLink’s plan is dated 2009, and Virgin Australia’s plan is dated 2018, but the link to the plan is broken. This suggests that organisations do not regularly review and update DAPs to take account of new knowledge about issues affecting people with disability, new approaches to removing barriers, or emerging communities within the disability community.

Currently the AHRC does not assess the DAPs or monitor their implementation and has only had sporadic capacity to assess them due mainly to lack of resources or the power to do so.

DAPs could, with appropriate amendments to the provisions, be an important mechanism with the capacity to drive systemic change within organisations. The focus of the DAPs to date has been on establishing a voluntary mechanism to achieve compliance with the prohibitions of disability discrimination found in the DDA. This, however, should not continue to be the sole focus. The introduction of a positive duty, a standalone duty to make adjustments and amendments to disability standards made under Part 2 Division 2A of the DDA, if linked to achieving compliance with relevant disability standards could mean significantly greater progress towards equality for people with disability could be achieved in a much more timely way.

41. Should there be minimum requirements for action plans (such as through guidelines) and what should the minimum requirements cover?

We strongly support expansion of the minimum requirements for DAPs found in section 61 of the DDA.

The current requirements are insufficient to achieve any substantial progress on equality for people with disability, particularly in relation to larger organisations and because of their voluntary nature.

¹⁷² Australian Local Government Association, *Disability Inclusion Planning: A Guide for Local Government* (October 2016) available under ‘National Disability Strategy’ on the ‘Other Policies’ page of the ALGA website: <<https://alga.com.au/other-policies/>>.

¹⁷³ AHRC, ‘[Disability Action Plan Guide \(2021\)](https://humanrights.gov.au/our-work/disability-rights/publications/disability-action-plan-guide-2021)’ (6 December 2021) <<https://humanrights.gov.au/our-work/disability-rights/publications/disability-action-plan-guide-2021>>.

DAPs, public entities and larger organisations

We note that there have been significant developments in relation to disability planning since the DDA was enacted. This includes the development of the National Disability Strategy and various state and territory laws that mandate that particular organisations must develop and report against plans to achieve ‘disability inclusion’.

For example, the provisions of the *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) (‘the Tasmanian Disability Rights Act’) mandates ‘Disability inclusion action plans’ (‘DIAPs’) for defined entities (which largely includes state government agencies)¹⁷⁴ and of the *Disability Inclusion Act 2014* (NSW) (‘the NSW Disability Inclusion Act’) that mandates that all NSW ‘public authorities’ have DIAPS.¹⁷⁵ Public authorities are defined in section 7 of that Act as being government departments, local councils and other entities ‘prescribed by the regulations’.

It is also important to note that in relation to gender equity in employment, all employers with 100 or more employees (including those employed by subsidiaries, and higher education institutions) have a range of obligations under the WGE Act including most relevantly, under Part IV, to report annually to the Workplace Gender Equality Agency in relation to gender equality indicators.¹⁷⁶ These organisations have had obligations under this Act and its predecessors since 1986. The obligations in the original *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) (‘the 1986 Affirmative Action Act’) included, in section 6, developing and implementing an affirmative action program in relation to women. That Act also set out, in section 8, what actions were specifically to be included in the plans, such as ‘the collection and recording of statistics ...’ Organisations were required under Part IV to report against their plans every 12 months to the (then) Director of Affirmative Action, who could (under section 19) report a failure to comply to the relevant federal government Minister.

Obligations of this sort are vital to developing an understanding of the situation of people within the identified group in respect of that organisation. We currently have a situation in Australia where there is regular reporting on the pay gap for women, but no equivalent reporting on the pay gap or other employment data for people with disability.

Recommendation 6.2.1: The *Disability Discrimination Act 1992* (Cth) be amended to require all organisations with 100 employees or more (as defined in the *Workplace Gender Equality Act 2012* (Cth)), other organisations that are ‘relevant employers for the purposes of that Act and government departments and agencies (at all levels to the extent the federal government has power) to have a disability action plan, to lodge that plan with the Australian Human Rights Commission and to report against that plan and key disability equality indicators.

¹⁷⁴ *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) pt 2 div 2.

¹⁷⁵ *Disability Inclusion Act 2014* (NSW) pt 2 div 3.

¹⁷⁶ *Workplace Gender Equality Act 2012* (Cth) s 3 (definition of ‘gender equality indicators’).

Recommendation 6.2.2: The Australian Human Rights Commission co-design, with disability representative organisations and people with other relevant expertise, disability equality indicators relevant to different areas of activity under the *Disability Discrimination Act 1992* (Cth) for use in reporting against action plans.

DAPs and smaller organisations

DAPs in respect of other organisations should remain voluntary.

Relationship of DAPs to the positive duty

As noted above, there is a clear and important potential relationship between DAPs and the proposed positive duty. For organisations mandated to develop a DAP under recommendation 6.2.1 above and report against it, those obligations should be relevant to the question of whether or not they are fulfilling their positive duty. A failure to develop or report against a plan should be deemed to be a failure to fulfil the positive duty.

In respect of smaller organisations, which will have positive duties under the proposed amendment, they should be able to use their DAP as evidence of their ongoing fulfilment of their positive duty. This is similar in principle to the current relevance of DAPs to the defence of unjustifiable hardship under section 11(1)(e) of the DDA. This is discussed further below.

Scope of Disability Action Plans

A voluntary DAP—that is a DAP developed by a smaller non-government organisation—should be required to meet the criteria set out in a revised section 61 of the DDA. Section 61 should be revised to clarify that an organisation’s DAP needs to be communicated to people with disability interacting with the action planner, that actions must be specific and timetabled, and that the action planner must ensure their DAP is available free of charge in accessible formats on a public-facing website. The following sets out how these amendments might be achieved:

61 Provisions of action plans

The action plan must include provisions relating to:

- (a) the devising of policies and programs to achieve the objects of this Act; and
- (b) the communication of these policies and programs in accessible formats to persons ~~within~~ interacting with the action planner; and
- (c) the review of the provision of goods, services and facilities, of information provision, of access to premises, and employment practices within of the action planner with a view to the identification of any discriminatory practices including any aspects of the action planner’s operations that do not comply with disability standards made under section 31; and
- (d) the setting of goals and targets with specific actions to be undertaken and the timeframes for those actions ~~where these may reasonably be determined~~ against

which the success of the plan in achieving the objects of the Act and compliance with Part 2, including disability standards made under section 31, may be assessed; and

- (e) the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and
- (f) the appointment of persons within the action planner to implement the provisions referred to in paragraphs (a) to (e) (inclusive); and
- (g) the maintenance of a publicly accessible (free and in alternative formats) copy of the action plan by the action planner.

The obligations in relation to scope of DAP requirements for mandated action planners should be extended to identify that a mandated plan and reports against the plan should be required to also fulfil the following obligations:

- Report against disability equality indicators in relation to people with disability. These could include, but should not be limited to, in relation to employment, disability composition of the workforce, disability composition of governing bodies, remuneration rates of people with disability compared to those without, availability of flexible working arrangements and adjustments and their utilisation by people with disability in to all mandated action planners, discrimination and related complaints or grievances made by people with disability.¹⁷⁷
- Set out the timeline for regular audits and review, and amendment to the plan. Such audits have particular contemporary relevance to workplaces adopting new artificial intelligence ('AI') technologies and automating decision-making processes. The impact of such technologies on the equality rights of people with disability is not well understood. However, scholarly literature¹⁷⁸ and anecdotal accounts¹⁷⁹ suggest that AI technologies present serious risks of discriminatory harm. For this reason, for example, recruitment processes utilising AI systems¹⁸⁰ should be audited before they are implemented and at regular intervals thereafter to identify any discriminatory practices and/or outcomes arising out of the use of these

¹⁷⁷ Other disability equality indicators for organisations more generally could include procurement policies that require procurement decisions to ensure disability accessibility of whatever is procured, physical accessibility of premises and other facilities, accessibility of information including websites, etc.

¹⁷⁸ Natalie Sheard, 'Algorithm-Facilitated Discrimination: A Socio-Legal Study of the Use by Employers of Artificial Intelligence Hiring Systems' (2025) 52(2) *Journal of Law and Society* 269.

¹⁷⁹ Disability Royal Commission, *Inclusive Education, Employment and Housing: Part B* (Final Report, volume 7, Part B, 2023) 388.

¹⁸⁰ An 'AI system' is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment: DISAR, [Safe and responsible AI in Australia: Proposals paper for introducing mandatory guardrails for AI in high-risk settings](#) (Report, Australian Government, September 2024) 8.

systems. Taking steps to ensure that AI systems do not discriminate against people with disability would also be an essential part of compliance with a positive duty in the DDA.

- Set out the process adopted to ensure co-design of the DAP with people with disability and the accessible mechanisms that have been implemented for ongoing consultation with and feedback from people with disability.

Recommendation 6.2.3: Action plans developed under the mandatory requirements recommended in Recommendation 6.2.1 include key disability equality indicators, the schedule for audits, review and amendment to the plan, evidence of co-design by and ongoing involvement of people with disability, and accessible mechanisms for consultation with and feedback from people with disability.

To fulfil an effective role in relation to the positive duty, a DAP should clearly address actions taken to fulfil that positive duty (see Part 2).

The AHRC should be resourced to work with disability representative organisations and industry sectors to develop and keep current guidance on action planning, and to review both voluntary and mandatory DAPS to ensure compliance with the requirements. Disability representative organisations should be expressly resourced to participate in this work.

The Tasmanian Disability Rights Act, in Part 2 Division sets out reporting, review and compliance processes that could usefully be considered in the review of the Action Plan provisions of the DDA.

Further, the DDA could usefully permit a DIAP made and lodged under the Tasmanian Disability Rights Act, the NSW Disability Inclusion Act or equivalent plans under other state and territory laws to be deemed to meet all or some of the requirements of section 61 and be lodged under section 64. To support this approach, an amendment to section 11 regarding unjustifiable hardship might be considered to include consideration of action plans deemed to comply with section 61 and lodged under section 64.

42. Should the Australian Human Rights Commission be able to reject action plans that fail to meet these requirements?

Yes. The AHRC is currently required to make a copy of an action plan available to the public, suggesting but not expressly stating it is not required to make public anything that is submitted that does not meet the definition/requirements of DAP under section 61. It is unlikely that the AHRC has the current capacity to undertake any type of assessment and vetting. The AHRC should be resourced and:

- empowered to review and reject plans that do not meet the requirements; and
- obliged to provide assistance to orgs to improve their plans.

It is relevant to note that rejection is likely to only be effective as a means to achieve improved DAPs in relation to mandatory action planners (discussed in the response to

question 41). Without mandating DAPs for some organisations, organisations could very easily take the rejection and do nothing further.

43. Should there be a set period of time for which an action plan is valid?

There should be a set period for which an action plan is valid. A review of the DAP Register indicates significant variability and includes a number of plans that have, as far as it is able to be readily ascertained, lapsed or lack clear timeframes for achieving positive change. It should be noted, however, that some organisations will be under a legislated obligation to have plans for a different set period. For example, the Tasmanian Disability Rights Act requires 4-year plans. A set period will also ensure that it is readily achievable for the AHRC to remove DAPs that are no longer valid should be moved to a lapsed section of the DAP Register.

Recommendation 6.2.4: Voluntary action plans be valid for 5 years unless there is a state or territory requirement for action plans that applies to the organisation that has a different legislated time frame.

Recommendation 6.2.5: Mandatory action plans be required to be updated annually and remain valid so long as the mandatory action planner complies with its reporting obligations.

44. Are there any other changes to the action plan process that you would recommend?

As noted in the introduction to this Part, a ‘relevant’ DAP that has been ‘given to the Commission’ must be taken into account in considering the defence of unjustifiable hardship for a respondent.¹⁸¹ It should not be enough that a respondent has an action plan that has been given to the AHRC. The consideration should be of any current DAP given to the AHRC and evidence that the respondent is implementing, in accordance with its timetable, the parts of that DAP relevant to the complaint. The framing of this could be informed by section 4.1(3)(n) of the Premises Standards.

Recommendation 6.2.6: Section 11(1)(e) of the *Disability Discrimination Act 1992* (Cth) be amended to specify that what must be taken into account is relevant current action plans given to the Australian Human Rights Commission under section 64 and evidence from the respondent of its fulfilment of its commitments under that action plan that are relevant to the complaint.

In order to ensure compliance with both the positive duty and action plan requirements, the functions of the AHRC under section 67 of the DDA should be amended to include the functions of reviewing action plans against the requirements in section 61, auditing compliance actions plans of mandatory action planners and, also in respect of mandatory action planners, reviewing reports made in respect of their action plans. In addition, data and other outcomes arising from the review of action plans should be made public to

¹⁸¹ DDA s 11(1)(e).

facilitate sharing of best practice regarding elimination of obstacles to equitable engagement of people with disabilities, and enable comparison across industries and years. Industry comparisons can assist the regulator to identify which sectors may require clearer guidance and support to achieve compliance. The evidence-based insights and data produced by the Victorian Commission for Gender Equality in the Public Sector provides a model for how best practice can be advanced in this manner.

Recommendation 6.2.7: Section 67 of the *Disability Discrimination Act 1992* (Cth) be amended to include the Australian Human Rights Commission having functions:

- to review action plans against the requirements in section 61;
- to audit compliance with actions plans of mandatory action planners;
- to review reports made to it in respect of mandatory action plans; and
- to report publicly on data and other outcomes of mandatory action planners.

Part 6.3: Disability Standards

The provisions relating to disability standards now found in Part 2, Division 2A of the DDA were, at the time of the DDA being enacted, seen as a very positive development in achieving systemic change in key areas of life activity: public transport, accommodation, education, employment and the administration of Commonwealth laws and programs.¹⁸² This was seen as an opportunity to establish the minimum that was required by duty bearers to comply with the DDA in those areas. Subsequently the DDA was changed to allow for disability standards to be made in any area covered by the DDA. To date, however, disability standards have only been established in the areas of public transport, education and buildings.

While the *Disability Standards for Accessible Public Transport 2002* (Cth) ('Transport Standards') and *Disability (Access to Premises – Buildings) Standards 2010* (Cth) ('Premises Standards') are based on technical compliance standards, the *Disability Standards for Education 2005* (Cth) ('Education Standards') provide a looser approach to compliance based primarily on engagement with students and their families on individual needs.

All of the disability standards provide for the defence of unjustifiable hardship similar, but not identical, to the provision in the DDA itself.

All three were developed through consultative processes involving industry, federal, state and territory governments and representatives of people with disability. All of them have timetables for review every 5 years. Unfortunately it has been the case that reviews have generally begun at the end of the 5 year period and taken many years to complete.

Section 32 of the DDA states that it 'is unlawful to contravene a disability standard'. Section 46P of the AHRC Act—which deals with what a complaint can be made about—states that a complaint can be made by a person aggrieved by unlawful discrimination and unlawful discrimination is defined in section 3 as including 'acts, omissions or practices that are unlawful under ... Division 1, 2, 2A, 3 or 6 of Part 2' of the DDA. Section 32 is found in Division 2A and, as such, can be the basis of a complaint.

Disability standards remain an important mechanism with, if appropriately amended and enforced, the capacity to drive systemic change in key areas of life. The focus of the disability standards to date has been on establishing mechanisms to achieve compliance with the prohibitions of disability discrimination found in sections 22 (education), 23 (access to premises) and 24 (specifically in relation to the provision of public transport). These areas, however, should not continue to be the sole focus. The introduction of a positive duty, a standalone duty to make adjustments and amendments to action planning under Part 3 of the DDA, if linked to achieving and reporting compliance with the disability standards could mean significantly greater progress could be achieved in a much more timely way.

¹⁸² DDA s 31.

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

Under the DDA, challenges to non-compliance rely entirely on individual complainants asserting they have been personally affected (‘aggrieved’) by the non-compliance.¹⁸³ This means that even if non-compliance can be readily shown an individual who is personally affected must be the one to challenge that non-compliance. So, where a disability organisation or the AHRC identify clear non-compliance with the Disability Standards, neither are able to pursue a claim under the DDA for unlawful discrimination.

Recommendation 6.3.1: There be an independent prosecutorial power to pursue non-compliance which is granted either to the Australian Human Rights Commission and/or to a suitable independent or government body, such as the Attorney-General’s Department, with associated additional and dedicated funding to support the relevant body in enabling the effective discharge of this responsibility.

Recommendation 6.3.2: The *Disability Discrimination Act 1992* (Cth) and *Australian Human Rights Commission Act 1986* (Cth) be amended to make clear that disability organisations are authorised to make complaints about non-compliance.

Defence of unjustifiable hardship

The inclusion of the defence of unjustifiable hardship in the disability standards means that non-compliance cannot be established without a judicial determination. This has been one aspect of the standards that has undermined their effectiveness as a minimum standard to be met by all.

Role of industry regulators

One concern about the way in which the disability standards operate is their lack of integration with relevant industry regulatory bodies and processes. This has been overcome to some extent with the Premises Standards with compliance being achieved through approvals processes of state and territory building law which reference the *National Construction Code 2022* (Cth) (‘NCC’). This is because the access provisions of the NCC are generally consistent with the requirements of the Premises Standards.

The lack of integration means that organisations that are aware of their obligations under relevant industry regulations can remain unaware of their obligations under the disability standards because their regulator does not necessarily consider these within its regulatory actions. This issue is considered in more detail below.

Details of technical requirements

As noted above, both the Transport Standards and the Premises Standards set out technical compliance requirements. For example, the Premises Standards reference Australian

¹⁸³ AHRC Act s 46P(2) and *Access for All Alliance (Hervey Bay) and Hervey Bay City Council* [2007] FCA 615.

Standards, notably AS 1428.1, which specify minimum doorway widths,¹⁸⁴ maximum ramp slopes,¹⁸⁵ and levels of luminance contrast,¹⁸⁶ and the Transport Standards require technical compliance in relation to continuous accessible paths of travel.¹⁸⁷ A very significant number of these requirements refer to the requirements in various Australian Standards rather than setting out the details of those requirements in the disability standards. This means that a person or organisation seeking to assess whether or not a technical standard has been complied with must be able to access the relevant Australian Standards.

The Australian Standards are not publicly available and must be purchased. They are not generally affordable by individuals with disability, many of whom are financially disadvantaged. For example, the *Design for access and mobility, Part 1: General requirements for access – New building work (AS 1428.1:2021)* costs \$275, and Part 2 costs \$193. The Transport Standards reference seven different Australian Standards, all of which would need to be purchased to understand compliance obligations and/or assess compliance.

Recommendation 6.3.3: All relevant Australian Standards be made publicly available either through them being appended in accessible formats as schedules to the relevant disability standards or on a public-facing website maintained by Standards Australia or another appropriate body.

If the copyright holder seeks compensation for this to happen, this should be a cost borne by the Federal Government on the basis that these form critical elements of public laws. In countries such as the UK, Canada and the USA, access to these technical standards has been made public and free.

Reviews of disability standards

Each of the disability standards includes a provision for regular review to be undertaken.¹⁸⁸ In general terms, these reviews are set at a 5-year interval, with slightly different wording. While these provisions seem to require reviews to be completed within the 5-year interval (at least for the first review), this has clearly not been achieved. For example, the first review of the Education Standards, which were enacted in 2005, did not begin until December 2010 and the final report was not completed until June 2012.

¹⁸⁴ *Disability (Access to Premises – Buildings) Standards 2010* (Cth) ('Premises Standards') sch 1 pt A3 table 1; *AS 1428.1–2009 Design for access and mobility. Part 1: General requirements for access—New building work*, cl 13.2.

¹⁸⁵ *Ibid* cl 10.3.

¹⁸⁶ *Ibid* cl 4.11.

¹⁸⁷ *Disability Standards for Accessible Public Transport 2002* (Cth) ('Transport Standards') s 2.2, referencing *AS 1428.2–1992 Design for access and mobility. Part 2: Enhanced and additional requirements – Buildings and facilities*, cl 7.

¹⁸⁸ Transport Standards s 34.1; *Disability Standards for Education 2005* (Cth) ('Education Standards') s 11.1; Premises Standards s 6.1.

Further delaying beneficial changes to disability standards as a result of the reviews has been slow responses by governments, including the federal government, to the review recommendations and active implementation. For example, the government response to the first review of the Education Standards was not made public until November 2012, 5 months after the review's final report was completed. This delay means that effectively 2 years of the next review cycle had elapsed before any action on reforms to the Education Standards would be commenced. There have been recommendations in each of the three reviews of the Education Standards for amendments to those Standards. To date there have been no amendments to the Education Standards since they came into force in 2005.

The 2021 review of the Premises Standards made a recommendation about updating the *Guideline on the Application of the Premises Standards*.¹⁸⁹ This work is, however, yet to be progressed by the federal government.

Recommendation 6.3.4: The *Disability Discrimination Act 1992* (Cth) be amended to include a clear disability standards review provision requiring reviews to be completed within 5 years of the adoption of a disability standard and further reviews to be completed within 5 years of the legislative completion requirement of the previous review.

Such reviews should, however, be able to be completed more regularly in order to align with other related legislative review processes, such as the 3-year cycle for the NCC.

Consideration needs to be given to what can be done to ensure timely responses to review recommendations and completion of the further work required to respond to those recommendations. At least one generation of children with disability have begun and finished compulsory education since the Education Standards commenced and we have seen no changes to improve those standards during that time.

Development and governance

The delay in reviews and implementation of recommendations could arguably have been avoided had there been adequate and appropriate ongoing governance mechanisms in place for the disability standards.

Recommendation 6.3.5: Expert advisory groups be established in respect of each of the standards as an ongoing governance mechanism to ensure that the standards are kept up to date and are fit for purpose.

Recommendation 6.3.5 would be achieved if an access standards board as recommended in Recommendation 6.3.21 below is implemented.

It is important to note that disability representative organisations need to be expressly resourced to participate in these processes on an ongoing basis to ensure maintenance and development of relevant capacity to effectively contribute.

¹⁸⁹ AHRC, [Guideline on the Application of the Premises Standards](https://humanrights.gov.au/our-work/disability-rights/guidelines-application-premises-standards) (version 2, Australian AHRC, February 2013) <<https://humanrights.gov.au/our-work/disability-rights/guidelines-application-premises-standards>>.

Transport Standards

The Transport Standards set out a 20-year timetable¹⁹⁰ for most public transport providers to achieve compliance—therefore requiring full compliance by 2022—with train and tram operators having 30 years.¹⁹¹ Whilst it appears from the information available that some aspects of public transport have achieved compliance, other aspects such as taxis, bus stops, and aviation clearly have not. In respect of taxis and bus stops, to some extent the problem lies in lack of clarity about who bears what obligations and, therefore, who is the proper respondent to a complaint about non-compliance.

Recommendation 6.3.6: In respect of all those aspects of the *Disability Standards for Accessible Public Transport 2002* (Cth) that were to achieve full compliance by 2022, the defence of unjustifiable hardship no longer be available.

We recognise that there will be some circumstances in which compliance cannot be achieved, for example, the provision of accessible bus stops in a very hilly or rural area without footpaths and a mechanism is needed to deal with this issue.

Recommendation 6.3.7: The *Disability Standards for Accessible Public Transport 2002* (Cth) and/or the *Disability Discrimination Act 1992* (Cth) be amended to provide a mechanism whereby the operator of public transport facilities facing absolute barriers to compliance that was required to be achieved by 2022 can apply to the AHRC for an exemption from the relevant provision either for the life of that particular transport element or permanently (such as where topography is involved).

Other situations may mean that compliance requires time and planning and again this needs to be expressly dealt with.

Recommendation 6.3.8: The *Disability Standards for Accessible Public Transport 2002* (Cth) be amended to require an operator who is non-compliant with obligations scheduled to have been fulfilled by 2022 to apply for a time-limited exemption under section 55 of the *Disability Discrimination Act 1992* (Cth), provide an Action Plan setting out its timetable for achieving compliance and report to the Australian Human Rights Commission against that Action Plan.

Recommendation 6.3.9: Any non-compliance with the 2022 obligations in the *Disability Standards for Accessible Public Transport 2002* (Cth), in the absence of an exemption, be deemed to be unlawful discrimination with the defence of unjustifiable hardship clearly excluded.

The issue of the role of industry regulatory bodies was briefly discussed above. This is particularly relevant to Transport Standards where a number of different state/territory and federal authorities regulate and licence particular modes of public transport. For example, the Civil Aviation Safety Authority is responsible for licensing airline operations in Australia, however, it does not monitor compliance with the Transport Standards.

¹⁹⁰ Transport Standards sch 1 pts 1–4.

¹⁹¹ Ibid sch 1 pt 5.

Recommendation 6.3.10: Compliance with the *Disability Standards for Accessible Public Transport 2002* (Cth) be expressly embedded in the regulatory requirements administered by industry regulators.

Education Standards

Unlike the Transport Standards and the Premises Standards, the Education Standards do not provide mechanisms for technical compliance. Rather, they are framed in broad terms and apply without distinction to all aspects of education provision in Australia. The generality of the standards arguably makes it more difficult for providers to understand what it is they have to do to comply with the Education Standards and for people with disability to determine whether or not the provider has complied.

One key aspect of the Education Standards is the requirement of education providers to consult with the person with disability and/or their parent/guardian where relevant. In each of the areas of educational activity—such as enrolment in section 4.2—there is a provision that indicates that, as long as the provider has complied with the consultation obligations found in each of these sections, they have complied with the obligation to take ‘reasonable steps’ to ensure non-discrimination.

These provisions also refer to an obligation to take ‘reasonable steps to ensure that the [person with disability] is able to [access, participate, etc] on the same basis as a [person] without disability, and without experiencing discrimination’.¹⁹² This framing does not ensure that education providers apply the prohibition of direct and indirect discrimination in their education settings. The words ‘on the same basis as’ suggest equal treatment is all that is required, therefore excluding consideration of indirectly discriminatory acts or omissions. The words ‘without experiencing discrimination’ may communicate the work needing to be done to prevent indirect discrimination to a discrimination law expert, but are unlikely to communicate this to an education provider. Further, the definition of ‘discrimination’ in section 1.4 is unhelpful in this regard as it requires the reader to go first to the definition of ‘discriminate’ in the same section and then locate the relevant provisions in the DDA.

Another particularly concerning aspect of the Education Standards is the way in which ‘reasonable adjustments’ are defined in section 3.4(1). This states that an adjustment is reasonable ‘if it balances the interests of all parties affected’. This threshold reduces the rights of students with disability to ‘interests’ no more or less important than those of others involved in the situation. This threshold is entirely inconsistent with Australia’s obligations under the CRPD¹⁹³ and with the prohibition of discrimination in education in the DDA.¹⁹⁴ As well as this fundamental problem with this framing, the decision about what is reasonable is to consider factors listed in section 3.4(2) that are required to be again

¹⁹² See, Education Standards ss 4.2(1), 5.2(1), 6.2(1), 7.2(1).

¹⁹³ CRPD art 24.

¹⁹⁴ DDA s 22.

considered in determining whether a defence of unjustifiable hardship is available to the provider under section 10.2.

Recommendation 6.3.11: Consistent with earlier Recommendation 3.1.3, the *Disability Standards for Education 2005* (Cth) be amended to remove the word ‘reasonable’ from this term and define adjustments consistent with articles 2 and 24 of the *Convention on the Rights of Persons with Disabilities* as ‘those necessary and appropriate modifications and adjustments ... needed ... to ensure to [people with disability] the enjoyment or exercise on an equal basis with others’ the right to non-discrimination in education.

Implementing this recommendation will not interfere with the continuing operation of the unjustifiable hardship defence in section 10.2, which provides sufficient protection for education providers.

As discussed above, compliance with the Education Standards would be greatly enhanced if the regulators of school and other education providers required those providers to report against the Education Standards. For example, the current registration requirements for non-government schools in Tasmania are found in the *Education Regulations 2017* (Tas) and make no reference at all to disability or to the Education Standards. The Act under which the Education Regulations are made is the *Education Act 2016* (Tas), which also is silent on the Education Standards. This means that education providers regulated under that Act need to separately be aware of their obligations under federal law and the regulator is under no obligation to consider compliance with the Education Standards or review complaint history in respect of schools or other education providers.

Recommendation 6.3.12: All education regulators—state, territory and federal—be required to assess education providers that they regulate for compliance with the *Disability Standards for Education 2005* (Cth). A failure to comply with the *Disability Standards for Education 2005* (Cth) should be listed in the relevant legislation as grounds for suspension or cancellation of registration, or for registration to be made conditional on implementing actions that will achieve compliance and report against those actions.

To the extent that such regulators do not oversee the operation of government schools, relevant legislation should ensure that ensuring compliance with the Education Standards is a requirement of the leadership within those schools and be subject to whatever review mechanism is specified in the legislation. So, for example, the *Education Act 2016* (Tas) specifies in section 27 that the Secretary of the Department ‘is to carry out any review that he or she considers appropriate – ... to assess the quality of education in State schools; and ... to evaluate the educational programs provided ...’ This provision could be expanded to include compliance with the Education Standards as a matter for review.

Recommendation 6.3.13: In respect of the *Disability Discrimination Act 1992* (Cth) and the *Disability Standards for Education 2005* (Cth), mechanisms be legislated to require both private and public education providers to report on compliance and provide relevant disability data for compilation and public availability nationally.

This recommendation links to the role of Disability Action Plans, which are discussed in the previous part of this submission.

We note that the Tasmanian Education Department has committed to ensuring that schools in Tasmania are ‘disability ready and responsive’. This began with the report of the Ministerial Taskforce on Inclusive Education in August 2015: *Improved Support for Students with Disability: Ministerial Taskforce Report* (‘Inclusive Education Taskforce Report’).¹⁹⁵

Disability Ready and Responsive Schools

Achieving inclusive education requires all schools to be both proactive and responsive in relation to inclusion of students with disability. This means all Tasmanian schools:

- a. auditing their current approaches and practices to identify and remove barriers to students with disability; and
- b. identifying and maintaining relevant skills and resources (and links to professional supports) needed to ensure inclusive education can be delivered; and
- c. developing procedures for identifying and assessing the needs of current and prospective students with disability and for working with students and their parents/guardians to respond to those needs; and
- d. ensuring all relevant staff members understand those procedures and implement them in a timely, consistent and appropriate way to ensure equality of educational opportunity is the paramount consideration and goal.

Achieving inclusive education requires the Government to support and expect schools—both public and private—to achieve this readiness and responsiveness.

Achieving inclusive education also requires all members of every school community to understand and support equal opportunity in education for all students.

The Department in Tasmania has indicated that this approach is central to its work to fulfil its obligations under the learning and skills outcome area of *Accessible Island: Tasmania’s Disability Framework for Action*.¹⁹⁶

There has been increasing focus in education provision for people with disability has been on implementing universal design for learning (‘UDL’) at all levels.¹⁹⁷ This is one element of ‘disability ready’.

¹⁹⁵ Tasmanian Government, Ministerial Taskforce on Inclusive Education, *Improved Support for Students with Disability: Ministerial Taskforce Report* (August 2015) (‘Inclusive Education Taskforce Report’) 4 and 24, rec 1.

¹⁹⁶ See, for example, Department of Education (Tasmania), [Accessible Island: Tasmanian’s Disability Framework for Action 2018–2021](#) (Tasmanian Government, 15 October 2020) 26, 27.

¹⁹⁷ See, for example, Australian Disability Clearinghouse on Education and Training (‘ADCET’), ‘[Universal Design for Learning](#)’ (2025) <<https://www.adcet.edu.au/inclusive-teaching/universal-design-for-learning>>; Inclusion ED, ‘[Universal design for learning \(UDL\)](#)’ (2024) <<https://www.inclusioned.edu.au/universal-design-for-learning>>.

Recommendation 6.3.14: Universal design for learning be expressly included in the *Disability Standards for Education 2005* (Cth) particularly in relation to Part 6: Standards for curriculum development, accreditation and delivery.

The implementation of UDL by education providers will address systemic barriers to education for people with disability and reduce the need for individual adjustment processes.

The ‘disability responsive’ element requires effective adjustment processes and staff trained to respond openly and supportively to current and prospective students with disability. As identified in the Inclusive Education Taskforce Report, many parents experienced:¹⁹⁸

... a crisis response to the prospective enrolment of a child with disability in a school rather than an active management and support approach. This showed a prevalent pattern of schools having to respond to the enrolment or prospective enrolment of students with disability and the changing needs of students with disability or through acquiring disability without the necessary skills or processes to do this effectively.

This experience, which continues to be repeated across the country, demonstrates the urgent need for education providers to be ‘disability responsive’ through ensuring all staff are aware of the rights of students with disability under the Education Standards, the DDA¹⁹⁹ and the CRPD,²⁰⁰ and that effective policies and procedures are in place for staff to follow when unfamiliar situations arise.

Recommendation 6.3.15: Consideration be given to incorporating the principle of ‘disability ready and responsive’ in the *Disability Standards for Education 2005* (Cth).

Premises Standards

One beneficial aspect of the Premises Standards is the approach that has been taken to incorporate them into the national regulatory framework for buildings: the NCC and state and territory building law.

Non-compliance with the technical provisions of the Premises Standards occurs for several reasons:

- lack of access to technical compliance documents;
- lack of expertise within the building and related sectors about the ways in which people with disability move through and otherwise interact with the built environment and how compliance with the Premises Standards provides non-discriminatory access;
- misunderstanding or misinterpretation of the compliance requirements; and

¹⁹⁸ Inclusive Education Taskforce Report 18.

¹⁹⁹ DDA s 22.

²⁰⁰ CRPD art 24.

- lack of access to a mechanism to provide guidance on questions of unjustifiable hardship and alternative approaches to compliance (Performance Solutions).

The first issue will be addressed by making the Australian Standards available publicly as set out in Recommendation 6.3.3. The second and third issues need to be addressed through the development of resources and training, which should have been prioritised by the building industry at the time the Premises Standards were introduced.

In relation to the fourth issue, we note that questions relating to application of unjustifiable hardship and alternative approaches to compliance were to be covered through the adoption by states and territories of an administrative protocol: *A Model Process to Administer Building Access for People with a Disability* ('the Protocol').²⁰¹ Such a protocol would have established expert bodies to consider and determine individual claims that full compliance with the technical standards would not be feasible for a range of reasons. The 'appropriateness and effectiveness' of the Protocol was considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs under its Terms of Reference for its 2008–09 Inquiry into the draft Disability (Access to Premises – Buildings) Standards.²⁰² It stated in its comments on this aspects of its reference:²⁰³

The Committee supports the use of the Protocol in principle but notes that its benefits would only be available in those jurisdictions where it is adopted. It is appropriate that state and territory governments would decide whether or not to adopt the Protocol. The Committee suggests that further consultation with state and territory governments would be worthwhile to ensure that adoption of the Protocol is as extensive as possible.

The Protocol was not fully adopted by any state or territory. This means that there is nationally an inconsistent application of flexibility that the Premises Standards allow for. This makes it very difficult to determine whether or not the Premises Standards have been fully complied with in respect of any premises undermining the confidence of the disability community in the effectiveness of the Premises Standards. The ongoing case involving David Cawthorn and the development at Parliament Square in Hobart²⁰⁴ is an example of

²⁰¹ Australian Building Codes Board, *A Model Process to Administer Building Access for People with a Disability: 'The Protocol'* (Australian Building Codes Board, 2008) <https://www.apb.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/disabilitystandards/tor.htm>.

²⁰² Parliament of Australia, 'House of Representatives Committees: *Terms of Reference*' <https://www.apb.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/disabilitystandards/tor.htm>.

²⁰³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Access All Areas: Report of the Inquiry into Draft Disability (Access to Premises – Buildings) Standards* (Report, June 2009) 144 [7.29] <https://www.apb.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/disabilitystandards/report.htm>.

²⁰⁴ *David Cawthorn and Paraquod Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15; *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16; *Cawthorn v Parliament Square Property Pty Ltd* [2024] TASCAT 213; *Cawthorn v Parliament Square Property Pty Ltd (No 2)* [2025] TASCAT 157.

the complexities and costs that could have been avoided had the Protocol been in place to test compliance.

Recommendation 6.3.16: *A Model Process to Administer Building Access for People with a Disability* be adopted in all states and territories through amendments to relevant building laws and the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) expressly reference the Protocol in the factors listed in the defence of unjustifiable hardship in section 4.1.

Consideration should be given to whether any amendment to the DDA itself is necessary and constitutionally valid.

Recommendation 6.3.17: The *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to ensure that future scheduled reviews occur in alignment with the 3-yearly reviews of the *National Construction Code* with clear requirements to consult with people with disability. Alternatively, provision needs to be made for the National Construction Code to be updated consistent with changes to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) outside the usual *National Construction Code* review period.

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

One concern repeatedly raised in the reviews of disability standards has been the lack of baseline data against which improvements over time could be measured.²⁰⁵ There is an understandable perception in the disability community that Disability Standards have been largely ineffective. Such perceptions could have been tempered had governments required from the outset reporting key indicators of improvements.

Recommendation 6.3.18: Reporting by organisations on their compliance with applicable disability standards in Disability Action Plans be part of the mandatory action planning and reporting obligations proposed elsewhere in this submission.

Recommendation 6.3.19: The matters listed in section 61 of the *Disability Discrimination Act 1992* (Cth) to be dealt with in all Disability Action Plans should include specific identification of current non-compliance with relevant disability standards, actions to be taken under the Action Plan to achieve compliance and the timetable for taking those actions.

²⁰⁵ See, for example, Department of Education, Employment and Workplace Relations, *Report on the Review of Disability Standards for Education* (Australian Government, June 2012) 26, 28, 45 and 49 (recommendation 14); The Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Final report* (The Allen Consulting Group, October 2009) 9, 14 (Key issues/problems identified Table ES.1 – Issues 1 and 2), 40, 42, 46, 55, 58, 63, 67, 77, 79, 87, 88, 94 and following, 182, 191–93, 215 (Table 11.6, recommended action 1 in particular).

Recommendation 6.3.20: The *Disability Discrimination Act 1992* (Cth) be amended to make it mandatory for duty bearers to report data on key elements relevant to measuring both improvements for people with disability and compliance with the disability standards.

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

While the AHRC could potentially provide additional guidance to duty holders on reporting against the Disability Standards, that work would be best done in conjunction with existing relevant industry regulatory bodies and should be informed by funded input from disability representative organisations.

For the AHRC to be able to undertake this work it is clearly necessary that it have significantly increased resourcing given the current size of the Disability Rights Unit within the Commission and the expanded scope we are advocating for. There are a number of areas of work relevant to achieving equality and non-discrimination under the DDA that require dedicated resources and diverse expertise. This is not currently available within the limited budget of the AHRC.

The *Accessible Canada Act*²⁰⁶ established a Canadian Accessibility Standards Development Organization setting out:²⁰⁷

- 18** The Standards Organization's mandate is to contribute to the realization of a Canada without barriers, on or before January 1, 2040, through, among other things,
- (a) the development and revision of accessibility standards;
 - (b) the recommendation of accessibility standards to the Minister;
 - (c) the provision of information, products and services in relation to the accessibility standards that it has developed or revised;
 - (d) the promotion, support and conduct of research into the identification and removal of barriers and the prevention of new barriers; and
 - (e) the dissemination of information, including information about best practices, in relation to the identification and removal of barriers and the prevention of new barriers.

In the USA, the US Access Board²⁰⁸ is an independent federal agency that advances accessibility through leadership in accessible design and the development of accessibility guidelines and standards.

²⁰⁶ *Accessible Canada Act*, SC 2019, c 10.

²⁰⁷ *Ibid* s 18.

²⁰⁸ US Access Board, 'About the U.S. Access Board' (no date) <<https://www.access-board.gov/about/>>.

Both of these approaches ensure a specialist disability focus on accessibility in the establishment of standards.

Recommendation 6.3.21: A dedicated body be established to develop, support and monitor accessibility standards similar to those established in the USA and Canada. One aspect of its mandate should be to review standards for accessibility established in other countries and implement them in Australia with appropriate modifications.

Part 7: Further Options for Reform

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

Own motion investigation and complaint powers

The *Human Rights Commission Act 2005* (ACT) empowers the ACT Human Rights Commission to conduct an investigation into conduct that is potentially in breach of the DA ACT through a ‘commission initiated consideration’²⁰⁹ and to refer the matter to the ACT Civil and Administrative Tribunal (‘ACAT’) for inquiry with the Commission being the complainant.²¹⁰ Similarly, the ADA Tas empowers the Anti-Discrimination Commissioner to investigate ‘any discrimination or prohibited conduct’ in the absence of a complaint being lodged, and that complaint is to proceed as if the Commissioner were the complainant, including by referring the complaint to the Tasmanian Civil and Administrative Tribunal for inquiry.²¹¹ These provisions are important to ensure the effectiveness of the prohibition of discrimination for individuals or groups of people with disability who experience breaches of discrimination law but who are unable to pursue a formal legal complaint.

Earlier in this submission, we discussed the need for the AHRC to have powers in respect of compliance matters under the positive duty, action plans and disability standards. The AHRC should also have powers in respect of breaches of the substantive discrimination prohibitions found in Part 2 of the DDA.

Recommendation 7.1: The *Disability Discrimination Act 1992* (Cth) be amended to empower the Australian Human Rights Commissioner and/or the Disability Discrimination Commissioner to conduct an investigation into a situation of potential breaches of the Act as if the Commissioner had received a complaint on that situation and, if the Commissioner is satisfied that the investigation discloses a prima facie case of a breach of the Act, for the Commissioner to commence proceedings in the Federal Court of Australia as if the Commissioner were a person aggrieved by that situation.

Other federal laws can also be drawn on to modernise the DDA. The ACCC has power (and obligation) to take and respond to ‘super’ complaints, which are complaints made by bodies ‘designated’ by the Minister and relate to ‘significant or systemic’ issues and require the ACCC to respond within a set time. The ACCC response can include education,

²⁰⁹ *Human Rights Commission Act 2005* (ACT) s 48.

²¹⁰ Ibid ss 53BA, 53, 53C, Dictionary (definition of ‘complainant’).

²¹¹ ADA Tas s 60(2), (5), (6).

research, engagement, advocacy, or in-depth investigation leading to enforceable undertakings.²¹²

Recommendation 7.2: The new positive duty provision in the *Disability Discrimination Act 1992* (Cth) include a ‘super’ complaint provision similar to that of the Australian Competition and Consumer Commission, with key disability advocacy bodies being ‘designated’ bodies with additional powers to make complaints about significant or systemic issues and the AHRC resourced to respond within a set timeframe to these ‘super’ complaints and empowered to conduct the same range of responses as the Australian Competition and Consumer Commission.

The Administrative Review Tribunal (‘ART’) President also has power to inform the relevant Minister and others on whether systemic issues have arisen in the ART’s caseload. The President can issue public ‘systemic issues notices’ regarding trends and patterns of problems to prevent recurring issues and promote collaboration between oversight bodies.²¹³

Recommendation 7.3: The *Disability Discrimination Act 1992* (Cth) be amended to empower the Australian Human Rights Commission to identify systemic issues regarding individual complaints and/or positive duty complaints, similar to the Administrative Review Tribunal, such that they can collaborate with other equality agencies to prevent recurring issues.

49. What additional guidance materials should be provided to the community, including duty holders, about the operation of the *Disability Discrimination Act* or specific amendments proposed in this paper?

Guidance material – Artificial Intelligence and Automated Decision-Making

Algorithmic²¹⁴ and AI-driven systems²¹⁵ are now used every day to automate, or partially automate, decisions and tasks in a range of domains including healthcare, education and employment. One of the key risks arising from the use of these systems is that of

²¹² See Australian Competition and Consumer Commission, ‘[Designated Complaints](https://www.accc.gov.au/about-us/designated-complaints)’ (no date) <<https://www.accc.gov.au/about-us/designated-complaints>>.

²¹³ See Administrative Review Tribunal, ‘[Systemic Issues Notices](https://www.art.gov.au/about-us/accountability-and-reporting/systemic-issues-notices)’ (no date) <<https://www.art.gov.au/about-us/accountability-and-reporting/systemic-issues-notices>>.

²¹⁴ An ‘[algorithm](https://www.industry.gov.au/publications/voluntary-ai-safety-standard/terms-and-definitions)’ is a set of instructions that guide a computer in performing specific tasks or solving problems: Department of Industry, Science and Resources (‘DISAR’), ‘Terms and Definitions’ (no date) <<https://www.industry.gov.au/publications/voluntary-ai-safety-standard/terms-and-definitions>>.

²¹⁵ An ‘AI system’ is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment: DISAR, *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High Risk Settings* (Report, Australian Government September 2024) 8.

discrimination against people with disability (and other protected groups).²¹⁶ Discrimination may occur because of the data used to train the system, the use of proxies, the system's implementation, a failure to provide adjustments, or the facilitation of intentional discrimination.²¹⁷ Of particular concern are the new structural barriers to equality that may result from the use of these systems in Australia,²¹⁸ where almost a quarter of the population are digitally excluded or highly digitally excluded.²¹⁹ Highly digitally excluded Australians are more likely to be with disability.²²⁰

Recommendations are made in answer to question 50 to ensure that organisations designing, developing, selling and deploying AI systems may be liable, where appropriate, for any algorithm-facilitated discrimination.²²¹ However, this is an area where additional guidance materials are needed. AI technologies are complex and inscrutable, and Australia has one of the lowest levels of AI education, training and knowledge amongst comparable advanced economies.²²² Practical guidance materials for the community, including duty-holders, should therefore be developed by the AHRC via co-design principles with people with disability and subject matter experts. Such guidance should cover the

²¹⁶ DISAR, *Safe and Responsible AI in Australia Consultation: Interim Response* (Report, Australian Government, 2024).

²¹⁷ Natalie Sheard, 'Algorithm-Facilitated Discrimination: A Socio-Legal Study of the Use by Employers of Artificial Intelligence Hiring Systems' (2025) 52(2) *Journal of Law and Society* 269.

²¹⁸ Ibid 286–7.

²¹⁹ Australian Digital Inclusion Index, 'Digital Inclusion: The Australian Context in 2023' *Australian Digital Inclusion Index* (2025) <<https://www.digitalinclusionindex.org.au/digital-inclusion-the-australian-context-in-2023/>>.

²²⁰ Julian Thomas, Anthony McCosker, Sharon Parkinson, Kieran Hegarty, Daniel Featherstone, Jenny Kennedy, Indigo Holcombe-James, Lyndon Ormond-Parker and Lauren Ganley, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2023* (Report, 2023) 5 <https://www.digitalinclusionindex.org.au/wp-content/uploads/2023/07/ADII-2023-Summary_FINAL-Remediated.pdf>.

²²¹ 'Algorithm-facilitated discrimination' is discrimination against protected groups by an individual or organisation resulting from the use of an algorithmic system. This term is preferred to that of 'algorithmic discrimination' as it encompasses the different ways in which discrimination may occur when an AI system is used. AI systems are 'socio-technical' systems and discrimination may occur not only because it is embedded in the algorithm or AI model. It may also result from the interaction of social and organisational processes with AI technologies, such as the way the system is implemented or operated: Natalie Sheard, 'Algorithm-Facilitated Discrimination: A Socio-Legal Study of the Use by Employers of Artificial Intelligence Hiring Systems' (2025) 52(2) *Journal of Law and Society* 269.

²²² Nicole Gillespie, Steve Lockey, Alexandria Macdade, Tabi Ward and Gerard Hased, *Trust, Attitudes and Use of Artificial Intelligence: A Global Study 2025* (Report, The University of Melbourne and KPMG, 2025) 24.

application of the DDA to AI and automated decision-making including the responsibilities of duty-holders in that context.²²³

Similar guidance material is available in other international jurisdictions. Most notably, in the United States, the Equal Employment Opportunity Commission (‘EEOC’) developed specific guidance relating to the use of AI in recruitment: *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*.²²⁴ In January 2025, following the election of President Donald Trump, this guidance material was removed from the EEOC’s website, it is an example of best practice guidance in this area.²²⁵

Recommendation 7.4: The Australian Human Rights Commission be funded to develop guidance materials via co-design principles with people with disability and subject matter experts for the community, including duty-holders regarding the application of the *Disability Discrimination Act 1992* (Cth) to AI and automated decision-making.

50. How can we ensure the Disability Discrimination Act remains fit-for-purpose into the future?

Liability – Artificial Intelligence and Automated Decision-Making

It is well recognised that there are gaps in the protection offered by federal discrimination laws when algorithms, AI models,²²⁶ AI systems or agentic AI²²⁷ are used by individuals and organisations.²²⁸ To ensure the DDA remains fit-for-purpose into the future, it needs to be updated including to provide that duty-holders are liable for the acts and decisions of AI technologies.²²⁹

²²³ The AHRC has recognised the need for it to develop guidance materials on an ongoing basis: AHRC, [Revitalising Australia’s Commitment to Human Rights: Free & Equal Final Report 2023](#) (AHRC, 2023) (‘Free & Equal Human Rights Report’) Reform 8, 84.

²²⁴ US Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (2022) <<https://www.eeoc.gov/eeoc-disability-related-resources/artificial-intelligence-and-ada>>.

²²⁵ A copy of the guidance can be provided if required.

²²⁶ An ‘AI model’ is a representation of an entity, phenomenon, process or data, employing various AI algorithms to interpret, predict, or generate responses based on input: DISAR, *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High Risk Settings* (Report, September 2024) 8.

²²⁷ Ibid. ‘Agentic AI’ is an AI system that is capable of accomplishing multi-step tasks in pursuit of a high-level goal with little or no human oversight.

²²⁸ See, for example, DISAR, *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High Risk Settings* (Report, Australian Government, September 2024); AHRC, [Revitalising Australia’s Commitment to Human Rights: Free & Equal Final Report 2023](#) (AHRC, 2023) 77.

²²⁹ House of Representatives, Parliament of Australia, *Future of Work: Inquiry into the Digital Transformation of Workplaces* (Report, January 2025), recommendation 2.

At present, liability under the direct discrimination provisions in the DDA is premised on a human actor or decision-maker.²³⁰ The Act does not contemplate a situation where a non-human actor, such as an AI model, AI system or agentic AI, does the act or makes the decision that is discriminatory.²³¹ Unlike for a body corporate,²³² principal²³³ or an employer,²³⁴ the DDA does not attribute liability in this situation to an entity with legal personhood.

Recommendation 7.5: That the *Disability Discrimination Act 1992* (Cth) be amended to provide clarity and certainty regarding questions of liability when duty-holders use AI models or systems or agentic AI by enacting a provision to the effect that:

any act done or omitted to be done by the operation of a computer program in contravention of this Act is taken to have been done or omitted by the person who authorised the deployment of that program.²³⁵

This provision is modelled on the express statutory rule of attribution in the *Migration Act 1958* (Cth) (and other similar federal legislation). Section 495A(2) of that Act provides that a ‘decision’ made by ‘the operation of a computer program’ is ‘taken’ to be a decision of the relevant Minister.

‘Computer program’ is not defined in that or similar legislation. As it is important that the law keeps pace, to the greatest extent possible, with technological change, it is also recommended that a definition be provided of ‘computer program’. ‘Computer program’ should be defined to include ‘artificial intelligence models and systems, agentic artificial intelligence and computer software’.

Once primary liability is attributed to a legal person, such as an employer, the accessorial liability provisions can be used to extend liability to any legal person, such as an AI developer or vendor, who ‘causes, instructs, induces, aids or permits another person to do an act that is unlawful’.²³⁶ They are then ‘taken also to have done the act’ and bear joint and several liability.

²³⁰ Mark Burdon and Paul Harpur, ‘Re-Conceptualising Privacy and Discrimination in the Age of Talent Analytics’ (2014) 37(2) *University of New South Wales Law Journal* 679.

²³¹ Natalie Sheard, ‘Employment Discrimination by Algorithm: Can Anyone Be Held Liable?’ (2022) 45(2) *University of New South Wales Law Journal* 617, 633–8.

²³² DDA s 123(2).

²³³ DDA s 123(2) and (4).

²³⁴ Ibid.

²³⁵ Natalie Sheard, ‘Employment Discrimination by Algorithm: Can Anyone Be Held Liable?’ (2022) 45(2) *University of New South Wales Law Journal* 617, 638.

²³⁶ DDA s 122.

As a defence, AI developers and deployers can assert that they have taken ‘reasonable precautions and exercised due diligence to avoid the conduct’.²³⁷ These precautions should include compliance with any legislative AI ‘guardrails’²³⁸ and the development of risk management processes as specified in Australia’s Voluntary AI Safety Standard,²³⁹ including, independent audits of the computer program to ensure that it does not discriminate against people with disability,²⁴⁰ as well as data governance measures to manage data quality and provenance,²⁴¹ and identifying and engaging with people with disability and other relevant stakeholders over the life of the AI system.²⁴²

Recommendation 7.6: The *Disability Discrimination Act 1992* (Cth) be amended to include an attributed liability provision to the effect that:

any act done or omitted to be done by the operation of a computer program in contravention of this Act is taken to have been done or omitted by the person who authorised the deployment of that program.

Computer program’ should be defined to include ‘artificial intelligence models and systems, agentic artificial intelligence and computer software’.

Ongoing review advisory body

Recommendation 7.7: An ongoing review advisory body composed of disability community representatives and discrimination law experts be established to contribute to (a) discussions in preparation for reviews of the *Disability Discrimination Act 1992* (Cth) and disability standards made under the Act, (b) the development of guidance materials related to the positive duty, disability equality indicators and other compliance promotion mechanisms, and (c) the identification of systemic disability discrimination issues requiring action, particularly in relation to people with disability who face particular barriers to accessing the justice system.

²³⁷ DDA s 123(2).

²³⁸ As set out in DISAR, *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High Risk Settings* (Report, Australian Government September 2024).

²³⁹ DISAR, [Voluntary AI Safety Standard](https://www.industry.gov.au/publications/voluntary-ai-safety-standard) (August 2024), <<https://www.industry.gov.au/publications/voluntary-ai-safety-standard>>.

²⁴⁰ Ibid guardrail 4.

²⁴¹ Ibid guardrail 3.

²⁴² Ibid guardrail 10.

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

The role of Disability Discrimination Commissioner

It is vital that the role of Disability Discrimination Commissioner be held by a person with disability. The recently enacted *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) specifies this in relation to the Disability Commissioner and any acting Commissioner appointed under that Act.²⁴³ This approach reflects the principle that mechanisms that affect the lives of people with disability should have people with disability in leadership positions.

Recommendation 7.8: Sections 113 and 120 of the *Disability Discrimination Act 1992* (Cth) be amended to require that the person appointed to the role of Disability Discrimination Commissioner—whether as an acting appointee or otherwise—be a person who publicly identifies as a person with disability and has been active in promoting the right of people with disability to equality and freedom from discrimination.

Conflict of laws

It is understood that it was the intention of the Commonwealth Parliament when enacted in the DDA and making disability standards under that Act that these would operate alongside state and territory discrimination laws. Unfortunately, the drafting of the provision relating to disability standards—section 31(2)(b)—leaves open the possibility that a disability standard could ‘in whole or in part’ ‘affect the operation of a law of a State or Territory. The Transport Standards, the Education Standard and the Premises Standards are all silent on whether or not any part is intended to ‘affect the operation’ of such laws including those that prohibit disability discrimination. This has resulted in complex legal arguments about whether the **possible** application of a disability standard to a situation that is the subject of a discrimination complaint under state or territory discrimination law prevents that complaint proceeding.²⁴⁴

Recommendation 7.9: Section 31(2) of the *Disability Discrimination Act 1992* (Cth) relating to the effect of disability standards be amended to make it clear that disability standards are not intended to affect the operation of state and territory discrimination laws.

Recognising supported decision making

Australia still has many substituted decision making regimes in place and these regimes institutionalise discrimination against persons with disabilities. In line with

²⁴³ *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) s 27(2), sch 2 s 5(3).

²⁴⁴ See, for example, the course of litigation involving David Cawthorn in relation to the Parliament Square development in Hobart: [David Cawthorn and Paraquod Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd](#) [2019] TASADT 10; [Cawthorn v Citta Hobart Pty Ltd](#) [2020] TASFC 15; [Citta Hobart Pty Ltd v Cawthorn](#) [2022] HCA 16; [Cawthorn v Parliament Square Property Pty Ltd](#) [2024] TASCAT 213; [Cawthorn v Parliament Square Property Pty Ltd \(No 2\)](#) [2025] TASCAT 157

Recommendation 6.6 of the Final Report of the Disability Royal Commission, the DDA should be updated to ensure that the principles of ‘supported decision making’ are adopted by all persons exercising powers, carrying out functions or performing duties that affect the lives of persons with disability.²⁴⁵ This shift from ‘substituted decision making’ to ‘supported decision making’ reflects the CRPD’s recognition that persons with disabilities have legal capacity on an equal basis with others.²⁴⁶ The Committee on the Rights of Persons with Disabilities has emphasised the importance of distinguishing between mental capacity (a controversial concept) and legal capacity, and noted that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.²⁴⁷ The Committee has clarified that:²⁴⁸

States parties [to the CRPD] must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.

This requires that all substituted decision making regimes be replaced with supported decision making alternatives.²⁴⁹

Recommendation 7.10: The *Disability Discrimination Act 1992* (Cth) be amended to ensure that the principles of ‘supported decision making’ are adopted by all officers of the Australian Human Rights Commission exercising powers, carrying out functions or performing duties under the Act.

Climate change and people with disability

The DDA should be updated to reflect the discriminatory impacts of climate change (and climate action) on persons with disabilities, who ‘are at greater risk of the adverse impacts of climate change owing to a variety of social and economic factors’.²⁵⁰ The Conference of States Parties to the CRPD has noted the importance of adopting a disability-inclusive approach to climate action in order to prevent climate change from exacerbating inequalities.²⁵¹ Such a disability-inclusive approach would involve ensuring that housing is

²⁴⁵ Disability Royal Commission, *Final Report: Realising the human rights of people with disability* (2023) Executive Summary 217–18.

²⁴⁶ CRPD art 12. See also Committee on the Rights of Persons with Disabilities, [General comment No 1: Article 12: Equal recognition before the law](#) (2014) CRPD/C/GC/1 (‘CRPD General Comment 1’).

²⁴⁷ Ibid CRPD General Comment 1 [13].

²⁴⁸ Ibid [16].

²⁴⁹ Ibid [28].

²⁵⁰ Office of the United Nations High Commissioner for Human Rights, *Report on the analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change* (22 April 2020) A/HRC/44/30 [58].

²⁵¹ Conference of States Parties to the Convention on the Rights of Persons with Disabilities, *Participation of persons with disabilities in climate action, disaster risk reduction and resilience against natural disasters* (22 March 2022) CRPD/CSP/2022/4 [11].

appropriately adapted to the impacts of climate change such that extreme heat events or heightened risks of fire or flooding do not exacerbate the inequalities experienced by persons with disabilities. It would also mean ensuring that all disaster and displacement planning is proactively disability-inclusive to ensure that persons with disabilities are not left to fend for themselves due to inadequate consideration of their needs or inaccessible evacuation plans.²⁵²

Recommendation 7.11: Consideration be given to what amendments could be made to the *Disability Discrimination Act 1992* (Cth) to reflect the discriminatory impacts of climate change on people with disability.

Vicarious liability provision

The DDA contains two provisions that identify potential liability beyond that of the individual involved in unlawful conduct under the Act. The first of these—section 122—is in virtually identical terms to the equivalent provision in the SDA (section 105). The second one—section 123 Conduct of directors, employees and agents—is distinctly different to the equivalent provision in the SDA (section 106 Vicarious liability etc. Section 106(1) of the SDA refers to conduct of ‘an employee or agent ... in connection with the employment of the employee or with the duties of the agent’ as being taken to be conduct of the employing entity. In contrast, section 123 of the DDA refers to conduct ‘engaged in on behalf of a body corporate by a director, employee or agent ... within the scope of his or her actual or apparent authority’ being taken to be conduct of the employing entity. This provision of the DDA appears to significantly limit liability of employers as it avoids liability if an employee, for example, engaged in harassment of another employee with disability as this would not be ‘within the scope of his or her actual or apparent authority’. Such limiting of vicarious liability is not consistent with, for example, the positive duty.

Recommendation 7.12: Consideration be given to amending section 123 of the *Disability Discrimination Act 1992* (Cth) to take a broader approach to liability of employers and principals, similar to that found in section 106 of the *Sex Discrimination Act 1984* (Cth).

²⁵² See, for example, Conference of States Parties to the Convention on the Rights of Persons with Disabilities, *Participation of persons with disabilities in climate action, disaster risk reduction and resilience against natural disasters* (22 March 2022) CRPD/CSP/2022/4 [12]–[16].

Glossary

ACCC	<i>Australian Competition and Consumer Commission</i>
ACAT	ACT Civil and Administrative Tribunal
ADA Tas	<i>Anti-Discrimination Act 1998 (Tas)</i>
ADCET	Australian Disability Clearinghouse on Education and Training
1986 Affirmative Action Act	<i>Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)</i>
AHRC	Australian Human Rights Commission
AHRC Act	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
AI	artificial intelligence
ALRC	Australian Law Reform Commission
ART	Administrative Review Tribunal
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i> (see n 9)
CHRC	Canadian Human Rights Commission
CRC	<i>Convention on the Rights of the Child</i> (see n 9)
CRPD	<i>Convention on the Rights of Persons with Disabilities</i> (see n 9)
CRPD General Comment 1	Committee on the Rights of Persons with Disabilities, <i>General comment No 1: Article 12: Equal recognition before the law</i> (2014) CRPD/C/GC/1
DA ACT	<i>Discrimination Act 1991 (ACT)</i>
DAP	<i>disability action plan</i>
DAP Register	AHRC, ' Register of Disability Discrimination Act Action Plans '
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>

DDA Exemption Guidelines	AHRC, ' <u>Temporary exemptions under the <i>Disability Discrimination Act 1992</i> (Cth): COMMISSION GUIDELINES</u> ' (no date)
DIAP	<i>disability inclusion action plan</i>
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
DISAR	Commonwealth Department of Industry, Science and Resources
DRO	Disability Representative Organisation
ECJ	European Court of Justice
EDSC	Education and Social Development Canada
Education Standards	<i>Disability Standards for Education 2005</i> (Cth)
EEA Canada	<i>Employment Equity Act</i> , SC 1995, c 44
EEOC	US Equal Employment Opportunity Commission
EO Act Vic	<i>Equal Opportunity Act 2010</i> (Vic)
Free & Equal Discrimination Report	<i>Free & equal: A reform agenda for federal discrimination laws</i> (see n 73)
Free & Equal Human Rights Report	<i>Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023</i> (see n 229)
FWA	<i>Fair Work Act 2009</i> (Cth)
FWO	Fair Work Ombudsman
HREOC	Human Rights and Equal Opportunity Commission, now the Australian Human Rights Commission ('AHRC')
ICCPR	<i>International Covenant on Civil and Political Rights</i> (see n 9)
ICERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> (see n 9)
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i> (see n 9)

IGDF	International Guide Dogs Federation
ILO 111	<i>Discrimination (Employment and Occupation) Convention</i> (see n 9)
Inclusive Education Taskforce Report	<i>Improved Support for Students with Disability: Ministerial Taskforce Report</i> (n 202)
Intersectionality at work Report	<i>Intersectionality at work: Building a baseline on compounded gender equality in the Victorian public sector report</i> (see n 31)
NCC	<i>National Construction Code</i>
NDIS	National Disability Insurance Scheme
NGO	<i>non-government organisation</i>
NSW Disability Inclusion Act	<i>Disability Inclusion Act 2014</i> (NSW)
Ovideo Convention	<i>Convention on Human Rights and Biomedicine</i> (see n 25)
PCBU	<i>person conducting a business or undertaking</i>
Premises Standards	<i>Disability (Access to Premises - Buildings) Standards 2010</i> (Cth)
<i>Purvis</i>	<i>Purvis v New South Wales</i> [2003] HCA 62; 217 CLR 92
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
Respect@Work Report	<i>Respect@Work: Sexual Harassment National Inquiry Report</i> (see n 73)
SDA	<i>Sex Discrimination Act 1984</i> (Cth)
Tasmanian Disability Rights Act	<i>Disability Rights, Inclusion and Safeguarding Act 2024</i> (Tas)
Transport Standards	<i>Disability Standards for Accessible Public Transport 2002</i> (Cth)
UDL	<i>universal design for learning</i>
WGE Act	<i>Workplace Gender Equality Act 2012</i> (Cth)
WHS	work health and safety