



Review of the Disability Discrimination Act 1992

Prepared by South-East Monash Legal Service Inc.

for the Australian Government, Attorney-General's Department

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Our organisation

Established in 1973, South-East Monash Legal Service (**SMLS**) is a community legal centre providing free legal advice, assistance, information, and education to people experiencing disadvantage across the City of Greater Dandenong, the City of Casey, and the Shire of Cardinia.

We operate duty lawyer services at courts including Dandenong Magistrates' Court and the Children's Court and offer legal representation at the Victorian Civil and Administrative Tribunal, Fair Work Commission and the Federal Circuit and Family Court.

SMLS runs one of Australia's longest-standing clinical legal education programs in partnership with Monash University's Faculty of Law, enabling students to gain practical experience as part of their undergraduate studies.

Our community legal education program is shaped by ongoing engagement and feedback from the communities we serve. Through our Support Connect Integrated Program (**SCIP**), we offer wraparound services that combine legal support with social work.

We also lead a robust policy, advocacy, and law reform program, contributing to reforms in areas such as family violence, civil procedure, employment law, discrimination, sexual assault, youth justice, climate justice and victims' rights.

Supporting our clients with disabilities

Our clients face complex legal challenges, including criminal justice, family violence, and employment issues. Many live with disabilities, ranging from age-related conditions and psycho-social diagnoses to autism spectrum disorders, WorkCover injuries, and physical impairments, requiring tailored service approaches and meaningful accommodations.

We regularly advise clients on disability discrimination law and witness firsthand the limitations of the current federal framework. The Disability Discrimination Act, in its current form, often falls short of providing the protections people with disabilities need to access justice equitably.

To address this, the Act must be strengthened to include a proactive duty to prevent discrimination, shifting the focus from reactive measures to preventative action. It should also empower the Australian Human Rights Commission with the authority and tools to enforce these protections effectively.

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

Acknowledgement of Country

SMLS acknowledges the Bunurong People and the Wurundjeri People, the traditional owners of the land where we work, and First Peoples language groups and communities across Victoria and Australia. We pay our respects to Elders past and present. We celebrate the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

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Terms of Reference

We are responding to the consultation on reforms to the Disability Discrimination Act (DDA), guided by the Terms of Reference outlined in the Issues Paper published by the Attorney-General's Department. This review focuses on implementing 15 recommendations from the Disability Royal Commission and exploring further amendments to modernise and strengthen the DDA. It seeks input on how best to improve the Act to benefit both people with disability and those with responsibilities under it.

Scope of submission

Many of the questions are outside of the scope of SMLS services. We have only provided comments where we were confident that our expertise was a valuable contribution to the subjects raised.

Acronyms

SMLS	South-East Monash Legal Service Inc.
CLC	Community legal centre
DDA	<i>Disability Discrimination Act 1992</i>
AHRC	Australian Human Rights Commission
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
CRPD	UN Convention on the Rights of Persons with Disabilities (CRPD),

Endorsements

This submission is endorsed by:



SMLS is a signatory to the [Network for Disability Law Reform joint statement: Time for a Stronger Disability Discrimination Act.](#)



SMLS Endorses the submission by Disability Discrimination Legal Service Inc.

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Summary of Recommendations

Recommendation 1:

Ensure First Nations leadership and consultation in all DDA reforms, and fund ACCOs to provide culturally appropriate legal assistance and advocacy for First Nations people with disability.

Recommendation 2:

Expand AHRC's powers to include systemic investigations, binding enforcement, arbitration, and advisory functions during ADR to improve access to justice and address disability discrimination more effectively.

Recommendation 3:

Modernise the definition of 'disability' in the Disability Discrimination Act to reflect inclusive, respectful, and contemporary understandings co-designed with people with lived experience.

Recommendation 4:

Ensure consistency across federal legislation by updating the definition of disability in laws such as the Fair Work Act to reflect any revised definition adopted in the Disability Discrimination Act.

Recommendation 5:

Expand the scope of the review to consider the broader framework of Commonwealth and state anti-discrimination legislation.

Recommendation 6:

Strengthen anti-discrimination protections through consolidation and harmonisation of existing laws or the introduction of an overarching Human Rights Act to address intersectional discrimination and reduce fragmentation.

Recommendation 7:

Replace the comparator test in the DDA's definition of direct discrimination with a detriment-based approach that focuses on the actual impact of discriminatory conduct, rather than hypothetical comparisons.

Recommendation 8:

Introduce a reverse onus of proof in discrimination cases under the DDA, requiring respondents to justify their actions once a prima facie case is established.

Recommendation 9:

Amend the definition of indirect discrimination in the DDA to align with the Victorian *Equal Opportunity Act* by removing the 'reasonableness' requirement and shifting the focus from compliance to the actual disadvantage caused by a condition or requirement.

Recommendation 10:

Replace compliance-based language such as “does not” or “would not” comply with terminology that assesses whether a person is disadvantaged, to better reflect systemic barriers and support a more inclusive legal framework.

Recommendation 11:

Introduce a universal positive duty under the DDA requiring all duty holders, such as employers, service providers, educational institutions, accommodation providers, and government agencies, to take reasonable and proportionate measures to prevent disability discrimination.

Recommendation 12:

Introduce clear guidelines and robust enforcement mechanisms to support the implementation of a positive duty under discrimination law, ensuring organisations are held accountable for systemic issues.

Recommendation 13:

Enable representative bodies and unions to initiate complaints on behalf of affected individuals, reducing the burden on individuals and promoting broader systemic accountability.

Recommendation 14:

Establish a clear, proactive legal obligation for duty holders to make reasonable adjustments for people with disabilities, unless doing so would impose unjustifiable hardship.

Recommendation 15:

Amend the DDA to explicitly state that failure to make reasonable adjustments constitutes discrimination, regardless of whether the refusal is directly linked to the disability.

Recommendation 16:

Extend the duty to provide reasonable adjustments so that it applies broadly across all contexts and settings, including employment, education, accommodation, and access to services. This duty should encompass both public and private sectors, while retaining the unjustifiable hardship defence to ensure proportionality and fairness.

Recommendation 17:

Adopt Option 1 of the Issues Paper, to strengthen the unjustifiable hardship provision in the DDA by introducing clear criteria, requiring meaningful consultation with people with disability, and clarifying that inconvenience or cost alone does not justify refusal of reasonable adjustments.

Recommendation 18:

Require Employers to follow a transparent, consultative process and bear the burden of proof when claiming unjustifiable hardship.

Recommendation 19:

Amend the DDA to include two additional factors in the assessment of inherent requirements:

1. The nature and extent of any reasonable adjustments made; and

2. The extent of consultation with the person with disability.

Recommendation 20:

To ensure fair and transparent employment decisions, we recommend that employers:

- Define inherent requirements clearly during the job design phase, rather than applying them retroactively during recruitment or performance management.
- Engage in meaningful consultation with the individual and relevant experts to explore reasonable adjustments that may enable the person to meet the inherent requirements.
- Distinguish between core and non-essential tasks, avoiding exclusion based on minor or modifiable aspects of a role.
- Base decisions on evidence and consultation, not assumptions.
- Undertake training to assess inherent requirements fairly and inclusively.

Recommendation 21:

Implement the Disability Royal Commission's recommendation to amend the DDA to explicitly prohibit suspensions and expulsions based on a student's disability and to ensure open access to education and prevent discriminatory disciplinary practices.

Recommendation 22:

Remove the comparator test, comparing a student with disability to a hypothetical non-disabled peer, as it creates unfair barriers to proving discrimination.

Executive Summary

South-East Monash Legal Service (SMLS) welcomes the opportunity to provide feedback to the review of the *Disability Discrimination Act 1992 (DDA)*. We strongly support reforms that strengthen the DDA to better protect and promote the rights of people with disability. Australia must move beyond a reactive, complaints-based system and adopt a proactive approach that places a positive duty on individuals and institutions to prevent discrimination before it occurs. It also highlights the DDA's ineffectiveness in supporting disabled persons to protect their human rights regarding discrimination in our systems. This review presents a significant opportunity to centre the lived experiences of people with disability and their needs, ensure accessible robust enforcement mechanisms, streamline discrimination laws, and invest in legal assistance to make disabled rights real and accessible.

Many of the discrimination-related matters we assist with arise in the context of employment. These issues commonly involve clients returning to work or seeking reasonable adjustments. These cases rarely proceed as formal disability discrimination claims under the Disability Discrimination Act (DDA). Instead, clients often seek immediate advice on dismissal or workplace disputes, with time sensitive employment law frameworks, such as unfair dismissal or general protections under the *Fair Work Act 2009* (Cth), providing more practical avenues for redress. In our experience, the DDA is seldom utilised directly due to its complexity, longer timeframes, and limited accessibility.

Client Story

Amir's* Story

How we helped Amir fight disability discrimination at work

When Amir* started his job at a busy fast-food restaurant, he was excited to earn his own income and build his independence. Amir lives with an intellectual disability and was employed with help from a disability employment agency. His employer knew about his disability and the support he needed to thrive at work.

But instead of a supportive environment, Amir faced repeated bullying from his manager. When he found the courage to speak up, senior management failed to act, and the bullying only got worse. Feeling unsafe and unheard, Amir made the difficult decision to resign.

He knew that how his workplace had treated him was wrong. With support from his dad, Amir decided to seek legal help. But without an income, he couldn't afford a lawyer, so reached out to South-East Monash Legal Service. With advice and help from our lawyers, Amir chose to challenge the situation at his workplace, claiming that his resignation was forced. We helped him file a General Protections application under the Fair Work Act 2009 (Cth), arguing that Amir had experienced adverse action because of his disability.

Amir chose this pathway because the Fair Work Commission provides a faster and more supportive process for resolving employment disputes. It allowed us to move quickly toward conciliation and a fair outcome for Amir without the stress and delay of a long court process.

Amir's father supported him closely throughout, and our team made sure Amir stayed at the centre of every decision. We communicated in plain language, checked in regularly, and remained sensitive to Amir's family's advocacy while upholding our duty to act on Amir's own wishes.

Through conciliation, Amir reached a fair resolution with his former employer. His story shows how the Fair Work system can offer accessible justice for people with disability who experience mistreatment at work.

However, people who experience discrimination in other settings (such as housing, education, or while accessing services) also need access to fast, supportive and accessible pathways to justice. That's why we want to see the Disability Discrimination Act 1992 (Cth) strengthened to provide the same kind of timely, person-centred resolution that made a difference for Amir.

*Name changed for confidentiality.

Despite our commitment to supporting clients experiencing disability discrimination, we often face limitations in progressing these matters. Casework opportunities are often constrained by a lack of clear evidence, the employees lack of power to enforce their rights and the broad exception available to employers around “reasonable adjustments,” which can be invoked readily and with minimal scrutiny. This creates a barrier with a high threshold for clients to demonstrate discrimination, particularly in employment contexts.

Clients often report feeling burdened by the need to justify even basic workplace accommodations, particularly when employers request extensive medical documentation. While such documentation is sometimes legally required, it is not always necessary, and the boundaries of what is legally required are often unclear. Employers frequently justify these requests on occupational health and safety grounds, but in practice, they can be invasive and create significant barriers to inclusion.

We have supported clients who have requested reasonable adjustments, only to have those requests refused by employers. In such cases, the refusal to accommodate effectively results in the employer failing to acknowledge the employee’s disability. This is especially concerning when performance issues arise from misunderstood or unsupported disabilities, such as autism, and the employer has not taken steps to provide appropriate adjustments.

In many cases, it appears that documentation from the employee is requested more as a procedural formality, to “tick the box” and demonstrate consultation, rather than to genuinely understand or support the employee’s needs. This approach undermines the intent of reasonable adjustments and can discourage employees from seeking the support they are entitled to.

These experiences highlight a gap between the legal protections available under the DDA, employers’ understanding or willingness to meet their obligations, and the practical enforcement of disability rights. The power imbalance is particularly evident in employment settings, where inclusive practices could enable people with disability to contribute meaningfully to society and the economy, rather than being pushed into chronic unemployment and dependency.

In practice, due to the DDA’s lack of impactful and accessible enforcement pathways or system supports, we often advise clients with disability related issues to use alternative legal pathways, including General Protections claims, potential WorkCover entitlements, or referrals to WorkSafe. These options are more accessible and responsive to the immediate needs of clients. Our experience underscores the need for a more integrated and disability-aware legal framework, one that empowers individuals to assert their rights without navigating overly complex or inaccessible processes.

Legal and tribunal processes are not consistently designed with disability accessibility in mind. Clients often require plain-language documents, additional time to gather evidence, and access to interpreters or support workers, with accommodations that are critical but not reliably provided or

provided in a consultative way for the disabled person. Clients with psychological or psychiatric disabilities present unique challenges that require nuanced and trauma informed approaches for their individual needs. As a CLC with limited resources, we often struggle to provide the time, accommodations and expertise needed to navigate these matters effectively and ensure our clients can access the justice support they require to ensure fairness. For example, obtaining clear instructions can be difficult when family members speak on behalf of clients without formal legal authority, complicating processes such as signing settlement agreements. We have clients who face both language barriers and disabilities, which together compound their challenges in accessing legal support.

CLCs including SMLS, play a critical role in providing access to legal support, representation, and advocacy for people with disabilities in line with their human rights. CLC work highlights the urgent need for increased funding not only for community legal education and support, so our disabled community and clients can better understand and assert their legal rights, but also for frontline legal services that assist individuals navigating complex discrimination and employment law systems which often lack suitable disability accommodations so creating barriers to legal support.

Without targeted change and investment in both education and legal assistance, the protections offered by the DDA are at risk of remaining largely theoretical. Accessible, well-resourced legal and advocacy services are essential to bridging the gap between legal frameworks and meaningful outcomes for people with disability.

Strengthening the DDA through clearer obligations, proactive duties, and systemic support will reduce discrimination. It is time to move from reactive compliance to proactive inclusion, ensuring that all Australians have equal access to meaningful employment and involvement in society.

First Nations consultation and leadership

First Nations people with disability in Australia face unique and compounded marginalisation due to the intersection of disability, colonisation, racism, and intergenerational trauma.¹ They are disproportionately affected by systems like child protection and criminal justice and often excluded from economic and social participation. Cultural perspectives on disability differ from Western views, emphasizing collective wellbeing over individual impairment.² Despite higher rates of disability, First Nations people encounter significant barriers to accessing culturally safe services especially in remote areas. Current policies often overlook their distinct needs, and their voices must be amplified to ensure their rights and wellbeing are respected.

Ensuring First Nations consultation and leadership in all legislative reform is critical to achieving meaningful and culturally safe outcomes for Aboriginal and Torres Strait Islander people. Reforms to the DDA must be shaped in genuine partnership with First Nations communities, recognising the importance of culture and community. The Government must commit to funding Aboriginal Community Controlled Organisations (ACCOs) to provide culturally appropriate legal assistance and advocacy, enabling First Nations people with disability to access civil justice remedies, including for disability discrimination. Without this leadership and investment, reforms risk perpetuating systemic exclusion and failing to address the intersecting forms of discrimination experienced by First Nations people with disability. Embedding First Nations voices at every stage of reform is essential to building a legal framework that is inclusive, responsive, and grounded in self-determination.

Recommendations

Recommendation 1:

Ensure First Nations leadership and consultation in all DDA reforms, and fund ACCOs to provide culturally appropriate legal assistance and advocacy for First Nations people with disability.

Strengthening AHRC Powers of investigation and enforcement

The Australian Human Rights Commission (AHRC) plays a key role in upholding disability rights, but its powers are currently limited. Its complaints-based model places the burden on individuals to challenge discrimination, often through lengthy and complex legal processes.

To strengthen federal disability discrimination laws, AHRC should be empowered to proactively investigate systemic issues, enforce compliance, and issue binding outcomes. Shifting

¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report, Volume 9: First Nations People with Disability

² Ibid

responsibility from individuals to institutions would lead to more consistent and effective responses to disability discrimination across sectors.

Expanding AHRC's role to include arbitration or determinative alternative dispute resolution (ADR) could significantly improve access to justice. While arbitration requires agreement from both parties, which may not always be forthcoming, it would still offer a valuable option for resolving matters without costly Federal Court proceedings. Giving AHRC the power to investigate and advise during ADR could encourage earlier settlements. This would help parties better understand the strengths and risks of their positions and reduce reliance on litigation. It could also allow AHRC to examine the use of non-disclosure agreements (NDAs), especially where power imbalances exist, helping prevent applicants from being pressured into unfair settlements.

Recommendations

Recommendation 2:

Expand AHRC's powers to include systemic investigations, binding enforcement, arbitration, and advisory functions during ADR to improve access to justice and address disability discrimination more effectively.

Part 1 – Updating understandings of disability and disability discrimination

Definition of Disability

SMLS supports the modernisation of the Disability Discrimination Act to ensure it uses inclusive and respectful language, particularly in its definition of 'disability'. Central to this reform must be the involvement of people with lived experience of disability in shaping the language and structure of the definition.

Rather than focusing on deficits or impairments, the definition should highlight the barriers that create disadvantage, recognising that disability arises from the interaction between individuals and these barriers, not solely from medical conditions. The language used must be free from outdated and stigmatising terms such as “malfunction,” “malformation,” “disfigurement,” and “disturbed,” which reinforce harmful stereotypes and undermine dignity. Adopting inclusive terminology is essential to ensuring the DDA reflects the values of respect, equality, and human rights.

A revised definition of disability under the DDA should be guided by several core principles. It must align with international standards, particularly the UN Convention on the Rights of Persons with Disabilities (CRPD)³, which Australia has ratified. This means embedding values of dignity, autonomy, inclusion, and equality into the definition itself. However, it is important to also reflect on the limitations of the CRPD definition. The CRPD defines persons with disabilities as those with

³ United Nations. “Convention on the Rights of Persons with Disabilities.” *Treaty Series*, vol. 2515, Dec. 2006

“long-term physical, mental, intellectual or sensory impairments”⁴ which, in interaction with various barriers, may hinder full and effective participation in society on an equal basis with others. While this definition is progressive in recognising the role of social and environmental barriers, it presents several limitations when applied to domestic law reform. The emphasis on “long-term” impairments may unintentionally exclude individuals with episodic or temporary disabilities who still face significant disadvantage. This narrow framing risks denying protection to people whose disability does not meet a strict duration threshold but who nonetheless experience discrimination.

The definition should be shaped by lived experience, with people with disabilities actively involved in its co-design. It must also be inclusive of those who may not identify with the term “disability” but still face discrimination, such as people with HIV, mental health conditions, or short-term illnesses. This would better reflect the diversity of disability experiences and ensure that the law protects all individuals who face discrimination, regardless of how their disability is medically classified or how long it lasts.

Words like “impairment” may also be considered stigmatising by many in the disability community, particularly those who identify with neurodivergent conditions such as autism, ADHD, or dyslexia. These individuals may be forced to describe themselves in terms that do not reflect their identity or experience, such as having a “mental impairment,” which can feel both inaccurate and offensive.

In reforming the DDA, Australia has an opportunity to go beyond the CRPD’s minimum standard by adopting a definition that is inclusive, barrier focused and co-designed with people with lived experience. To broaden the current definition and fulfill our obligations as a signatory party, it should acknowledge that disability is an evolving concept. Conditions not presently recognised as disabilities may be understood differently in the near future. Establishing rigid, determinative standards risks hindering progress and inclusivity.

The definition must be legally clear and consistent and harmonised across federal, state, and territory laws to reduce confusion and improve enforcement. A unified definition would strengthen protections and ensure a more coherent approach to disability rights across Australia. Reform of the definition of ‘disability’ in the DDA should also recognise intersectionality and how disability interacts with other forms of disadvantage, such as race, gender, and age, sexuality, migration status.

⁴ Ibid, Article 1 Purpose

Recommendations

Recommendation 3:

Modernise the definition of ‘disability’ in the Disability Discrimination Act to reflect inclusive, respectful, and contemporary understandings. The revised definition should be co-designed with people with lived experience, focus on barriers rather than impairments, avoid stigmatising language, and recognise intersectionality. It should also align with, but improve upon, the UNCRPD definition, ensuring protection for all individuals facing discrimination, including those with episodic or temporary disabilities.

Recommendation 4:

Ensure consistency across federal legislation by updating the definition of disability in laws such as the Fair Work Act to reflect any revised definition adopted in the Disability Discrimination Act. These updates must guarantee that individuals are not disadvantaged or excluded under the new wording.

Intersectionality under the Disability Discrimination Act and anti-discrimination framework

The DDA would be strengthened by expressly allowing claims to be brought on the basis of multiple or combined protected attributes. While the DDA currently allows a claim to proceed if disability is one of several reasons for discriminatory treatment, even if not the dominant or substantial reason, this flexibility is largely limited to the conciliation process at the AHRC. Once a matter proceeds to court, the legal framework becomes more rigid, and applicants may face challenges in proving discrimination across multiple attributes under separate Acts. This increases the burden on complainants and risks fragmenting their lived experience into artificial legal categories.

Many of our clients experience discrimination that is not solely based on disability, but rather on a combination of protected attributes such as gender, race, age, and socio-economic status. These intersectional experiences are complex and often systemic, making it difficult to isolate a single cause of discrimination. For example, a woman with disability from a culturally and linguistically diverse background may face compounded barriers that cannot be neatly separated into categories of gender, race, or disability. Recognising and addressing this compounding discrimination is essential to ensuring that all people with disability, particularly those with intersecting identities, are fully protected under the DDA. The DDA should be revised to clearly acknowledge intersectional discrimination, allowing individuals to make complaints that involve multiple or overlapping protected attributes.

Enhancement of the DDA with the introduction of a Human Rights Act

We note that while this review is focused solely on the DDA it does not consider the broader framework of Commonwealth and state anti-discrimination legislation. This limited scope reflects an ongoing structural flaw in Australia’s legal approach to equality. To meaningfully address

intersectional discrimination and ensure cohesive protection, it is essential to consider anti-discrimination legislation in its entirety, either through consolidation and harmonisation or by introducing an overarching Human Rights Act. Such reform would provide a unified framework for how these laws interact, reduce fragmentation, and strengthen protections for individuals navigating multiple forms of discrimination.

Introducing a Human Rights Act could significantly enhance the effectiveness of the DDA. Evidence from jurisdictions like Victoria, Queensland, and the ACT, where both discrimination laws and human rights legislation (such as Victoria's Charter of Human Rights) coexist, shows that embedding positive rights, including equality before the law, privacy, and dignity, strengthens how discrimination laws are interpreted and applied. These frameworks also allow discriminatory laws and policies to be challenged through a 'dialogue model'. In turn, updated discrimination laws support the implementation of human rights by ensuring those rights are accessible to all without discrimination. Although the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) recommended a Disability Rights Act due to its limited scope⁵, its emphasis on positive rights and legal reform aligns with the July 2024 joint statement from numerous disability organisations advocating for a Human Rights Act⁶. The Parliamentary Joint Committee on Human Rights also endorsed a Human Rights Act in its May 2024 report⁷, and this recommendation should be considered alongside reforms to the DDA as part of implementing the Commission's findings.

Recommendations

Recommendation 5:

Expand the scope of the review to consider the broader framework of Commonwealth and state anti-discrimination legislation.

Recommendation 6:

Strengthen anti-discrimination protections through consolidation and harmonisation of existing laws or the introduction of an overarching Human Rights Act to address intersectional discrimination and reduce fragmentation.

⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report, Volume 4: Realising the human rights of people with disability, Commonwealth of Australia, p107

⁶ Strengthening protection of the rights of people with disability through a national Human Rights Act (HRA), Position Statement by Disability Representative Organisations (DROs), 19 July 2024, accessed at <https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/>

⁷ Inquiry into Australia's human rights framework, Parliamentary Joint Committee on Human Rights, Commonwealth of Australia, May 2024, Recommendations 1 to 4

Definition of Direct Discrimination, the ‘Comparator test’ and the burden of proof

Under the DDA, direct disability discrimination occurs when a person is treated less favourably than another person without the disability would be treated in similar circumstances, because of their disability. This definition relies heavily on the ‘comparator test’, central to assessing whether discrimination has occurred, and which requires a person with disability to prove they were treated less favourably than someone without a disability in similar circumstances.

To improve the DDA, it would be beneficial to replace the comparator test with a detriment-based approach, similar to that used in the Fair Work Act 2009 (Cth) (FWA). The FWA offers a more accessible test for addressing discrimination through a reverse onus of proof. The focus is shifted from a person comparing how they have been treated and having to prove that they were treated less favourably to another, *to the actual impact of discriminatory conduct on the person*. This would also allow courts and tribunals to assess discrimination based on the **actual harm** or disadvantage experienced, rather than requiring hypothetical comparisons that often fail to capture the nuance of lived experience.

The burden of proof in discrimination cases is a critical issue and shifting it onto the respondent rather than the person with disability is essential for ensuring fairness and accessibility. The current DDA approach to the burden of proof places a significant and often overwhelming burden on individuals who are already navigating complex systems, trauma, and disadvantage. For many, especially those with limited access to legal support, gathering evidence, constructing legal arguments, and meeting technical thresholds is simply too much. It becomes yet another barrier to justice. A reverse onus of proof recognises the power imbalance between individuals with a disability and those with greater resources and authority.

Recommendations

Recommendation 7:

Replace the comparator test in the DDA’s definition of direct discrimination with a detriment-based approach that focuses on the actual impact of discriminatory conduct, rather than hypothetical comparisons. This would better reflect lived experience and improve accessibility to justice.

Recommendation 8:

Introduce a reverse onus of proof in discrimination cases under the DDA, requiring respondents to justify their actions once a prima facie case is established. This shift would reduce the burden on complainants and address the power imbalance faced by people with disability.

Definition of ‘Indirect’ discrimination, ‘reasonableness’ and ‘compliance’

A more inclusive and accessible approach to defining indirect discrimination would be to align the DDA with the Victorian *Equal Opportunity Act 2010*, which focuses on whether a condition or requirement disadvantages a person with a protected attribute, without requiring proof of non-

compliance or reasonableness. We recommend removing the ‘reasonableness’ element from the DDA’s definition of indirect discrimination to simplify the test and better reflect the lived experiences of people with disability. This recommendation is discussed below in the context of strengthening the duty to provide adjustments.

We also recommend removing the language ‘does not’ or ‘would not’ comply as it frames the issue in terms of compliance. The focus on whether a person can ‘comply’ can mask the fact that they are experiencing serious disadvantage. A more appropriate framing would assess whether the condition or requirement results in disadvantage, rather than whether the person can comply. This shift would better reflect the purpose of indirect discrimination provisions, to identify and address systemic barriers, and would align the DDA with contemporary anti-discrimination standards.

Recommendations

Recommendation 9:

Amend the definition of indirect discrimination in the DDA to align with the Victorian *Equal Opportunity Act* by removing the ‘reasonableness’ requirement and shifting the focus from compliance to the actual disadvantage caused by a condition or requirement.

Recommendation 10:

Replace compliance-based language such as “does not” or “would not” comply with terminology that assesses whether a person is disadvantaged, to better reflect systemic barriers and support a more inclusive legal framework.

Part 2 – Positive duty to eliminate discrimination

SMLS supports the introduction of a positive duty to prevent disability discrimination. A positive duty under the DDA should apply to all duty holders currently covered by the Act, including employers, service providers, education institutions, accommodation providers, and government agencies. This aligns with the approach taken in the other state legislation⁸, and the Sex Discrimination Act⁹, where the duty applies broadly to entities with responsibilities under the law. Applying the duty universally ensures consistency, promotes systemic change, and avoids creating gaps in protection for people with disability.

One key learning from the SDA is the importance of requiring organisations to take reasonable and proportionate measures to prevent discrimination, rather than relying solely on reactive complaints. The SDA also introduced guidelines and enforcement mechanisms, which help duty holders understand their obligations and promote compliance. These elements should be mirrored in the DDA to ensure clarity, accountability, and effectiveness.

SMLS supports reforms that would allow complaints for breaches of the positive duty to be brought not only by affected individuals, but also by registered organisations and unions. This approach is

⁸ *Equal Opportunity Act 2010* (Victoria)

⁹ *Sexual Discrimination Act 1984* (Cth)

essential to ensuring the duty is meaningfully enforced and achieves its intended impact. Individuals with disability should not bear the sole burden of initiating action, particularly when systemic discrimination is involved. Enabling representative bodies to take action helps shift the weight of enforcement away from individuals and strengthens accountability across institutions.

Recommendations

Recommendation 11:

Introduce a universal positive duty under the DDA requiring all duty holders, such as employers, service providers, educational institutions, accommodation providers, and government agencies, to take reasonable and proportionate measures to prevent disability discrimination.

Recommendation 12:

Introduce clear guidelines and robust enforcement mechanisms to support the implementation of a positive duty under discrimination law, ensuring organisations are held accountable for systemic issues.

Recommendation 13:

Enable representative bodies and unions to initiate complaints on behalf of affected individuals, reducing the burden on individuals and promoting broader systemic accountability.

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

Strengthening the duty to provide adjustments

We support the introduction of a standalone duty to provide reasonable adjustments in the DDA, making it unlawful for a duty holder to fail or refuse to make an adjustment unless doing so would impose unjustifiable hardship.

This reform would simplify the current framework, which relies on indirect discrimination provisions and implied obligations, and instead establish a clear, proactive duty. Currently, the obligation to make adjustments often only becomes enforceable after discrimination has occurred. The current duty is contained in sections 5(2) and 6(2) of the DDA. Section 5(2) provides that direct discrimination occurs where a duty-bearer fails to make reasonable adjustments for a person with a disability, and that failure results in the person being treated less favourably than someone without the disability would be in the same circumstances.

A standalone duty would shift the focus from reactive complaints-based enforcement to preventative action, encouraging duty holders to consider and implement adjustments before barriers arise. This would promote substantive equality, aligning the DDA with the social model of disability and international human rights standards.

This reform would also provide greater certainty and clarity for both people with disability and duty holders. It would reduce reliance on complex legal interpretations and empower individuals to assert their rights more confidently. For duty holders, clearer obligations would support better

planning, risk management, and inclusive practice, ultimately benefiting organisations through improved participation, retention, and reputation.

In the disability context, the duty to make adjustments reflects the social model of disability, which focuses on removing societal and environmental barriers that prevent full participation, rather than viewing disability as a problem within the individual.¹⁰ Unlike the medical model, which centres on treating or changing the person, the social model emphasises that disadvantage arises from inaccessible systems, attitudes, and structures. Adopting this approach means recognising that disability is shaped by context, and that meaningful inclusion requires addressing those external barriers.¹¹

One of the main barriers to effective action under the current DDA is the precedent set by *Sklavos v Australasian College of Dermatologists* ('*Sklavos*')¹². In this case, the Federal Court interpreted the DDA in a way that significantly narrowed the enforceability of the right to reasonable adjustments. It held that a person with a disability must not only demonstrate that a reasonable adjustment was not made but also prove a direct causal link between their disability and the failure to make that adjustment.

In practice, this is an extremely high bar, often impossible to meet, unless the respondent explicitly states that the refusal was because of the person's disability. This interpretation undermines the original intent of the DDA, which was to promote substantive equality through a positive duty to make reasonable adjustments unless doing so would cause unjustifiable hardship. The *Sklavos* decision effectively removes this positive obligation and shifts the burden unfairly onto the complainant.

Legal scholar Alice Taylor critiques the current interpretation of the DDA in her paper *Disability Discrimination, The Duty to Make Adjustments and the Problem of Persistent Misreading*. She references former Chief Justice of Canada, Beverley McLachlin, who observed:

"Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful endeavours on irrelevant, stereotypical grounds and the denial of individual dignity and worth. ...

*The other route is the route of reasonable accommodation. It starts from the premise of each individual's worth and dignity and entitlement to equal treatment and benefit. It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends.*¹³

¹⁰ Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* 461

¹¹ *Ibid.* 464

¹² *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247

¹³ Justice Beverley McLachlin, 'Reasonable Accommodation in a Multicultural Society' (Address to the Canadian Bar Association Continuing Legal Education Committee and National Constitutional and Human Rights Section, Calgary, Alberta, 7 April 1995).

Taylor argues that *Sklavos* removes the positive aspect of the duty to make adjustments, stating:

*[I]n Sklavos v Australasian College of Dermatologists, it was established that a duty-bearer is only required to make adjustments for persons with disabilities where the reason for the refusal to make adjustments is based on the disability itself. This removes the positive aspect of the duty from the requirement and makes it almost impossible for a claimant to prove their claim.*¹⁴

She further notes that Australian higher courts have typically adopted this more restrictive approach, in contrast to Canadian and UK jurisdictions. The purpose of the duty to make adjustments, she argues, is to implement a social model of disability, one that operates asymmetrically to eliminate socially constructed inequalities associated with difference and disability.¹⁵

Following legislative amendments after *Purvis*,¹⁶ the Federal Court in *Watt* considered the operation of section 5(2) in detail. Justice Mortimer acknowledged that the term “reasonable adjustment” was drawn from the Convention on the Rights of Persons with Disabilities (CRPD), to which Australia is a party. She further clarified that while the term “reasonable” is used, the DDA defines it to mean all adjustments up to the point of “undue hardship”, leaving no room for courts or duty-bearers to assess reasonableness outside that context.¹⁷

In contrast, the UK’s *Equality Act 2010* treats the duty to make adjustments as a distinct and detailed obligation, separate from direct and indirect discrimination. It outlines specific actions and examples across multiple subsections, helping courts interpret the duty as requiring different or more favourable treatment to achieve equitable outcomes for disabled people. This contrasts with the Australian approach, where the duty is less clearly defined and often interpreted narrowly by higher courts.¹⁸ The Supreme Court of the United Kingdom has consistently maintained that the correct approach to the duty to make adjustments requires asymmetry and potentially more favourable treatment of persons with disabilities. In Canada, the onus is more clearly placed on the respondent to justify barriers to access, requiring them to demonstrate that inclusion would jeopardise broader societal aims, such as public safety.

Taylor concludes by highlighting the opportunity for reform in Australia. At a minimum, she suggests that the duty to make reasonable adjustments should be redrafted as a separate and distinct section of the DDA, rather than being embedded within the provisions on direct and indirect discrimination. This would clarify that reasonable adjustments are a standalone obligation requiring a different legal analysis. However, she cautions that unless and until courts interpret the

¹⁴ Alice Taylor, ‘Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading’ (2019) 45(2) *Monash University Law Review*

¹⁵ Taylor cites *Archibald v Fife Council* [2004] 4 All ER 303 (‘Archibald’) and *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union* [1999] 3 SCR 3 (‘Meiorin’).

¹⁶ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248

¹⁷ Taylor (n10) 473

¹⁸ Taylor (n10) 479

duty as a **positive obligation** grounded in **substantive equality**, the Australian framework will continue to fall short of delivering meaningful equality for persons with disabilities.

Taylor concludes with highlighting the opportunity for reform in Australia: *There are potential reform opportunities in the Australian context. At the very least, and not a novel suggestion, is that the requirement to make reasonable adjustments should be re-drafted to become a separate and distinct section of the legislation, rather than a sub-section of direct and indirect discrimination. This would clearly identify reasonable adjustments as a separate and distinct obligation which requires different analysis from that related to direct and indirect discrimination. However, unless and until the courts interpret and understand the duty as a positive obligation with an underpinning right to substantive equality, the Australian duty to make adjustments will fail to be an effective mechanism to achieve any kind of equality for persons with disabilities.*¹⁹

Introducing a legislative amendment to restore or clarify the positive duty, such as a standalone provision stating that failure to make reasonable adjustments constitutes discrimination, would directly counteract the impact of *Sklavos*. This reform has been widely supported by disability advocacy organisations, legal experts, and the Australian Human Rights Commission, and aligns with international human rights obligations under the UNCRPD.

We agree with the Royal Commission's recommendation that this duty to provide adjustments should apply generally across all contexts and settings, including employment, education, accommodation, and access to services. The scope should be broad enough to cover both public and private sectors, while retaining the unjustifiable hardship defence to ensure proportionality and fairness.

Recommendations

Recommendation 14:

Establish a clear, proactive legal obligation for duty holders to make reasonable adjustments for people with disabilities, unless doing so would impose unjustifiable hardship.

Recommendation 15:

Amend the DDA to explicitly state that failure to make reasonable adjustments constitutes discrimination, regardless of whether the refusal is directly linked to the disability.

Recommendation 16:

Extend the duty to provide reasonable adjustments so that it applies broadly across all contexts and settings, including employment, education, accommodation, and access to services. This duty should encompass both public and private sectors, while retaining the unjustifiable hardship defence to ensure proportionality and fairness.

Definition of and considerations for 'unjustifiable hardship'

We recommend adopting Option 1 of the Issues Paper, as proposed by the Disability Royal Commission, to strengthen the unjustifiable hardship provision in the DDA. This approach

¹⁹ Taylor (n10) 486

introduces clearer criteria for assessing hardship, including consultation with the person with disability and consideration of alternative measures to reduce or eliminate hardship.

To further improve fairness and transparency, we also recommend that the legislation explicitly state that inconvenience alone does not constitute unjustifiable hardship, and that the expenditure of resources, in and of itself, is not sufficient grounds to avoid making reasonable adjustments. These clarifications are essential to ensure the defence is not misused and that the duty to accommodate is upheld in a meaningful and equitable way.

Before an employer can refuse to provide a workplace adjustment or make a claim of unjustifiable hardship, we recommend that they be required to undertake a transparent and consultative process. This should include engaging in meaningful dialogue with the employee requesting the adjustment, ensuring their voice is central to the decision-making process. Employers should also consult with relevant disability organisations or specialists to understand the nature of the adjustment and whether it can be reasonably implemented. The decision should not depend solely on a line manager's personal understanding of the disability or their budget limitations, but should instead reflect the organisation's overall knowledge and capacity to appropriately support and accommodate the individual's needs. Employers must document the steps taken, including the rationale for any refusal, and demonstrate that the adjustment would impose an unjustifiable hardship. Importantly, the burden of proof should lie with the employer, not the employee, and the process should not require the employee to disclose unnecessary medical information or bear the emotional toll of self-advocacy.

Recommendations

Recommendation 17:

Adopt Option 1 of the Issues Paper, to strengthen the unjustifiable hardship provision in the DDA by introducing clear criteria, requiring meaningful consultation with people with disability, and clarifying that inconvenience or cost alone does not justify refusal of reasonable adjustments.

Recommendation 18:

Require Employers to follow a transparent, consultative process and bear the burden of proof when claiming unjustifiable hardship.

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

SMLS supports the recommendations made by the Disability Royal Commission to strengthen the definition and application of *inherent requirements* under the DDA. Specifically, we support the insertion of two additional factors into the Act: the nature and extent of any adjustments made, and the extent of consultation with the person with disability. These changes would ensure that employment decisions are made fairly and transparently, and that reasonable adjustments are

properly considered before concluding that a person cannot meet the inherent requirements of a role.

We recommend that employers take several steps before concluding that a person cannot meet the inherent requirements of a role. These requirements should be clearly defined during the job design phase, not retroactively applied during recruitment or performance management. Employers must engage in consultation with the individual and relevant experts to explore whether reasonable adjustments could enable the person to meet these requirements.

It is essential to distinguish between core and non-essential tasks, and to avoid excluding candidates based on minor or modifiable aspects of a role. Employers should be guided by evidence and consultation, not assumptions, and must receive training to assess inherent requirements fairly and inclusively.

Recommendations

Recommendation 19:

Amend the DDA to include two additional factors in the assessment of inherent requirements:

1. The nature and extent of any reasonable adjustments made; and
2. The extent of consultation with the person with disability.

Recommendation 20:

To ensure fair and transparent employment decisions, we recommend that employers:

- Define inherent requirements clearly during the job design phase, rather than applying them retroactively during recruitment or performance management.
- Engage in meaningful consultation with the individual and relevant experts to explore reasonable adjustments that may enable the person to meet the inherent requirements.
- Distinguish between core and non-essential tasks, avoiding exclusion based on minor or modifiable aspects of a role.
- Base decisions on evidence and consultation, not assumptions.
- Undertake training to assess inherent requirements fairly and inclusively.

Exclusionary discipline and suspension

Exclusionary Discipline is considered by legal experts and professionals to be a controversial last resort taken by educational facilities. The Australian Government Attorney-General's Department in their Disability Discrimination Act 1992 Review (**DDA review**) defines in its glossary as “Actions by an educational authority or educational institution that results in the withdrawal of education or training from students with disability, including suspensions and expulsions”.²⁰

Under the DDA it is unlawful for an educational institution to discriminate against a student on the grounds of their disability by denying or limiting their access to a benefit; expelling them; or

²⁰ Australian Government Attorney-General's Department, *Review of the Disability Discrimination Act 1992* (2024) 18, citing Disability Royal Commission, *Final Report* (2023) 'Executive Summary, Our Vision for an Inclusive Australia and Recommendations' 319.

subjecting them to any other detriment.²¹ The Disability Royal Commission made a recommendation that for the protection of children and persons in educational facilities to have free and open access to education, stating that exclusion and suspension should be included to make it ‘unlawful for an educational authority to discriminate against a student by suspending or excluding [[them] on the grounds of student’s disability’.²²

The current case law standard under the *Purvis* decision still enforces an unbalanced requirement under a ‘because of’ test, where it was enforced that it was not discrimination for the student to be suspended because of his disability and then expelled because of his behaviour.²³ In the *Rana v Flinders University of South Australia*²⁴ matter, Lindsay FM interpreted the *Purvis* case that ‘establishes beyond doubt...that no distinction is to be drawn between the disability and its manifestations for the purposes of establishing whether discrimination has occurred’.²⁵

The difficulties raised earlier in this submission of the ‘comparator’ test still lies as a barrier for this issue, alongside any case of discrimination in federal discrimination law. This difficulty is further highlighted in the matter of *Minns v New South Wales*,²⁶ where the applicant had disabilities of Asperger’s syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder and was required by both schools he attended to attend part-time by suspending him and then expelling him. It was found that the ‘comparator’ in this case would be a student who moved to both schools with similar disruptive history as the Applicant.²⁷ Disability discrimination was not accepted on this comparison test as it would show he was not treated ‘less favourably’ than the comparator.²⁸

The DDA Review as a part of analysing the findings of the Disability Royal Commission found that there had been many inquiries into how exclusionary discipline was applied in context of the state and federal legislation. The review found numerous complaints about the inappropriate use of services of exercising discretion of exclusionary discipline.²⁹ The current protections under the DDA, as interpreted through case law, continue to place an unfair burden on students with disability by requiring them to prove a direct link between their suspension or expulsion and their disability.

SMLS supports the recommendation to explicitly include suspension and expulsion within section 22(2) of the DDA. SMLS also calls for the removal of the ‘comparator’ test, which remains a significant barrier to accessing protection under this provision.

²¹ Section 22(2) of the DDA

²² Disability Royal Commission, *Final Report* (2023) Volume 7, Part A, ‘Inclusive Education, Employment and Housing’ 170

²³ at 160.

²⁴ [2005] FMCA 1473

²⁵ *Ibid* 52.

²⁶ [2002] FMCA 60.

²⁷ *Ibid* 197.

²⁸ *Ibid* at [199]-[242].

²⁹ n 15, p. 59.

Recommendations

Recommendation 21:

Implement the Disability Royal Commission's recommendation to amend the DDA to explicitly prohibit suspensions and expulsions based on a student's disability and to ensure open access to education and prevent discriminatory disciplinary practices.

Recommendation 22:

Remove the comparator test, comparing a student with disability to a hypothetical non-disabled peer, as it creates unfair barriers to proving discrimination.