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DDAreview@ag.gov.au

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Review of the Disability Discrimination Act

Inquiries to:
Julie Phillips
CEO
Disability Discrimination Legal Service

Disability Discrimination Legal Service Inc
c/o Ross House Association, Inc.
247 Flinders Lane
Melbourne, 3000 VIC
Ph: 03 9654 8644
Website: www.ddls.org.u

ABN 36 079 687 722

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Executive Summary

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including: information, referral, advice, casework assistance, community legal education, and policy and law reform.
The long-term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with disability, and to generally promote equality for those with disability.

For decades DDLS has assisted people with disabilities to lodge complaints of discrimination under both state and federal laws. We have seen firsthand how drafting and systems problems have impeded claims of discrimination from people with disabiliti Willes.

DDLS supports the Joint Statement from the Network for Disability Law Reform (*attached*). We welcome this review, which presents a long overdue opportunity to improve and modernise the Disability Discrimination Act.

The recommendations for law reform from the Disability Royal Commission, emanate from the pain and suffering of people with disabilities around Australia. We pay our respects to those with the courage to submit to the Commission, and enthusiastically contribute to this review of the Disability Discrimination Act in order to honour the sharing of those experiences. We hope reforms assist in ensuring that the treatment of people with disabilities is vastly improved due to stronger legal protections.

RESPONSE TO CONSULTATION QUESTIONS

Definition of disability

1. **How should disability be defined in the Disability Discrimination Act?** (Page 26)

   The following alterations to the definition of disability have been formed through discussions with the disability community.

   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~~ irregularity of a part of the person's body
   f. a condition ~~disorder or malfunction that~~ results in the person learning differently from a person without the condition ~~disorder or malfunction~~; or
   g. a condition ~~disorder~~, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in ~~disturbed~~ behaviours of concern;

   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~~ assumed about 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.*

2. **What factors should be considered in developing a new definition of disability?** (Page 26)

   The definition should strive to be the least offensive to people with disabilities while maintaining the strength and flexibility of coverage of different disabilities.

Addressing intersectionality

3. **Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?** (Page 28)

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?** (Page 28)

Yes, the Disability Discrimination Act (DDA) would be strengthened, or rather it would make it easier for applicants, if one claim could be made under one law for multiple or combined protected attributes. However, this seems as if it would be extremely complex to achieve by making changes to the DDA, which is inherently a disability discrimination act. Therefore, it may be more sensible to revive the discussions that occurred a few years ago, about combining Commonwealth antidiscrimination legislation.

Regardless, as this would be a process in and of itself, we recommend that such a process be formalised, and the disability community be meaningfully engaged in that process from the beginning.

Amending the definition of direct discrimination

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?** (Page 32)

6. **How should the burden of proof be addressed in the Disability Discrimination Act?** (Page 32)

The comparator test should be removed.

Reasoning

Under section 5(1) of the DDA, to substantiate a successful direct discrimination claim, a complainant must be able to satisfy the comparator test.[1] Effectively, this is used to demonstrate that the person with the protected attribute has been treated less favourably than a person without the attribute. While conceptually this makes sense, how the appropriate comparator is constructed has proven to fundamentally undermine the protection provided by the DDA. This is particularly the case for students with cognitive or psycho-social disabilities where that disability manifests itself in behaviours of concern.

The principles behind how the comparator is constructed were outlined in-depth in the decision in *Purvis,* these principles remain applicable to current and future applicants.[2] *Purvis* involved the expulsion of a student with a visual impairment and brain injury. The brain injury partly manifested itself through disinhibited behaviours which included behaviours of concern such as striking out at other students and the student's aide. In the High Court decision it was decided that the prohibition against direct discrimination in section 5(1) of the *DDA* expressly included a 'comparator test', which required a comparison between the student with disability and a student without disability "in circumstances that are not materially different."[3] In applying this test it was held that the appropriate comparator, taking account of all the objective circumstances, was a student without disability displaying the same behaviours.[4] As the court decided the

[1] *DDA* (n 8), s 5(1).
[2] *Purvis* (n 278).
[3] *DDA* (n 8), s 5(1).
[4] *Purvis* (n 278), [222]-[226].

school would have expelled a student without disability if they displayed the same severe behaviours, they found
that the school had not acted in a discriminatory fashion.[5]

The decision in *Purvis* has proven problematic for two reasons. Firstly, in many situations it becomes incredibly difficult or artificial to construct an individual without disability in the same circumstances. This is demonstrated in the case of *Trindall*, where the appropriate comparator for an individual with a sickle cell condition was an individual who didn't have a sickle cell condition but had a "risk of injury of a similar nature to that of a person with the sickle cell trait."[6] Such a person does not exist. Therefore, alleged discriminators defending their actions on the basis they would treat anyone similarly is artificial; as the very reasons for the discriminatory conduct is attributed to the comparator. This understanding of the comparator test undermines the value
of the protection provided by the DDA.

Secondly, by disconnecting the behaviour from the disability, the nature of the disability is misunderstood. Although the minority in *Purvis* expressly noted that detaching the manifestations of a disability from the underlying disability was dangerous and undermined the protections provided by the *DDA*, the ultimate formulation of the 'comparator test' has done just that.[7] The continued reliance on the *Purvis* 'comparator test' and its understanding that circumstances not materially different include the behaviours of the student is particularly odd because it appears to directly contradict the legislation. Under the legislation, the correct comparator is an individual "without the disability."[8] The definition of disability since 2009 explicitly includes "behaviour that is a symptom or manifestation of the disability."[9]

The burden of proof should be on the Respondent to prove that an act or omission did NOT occur because of a person's disability.

Amending the definition of 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?** (Page 37)

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.** (Page 37)

   Remove the "reasonability" aspect of the definition. Allow unjustifiable hardship to be the test of whether a requirement or condition is reasonable or not.

[5] Ibid.
[6] *Trindall v NSW Commissioner for Police* [2005] FMCA 2, [144]-[145].
[7] *Purvis* (n 278), [27].
[8] *DDA* (n 8), s 5(1).
[9] *DDA* (n 8), s 3 (definition of 'Disability').

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?** (Page 37)

   Yes - the language in relation to compliance should be removed, and the test should be the same as the Victorian *Equal Opportunity Act 2010* (VEOA), that is, whether a requirement or condition disadvantages a person. This is consistent with the case law in *Hurst* [134].[10]

Interpreting the Disability Discrimination Act in line with the Convention on the Rights of Persons with Disabilities

10. **Should the Disabilities Convention be included in the objects provision of the Disability Discrimination Act?** (Page 39)

    Yes. This would be consistent with s12(8)(ba) of the DDA.

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?** (Page 39)

    Yes, this should be mandatory rather than optional.

Positive duty for duty holders to eliminate discrimination

12. **If there was a positive duty in the Disability Discrimination Act, who should it apply to?** (Page 45)

    All potential respondents under the current areas of public life.

    Importance of positive duty

    A positive duty is particularly important as it encourages public and private actors to take meaningful positive action to eliminate discrimination.[11] It is only with a positive duty that can be enforced, that a discrimination framework can truly claim to be protective, preventative, and prophylactic. Without it, the system remains reactionary, focused on compensation and redress, and any positive change to community behaviour is a secondary by-product.

    A positive duty also reduces the strain placed on victims of discrimination to take action to force the transformative change needed. It also, to some extent, mitigates the problem with compensation-based remedies discussed further below.

    It is worth noting that a positive duty is a well-accepted aspect of many discrimination frameworks. A domestic Australian example is that contained in the *Equal Opportunity Act 2010 (Victoria) (EOAV).*[12] We do note however, that this duty is unenforceable, and this severely limits its practical effectiveness.

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[10] *Hurst v State of Queensland [2006]* FCAFC 100

[11] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 1st ed, 2016) 266-267 ['*Equality and Discrimination Law in Australia'*].

[12] *EOAV* (n 8), s 15.

Internationally, the *Equality Act 2010* contains a positive equality duty that applies to all public sector organisations.[13] Unlike the Victorian model, the UK Equality and Human Rights Commission is actively involved in monitoring and regulating compliance.[14] Another example is Ireland, which has a positive duty in its *Irish Human Rights and Equality Commission Act 2014.*[15] Again, the Irish Human Rights and Equality Commission plays an active role in monitoring and regulating compliance.[16]

Without active and resourced enforcement, any change to a positive duty will be tokenistic rather than meaningful, and the burden of changing the landscape of disability discrimination will remain with people with disabilities.

It is noted that in 2022, the Sex Discrimination Act 1984 (SDA) was amended to include a positive duty[17] and the Australian Human Rights Commission (AHRC) was provided with the power to enforce compliance in 2023.[18] There is little information currently available in relation to how the positive duty and the enforcement powers are functioning practically, so it is difficult to comment on whether a similar amendment to the DDA would be appropriate.

15. Should there be exceptions or limits to the application of a positive duty? (Page 45)

The "unjustifiable hardship" test will apply, and this would provide protection for any acts or omissions that would not be seen to be reasonable, therefore no exceptions or limits need apply.

Strengthening the duty to provide 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? (Page 50)

Yes. The current situation where reasonable adjustments fall under direct discrimination is untenable and undermines the ability of Australians with disability to rely on the DDA to provide any right to reasonable adjustments.

Reasoning

The DDA's formulation of the reasonable adjustment provision is unique in Australian jurisdictions. Unlike many comparable pieces of disability discrimination legislation, the DDA currently does not have standalone

[13] *Equality Act 2010* (UK) 2010, c. 15, s 149.

[14] 'Public Sector Equality Duty', *Equality and Human Rights Commission* (Website, 20 April 2020) <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty#:~:text=The%20equality%20duty,-The%20equality%20duty&text=Eliminate%20unlawful%20discrimination%2C%20harassment%20and,and%20those%20who%20do%20not.>.

[15] *Irish Human Rights and Equality Act 2014* (Ire), s 42.

[16] 'Public Sector Equality and Human Rights Duty', *Irish Human Rights and Equality Commission* (Website) < https://www.ihrec.ie/our-work/public-sector-duty/>.

[17] SDA s 47C

[18] *Australian Human Rights Commission Act 1986*, s 35A

provisions relating to the provision of reasonable adjustments.[19] Rather, it has incorporated the prohibition against denial of a reasonable adjustment inside the prohibitions against direct and indirect discrimination. This has created a complex interpretation problem in understanding how these concepts relate to each other. The latest interpretation of this, in *Sklavos*, has proven to fundamentally undermine the ability of Australians with disability to rely on the DDA to provide any protection in relation to reasonable adjustments.[20]

The decision in *Sklavos* highlights the problems with inserting the reasonable adjustments prohibition inside both sections 5 and 6. Firstly, considering section 5, the *Sklavos* decision ruled that the decision to deny a reasonable adjustment must be because of the individual's disability.[21] The mere detrimental effect of the failure to provide the reasonable accommodation is not enough on its own to establish discrimination. Practically, no provider would ever admit that it denies a reasonable adjustment because of the individual's disability itself. They may do so for financial reasons, or practical implementation reasons. While it may be possible to prove that there is a system or practice of denying individuals with disability reasonable adjustments, this is an onerous task and may not always be evidentially possible. In any event, the effect of the *Sklavos* decision means that the denial of the adjustment request for any reason other than the disability, regardless of how unreasonable, would not be a contravention of the DDA. This further weakens the nature of the obligation to provide reasonable adjustments. The recent decision in *Connor*, following this understanding of the DDA, suggests this is a live and entrenched issue.[22]

Considering section 6, the decision in *Sklavos* highlights the problem with the construction of that section. The *Sklavos* decision interpreted section 6(3) as precluding the operation of section 6(2) if engaged.[23] In the *Sklavos* case this meant that because the court had decided that the decision to require written exams was reasonable there was no need to consider section 6(2).[24] This is problematic because many of the conditions and circumstances that Australians with disability may need reasonable adjustments for, are indeed reasonable. There is nothing fundamentally unreasonable about having a desk that isn't adjustable or having inflexible working arrangements. That does not mean those to whom the prohibition applies should be excepted from the need to provide reasonable adjustments, particularly as reasonable adjustments are intended to assist Australians with disability to comply with reasonable requirements and conditions. As such, the interpretation of section 6 in *Sklavos* has also undermined the ability of the DDA to protect Australians with disability from discrimination.

Reasonable adjustments are a recognised cornerstone of disability discrimination.[25] The decision in *Sklavos* has fundamentally undermined the ability of the DDA to secure the provision of reasonable adjustments for Australians with disability.

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[19] DDA (n 8), ss 5-6 Cf; EOAV (n 8), ss 20, 33, 40, 45.
[20] *Sklavos* (n 283).
[21] *Connor v State of Queensland (Department of Education and Training (No 3)* [2020] FCA 455 [*'Connor'*].
[22] *Sklavos* (n 283), [32]-[44].
[23] Ibid, [58].
[24] Ibid, [59]-[93].
[25] *Equality and Discrimination Law in Australia* (n 384), 125-129.

18. Would removing the word 'reasonable' from the term 'reasonable adjustments' to align the language with the legal effect create any unintended consequences? (Page 50)

It should not have any unintended consequences, as the current interpretation of "reasonable adjustments" does not take into consideration the word "reasonable".

> *"an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person"*

This was interpreted by Mortimer J in Watts.[26]

In addition, the word "adjustment" should be added to the definition section of the DDA as set out below.

"The term 'adjustment' is *'an alteration or modification'*[27]*,* including relevant assessments, planning processes, involvement of appropriately qualified professionals, and the procuring and formal consideration of advice from the person/student with disability".

Reasoning

Individuals whose disability manifests itself in complex behaviours are those who are most in need of the protection provided by anti-discrimination legislation. However, these behaviours are complex, and solutions are not necessarily straightforward or logical for laypeople. As such, there is a need to engage professional experts in those particular disabilities and experts in behaviour, to identify the adjustments the individuals with disability may need.

However, there is no clear definition provided by the DDA as to what constitutes an 'adjustment'. Clarity was provided by the decision in *Izzo,* but unfortunately, that judgment interpreted 'adjustment' narrowly.[28] In *Izzo*, Moshinsky J, interpreted an adjustment to mean the final adjustment made for the individual and not any necessary assessment processes to identify that final adjustment. For example, none of the following could be considered a reasonable adjustment:

> employing a professional to identify and understand 'trigger situations';
> an individual education plan unless the contents of the plan can be stated succinctly; and
> any assessment to evaluate the student.[29]

This narrow interpretation is particularly disappointing because it overturned a

[26] *Watts v Australian Postal Corporation* (2014) 311 ALR 680 (n 284).
[27] *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207
[28] *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770.
[29] Ibid. [42]-[43], [49]-[57], [68], [72], [84].

more liberal and beneficial interpretation of 'adjustment' in *Snell.*[30]

The narrow interpretation of 'adjustment' in *Izzo* is a problem for two reasons. Firstly, logically you cannot always identify the supports an individual may need prior to having the relevant evaluation/assessment. The purpose of the evaluation is to identify the supports needed. Secondly, the *Izzo* interpretation encourages the person to whom the obligation applies, the individual with disability, and, if appropriate, their parents and guardians to rely on their own knowledge of what the individual needs without professional assessment. While those persons may have some knowledge of disability and the needs of an individual, they are not experts, and should not be expected to play the role of expert.

Another related problem is that courts have shown a reluctance to recognise the fact that disability, and interpreting and understanding behaviours of concern, are specialist fields that require expert knowledge to traverse. Instead, they appear to believe that the person to whom the obligation applies can fulfill this role. As stated above, while the person to whom the obligation applies and those around the individual should be involved, they do not have the required knowledge to be able to conduct professional assessments themselves. With this in mind it is concerning that courts and tribunals appear to recognise that the person to whom the obligation applies can legitimately perform these evaluations. A recent example of such a decision in relation to the denial of a reasonable accommodation by a school is *Connor v Queensland Department of Education.*[31]

Therefore currently, the provision of reasonable adjustments is thwarted by legislation that does not cover the processes required to arrive at reasonable adjustments, in the definition of an "adjustment".

For many disabilities that manifest in complex behaviours and support needs, often the adjustment required is not logically obvious. Rather, expert knowledge and relevant assessments are required to identify the specific adjustment that a student with disability may need. Put simply, it is often difficult if not impossible to identify the adjustment without expert assessment.

Unfortunately, the definition of adjustment provided in the Disability Standards for Education (DSE) does not make it explicitly clear that assessments needed to identify ultimate adjustments can be considered adjustments in their own right. The decision in *Izzo* confirmed that assessments cannot be considered adjustments in their own right.

Due to this omission, all respondents have to do is not make any effort to find out what a person with a disability actually requires, or not even commence a planning process, and they can avoid their obligation to provide reasonable adjustments in circumstances where such an adjustment is not obvious due to be inherent complexity of the disability and its presentation.

[30] *Snell v State of Victoria (Department of Education and Training)* [Federal Court of Australia, JR Allaway, 8 August 2019].
[31] *Connor* (n 412).

To rectify this issue, the DDA and DSE must be amended to provide a definition of 'adjustment' that makes clear that any steps needed to identify an ultimate adjustment can be considered a reasonable adjustment in and of itself.

This must include:

- relevant assessments,
- reporting and planning processes designed to monitor progress, strategies, etc. (for example Individual Education Plans);
- involvement of appropriately qualified professionals; and
- the procuring and formal consideration of advice from the student with disability.

Definition of and considerations for 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.** (Page 53)

Option 1 is the preferred recommendation. We also believe that it should be explicitly stated that unjustifiable hardship does not include the fact that a Respondent might be inconvenienced, nor should the expenditure of resources in and of themselves, constitute unjustifiable hardship.

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

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?** (Page 57)

It is recommended that if a Respondent is going to withhold a job offer from a person with a disability on the assumption that they cannot perform the inherent requirements of the job, then consultation about reasonable adjustments ought to be mandatory.

In addition, when there is no reason for unjustifiable hardship in offering someone a part-time position rather than a full-time position, this should constitute a reasonable adjustment. We propose adding the underlined section in s15.

Section 15 - Discrimination in employment

(1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:

(a) in the arrangements made for the purpose of determining who should be offered employment; or

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, ***<u>including opportunities to reduce their hours of work or</u>***

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

(3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

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?** (Page 57)

The term "consultation" needs to be defined in s4 to reflect the Disabilities Convention. We suggest that a proper interpretation of 'consultation' refers to meaningful engagement with an individual, where they are not only heard as a mere formality, but that their views are given due weight, and can be confirmed in writing.

<u>Exclusionary discipline and suspension</u>

23. **Should the concepts of exclusion and exclusionary discipline be defined in the Disability Discrimination Act?** (Page 63)

Yes. It should include expulsion, suspension, formal suspensions, informal suspensions (e.g. when parents are called to pick their children up before the end of the day without formal paperwork), seclusion and restricted attendance. Suggested wording:

'make it unlawful for an educational authority to discriminate against a student by suspending or excluding [them] on the grounds of a student's disability', including behaviours that are a symptom/manifestation of their disability

The reason the definition is necessary, is due to the prolific nature of this type of discipline students with disabilities are subjected to throughout Australia.

24. Should there be exceptions or limits on when exclusion is unlawful? (Page 63)

No. The research on exclusionary discipline is long-standing and clear. It exacerbates behaviours of concern, increases disengagement, and this is extremely relevant to the fact that the child/young person with a disability in question:

a) remains at the school with an increased level of Occupational Health & Safety risk to themselves and others <u>because of</u> the exclusionary discipline; and
b) in the case of expulsion is moved to another school in a worse state than they were at the excluding school; and
c) often has not been provided with the reasonable adjustments required that could prevent the behaviours of concern.

25. Should any of the state and territory provisions relating to exclusionary discipline be adopted in the Disability Discrimination Act? (Page 63)

No. None of the State/Territory provisions are adequate. The language used reflects a medical model of disability, where behaviours of concern are seen as a deliberate negative act by a student. There is no recognition, particularly in relation to students who are neurodivergent/have cognitive disabilities that behaviours are often environmental, and can be caused by inept treatment, or a failure to provide supports.

There is no mandated legal requirement in any state/territory antidiscrimination legislation to our knowledge, that certain processes or reasonable adjustments be put in place after a behaviour of concern is displayed that is significant enough to warrant consideration of exclusionary discipline or physical restraint.

There is no requirement to engage a qualified behavioural expert, organise a functional behaviour assessment by someone who is qualified to undertake same, form a multidisciplinary team to support the child or to assess the child and consult the family about what supports need to be put in place to prevent behaviours of concern continuing.

In addition, the Disability Standards for Education (DSE) permit the education provider to hold the decision-making power in regard to any reasonable

adjustment, regardless of what a practitioner or person with a disability may say.

Across Australia, punitive responses are routinely employed to what is often simply a symptom/manifestation of a disability which can be mitigated in a preventative proactive manner.

The lack of a mandated response in legislation or regulation means that exclusionary discipline is the preferred option on almost all occasions, due to the fact that there is no cost associated with it.

26. **Would a different approach to exclusionary discipline be more appropriate in the higher education and vocational education and training sectors?** (Page 63)

    No.

Offensive behaviour and vilification protections

27. **How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?** (Page 70)

    Use the same definition as in s18C of the Racial Discrimination Act.

28. **If the Disability Discrimination Act were to prohibit offensive behaviour and/or harassment, how should these terms be defined?** (Page 70)

    As above, or mirroring the EOAV.

29. **Should there be exemptions for any behaviour, similar to the Racial Discrimination Act?** (Page 70)

    As per s18C of the Racial Discrimination Act.

Services provided by police officers

31. **How could the Disability Discrimination Act be amended to ensure that it covers policing?** (Page 73)

    The DDA should include a definition of "services" in s4 to include the administration of laws and programs, including all functions performed by Police, Corrections and child protection authorities.

    This will address the many exceptions that have been made to the current interpretations, such exceptions which have been to the detriment of people with disabilities. This has the added benefit of covering policing.

32. **Are there any specific circumstances or situations relating to policing or justice that should be excluded from the application of the Disability Discrimination Act?** (Page 73)

    No. There is already an unjustifiable hardship defence available to respondents.

Exemptions

33. Could any of the permanent exemptions be narrowed or updated, while balancing other policy considerations? (Page 80)

The current exemption of "Acts done under statutory authority" is very broad. This should be specified in order that the DDA is not subjugated to every other piece of Commonwealth legislation.

34. Should the Australian Human Rights Commission be given the power to grant special measures certificates? (Page 80)

Yes.

35. Should a definition for special measures be added to the Disability Discrimination Act? (Page 80)

Yes.

36. Should a definition for temporary exemptions be added to the Disability Discrimination Act? (Page 80)

37. Would you recommend any changes to the legislative process of granting temporary exemptions? (Page 80)

Whether required by the AHRC or included in the DDA, it is recommended that :

a. there should there be a maximum of 2 exemptions;
b. more scrutiny is required on repeat applications;
c. why another temporary exemption is required needs to be explicitly addressed;
d. evidence must be provided of work completed or attempts made in order to minimise the impact of the exemption;
e. before exemptions are granted, the AHRC must meaningfully engage with the affected disability group to discuss the relevant proposed exemption.

We are concerned with the process for how exemptions are granted by the AHRC. Obviously, exemptions are a necessary aspect of any discrimination law to facilitate organisations working towards compliance. However, they should be conservatively provided in only truly exceptional cases where compliance is not practically achievable in the immediate future. We do not believe this is currently the case.

We believe two examples demonstrate our concern. Firstly, the AHRC has consistently provided exemptions to the Australasian Railways Association.[32] It

[32] *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 1 October 2015); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 18 December 2014); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 26 July 2014); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 19 December 2013); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 1 February 2012); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 5 November 2007); *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 20 January 2007);

could be understandable why transport organisations would be unable to comply in the immediate years following the introduction of the DDA and the *Disability Standards for Public Transport*. However, it has been almost 30 years since the introduction of the DDA and almost 20 for the introduction of the *Disability Standards for Public Transport*. Access to public transport is a benefit provided to all Australians, the justification for the continued exclusion of Australians with disability must be particularly strong considering the length of time providers have been given to comply. We are unconvinced that this is the case considering the vast majority of submissions received by the AHRC for the latest exemption application from the Australasian Railways Association supported not providing the exemption.[33]

Secondly, the exemption provided to the Department of Social Services in 2013 is concerning.[34] That exemption concerned the Commonwealth government's desire to continue using the Business Services Wage Assessment Tool (BSWAT). The decision is concerning for a number of reasons. Firstly, BSWAT was the subject of a Full Federal Court decision where the second most senior court in the Australian federal jurisdiction found it was unjustifiable to use the tool as the Commonwealth were doing.[35] It is inexplicable that the AHRC has effectively undermined the decision of the Full Federal Court and allowed the Commonwealth to continue to use BSWAT. Secondly, the decision largely appeared to be based on the impact to the financial viability of Australian Disability Enterprises.[36] However, the AHRC noted that this evidence was largely anecdotal with no firm expert evidence to support this.[37] We believe this demonstrates the relative ease of gaining an exemption.

Fundamentally, both of these cases suggest that exemptions are not as rigorously overviewed as should be expected and exemptions may be provided when they are not appropriate. The too readily provision of exemptions clearly undermines any protection provided.

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? (Page 86)

This should be done through a regulation. The regulation should also cover animals in training, who by nature of such training will be required to experience a range of environments with their owner/trainer. It would be reasonable to expect evidence of the training program in such circumstances.

Consideration should be given to the status of an "Authorised companion animal". This refers to animals who by their very existence through their relationship with their owner, provide comfort and reassurance to a person with

[33] *Australasian Railway Association* (exemption decision) [Australian Human Rights Commission, 1 October 2015), 27, 34-35.
[34] *Department of Social Services* (exemption decision) [Australian Human Rights Commission, 29 April 2014] ['*Department of Social Services exemption*']
[35] *Nojin v the Commonwealth* [2012] FCAFC 192.
[36] *Department of social services exemption* [above n 63], 5.
[37] Ibid.

a disability. The reason there ought to be a separate descriptor for this type of animal, is that an Assistance Animal, given the training requirements, will always likely be a dog.

For someone with, for example, post-traumatic stress disorder, the very nature of their relationship with their pet, may provide therapeutic benefit - for example helping them remain calm in stressful situations. This is a legitimate support for a person with a disability and should be recognised.

39. **Would legislative amendments or guidance materials be helpful to balance flexibility and certainty, or a mixture of both?** (Page 86)

    Guidance and regulation.

40. **Should specific training organisations be prescribed under the Disability Discrimination Regulations?** (Page 86)

    Yes, but not limited, if there is a public access test added, this would make it easier for self-trainers.

Disability Action Plans

41. **Should there be minimum requirements for action plans (such as through guidelines) and what should the minimum requirements cover?** (Page 88)

    Yes. All action plans should include SMART goals (Specific, Measurable, Achievable, Realistic and Time Bound) to be meaningful.

    However, there is clearly some overlap between the concept of Disability Action Plans, and bringing in a positive duty to eliminate discrimination (which we strongly support). Disability Action Plans are optional. If a positive duty is brought in, in all areas of public life, then all potential respondents should be developing statements of compliance. Ideally, that would occur after an audit. However, we note that unjustifiable hardship continues to apply as a defence, and what may be possible for a large organisation may not be possible for a small organisation. Will

    Nevertheless, if all organisations subject to the DDA are mandated to take steps to eliminate discrimination, should there even be an optional action plan, rather than statements of compliance? This could be a duplication.

    It should be mandatory that Disability Action Plans be developed in consultation with the disability community.

42. **Should the Australian Human Rights Commission be able to reject action plans that fail to meet these requirements?** (Page 88)

    Yes.

43. **Should there be a set period of time for which an action period is valid?** (Page 88)

A maximum of two years seems appropriate.

44. **Are there any other changes to the action plan process that you would recommend? (**Page 88)

Progress reports should also be made public.

ADDITIONAL RECOMMENDATIONS

A. Broadening s22 to include parents of students with disabilities

Parents who suffer economic loss due to unlawful discrimination against their children should be able to make a claim in their own right under the DDA. We suggest adding a new s22(2B), as underlined.

22 Education

(1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

(2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability:

(a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or

(b) by accrediting curricula or training courses having such a content.

Add new subsection:

(2B) It is unlawful for an educational authority to discriminate against a person on the ground of the disability of the person's associate by subjecting the person to detriment,

Example: A parent who loses fully or partially their source of income as a result of the unlawful discrimination against their child or adult child
(under family law, an adult child is one who is 18 or over)

B. Restraint and seclusion of students with disabilities

The physical restraint and seclusion of students with disabilities is not adequately covered by state laws. For example, in Victoria, there is no legal protection for students

from restraint and seclusion, rather a "permission" regulation which can be found in the *Education and Training Reform Act* - Regulation 25, which states:

> *A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that are dangerous to the member of staff, the student, or any other person*.

This regulation has remained stagnant for many years, in the context of:

a) Rising numbers of restrictive practices against students, the last recorded data being 2940 incidents in one year.
b) The Victorian Equal Opportunity and Human Rights Commission opinion that Regulation 25 raised *Charter of Human Rights and Responsibilities Act* issues in the areas of:
    a. Right to equality before the law;
    b. Protection from cruel, inhuman or degrading treatment;
    c. Protection of families and children;
    d. Liberty and security of person; and
    e. Freedom of movement.[38]

We understand the problem of restraint and seclusion of students is also a problem in other states, through various reports regarding students with disabilities.

Given the well-known consequences of restrictive practices include injury, trauma and death, the fact that in all states these practices are inflicted on students with disabilities prolifically, is an unacceptable discrimination/ human rights issue.

If it is intended that the DDA deal with exclusion and exclusionary discipline and suspension, as set out in Recommendation 7.2, which we support, it seems appropriate that restrictive practices, which can cause even more significant harm, are also dealt with.

To that end, we refer to and repeat our responses to questions 24 and 25.

Given that restraint and seclusion is almost exclusively used in response to behaviours of concern from students with disabilities (in terms of the area of education), and that a "harm" argument is used to justify these practices, an unjustifiable hardship argument will always be open to a Respondent under the DDA as a defence. In respect of that, for example, discrimination may not be unlawful where:

a) an unexpected behaviour of concern is exhibited, and a restrictive practice must be used to protect a person from serious harm; or
b) significant expert disability supports have been put in place to assist the student, and those supports had failed to mitigate their behaviours of concern requiring restraint/seclusion.

[38] Victorian Equal Opportunity and Human Rights Commission Submission to the Review of the Education and Training Reform Act Regulations 2017

We recommend that a new provision be added to s22 (2) - *subjecting a student to restraint or seclusion on the grounds of a student's disability, including behaviours that are a symptom/manifestation of their disability*

C. The Disability Standards for Education and their lack of consistency with the DDA.

The Disability Standards for Education (DSE), are undergoing a limited review this year.

Previous reviews have highlighted the embarrassing nature of the DSE and it's lack of consistency with the DDA, to which it is claimed it is subordinate legislation to. This lack of consistency will only be greater with changes to the DDA.

It is unclear why the obvious drafting errors of the DSE have not been corrected.

If the DSE are not altered to address current errors, this will cut across attempts to reform the DDA.

Below are the most obvious problems with the DSE, and we can only recommend previous submissions on reviews of the DSE by legal centres be reviewed all.

1. Removal of the onus on education providers to determine what constitutes a reasonable adjustment. EG Part 5.2 (1)(2)

    a. Our position is that while the responsibility remains with education providers to determine what constitutes a reasonable adjustment, the DDA is not viable legislation through which to make a claim of reasonable adjustments in the education context.

    b. By continuing to endorse educators as the decision-makers on reasonable adjustments, the DSE further empowers those who have already been found around Australia to commonly discriminate against students with disabilities. If the DSE are intended to further support the objects of the DDA, they fail here. This situation is anomalous to benevolent human rights legislation and will be in further non-compliance with the DDA if changes are made to the substantive legislation such as mandating interpretation of the act through the Disabilities Convention and changing the reasonable adjustment provisions.

    c. In relation to the definition of reasonable adjustments, the decision in *Watts* in terms of how a reasonable adjustment is defined (see above page 9), is at odds with the definitions in Part 3 of the DSE.

2. Comparator

    While it is hoped that the comparator test is taken out of the DDA, as recommended above, there is a further misalignment between the DSE and the DDA unless the DSE are changed.

The DDA makes it clear that the comparator can be someone with a different disability:

a) s5 (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without **the disability** in circumstances that are not materially different. [Emphasis added]

b) On the other hand, the DSE is drafted differently, limiting the comparator to somebody who does not have a disability at all.

> 5.2 Participation Standards
> *(1) The education provider must take reasonable steps to ensure that the student is able to participate in the courses or programs provided by the educational institution, and use the facilities and services provided by it, on the same basis as a student without* ***a disability****, and without experiencing discrimination.*

c) We submit that this difference between the DDA and the DSE is unsustainable. In terms of addressing this problem, clearly one of drafting, it would be a simple solution to have the DSE support the DDA in this regard. It is simply a changing of the word “a” to “the”.

3. Thousands of students in segregated schools are currently not covered by the DSE.

We again refer to the participation standards:

> 5.2 Participation Standards
> *(1) The education provider must take reasonable steps to ensure that the student is able to participate in the courses or programs provided* ***by the educational institution****, and use the facilities and services provided by it, on the same basis as a student without a disability, and without experiencing discrimination.*

The wording above only allows a comparison to students within the same institution (eg school). This means, and has already been argued (but not yet decided upon by a Court), that these standards do not cover students attending segregated settings, because the comparison can only be made within the same school, and therefore if all of the students with disabilities in the school are being treated equally as poorly, they cannot utilise the DSE.

Some of them **may have** been able to use the DSE if it were not for the drafting error that does not allow a student with one disability to be compared to a student with a different disability. The treatment of a student with cerebral palsy attending a segregated school could have been compared to the treatment of

a student with Autism Spectrum Disorder. However, these compounding drafting errors mean that students with disabilities in segregated schools are entirely cut out from many of the standards in the DSE. While this would not matter if the Applicant was making a claim only through the DDA, all a Respondent has to do is bring in the DSE itself and prove that they have acted in accordance with the DSE.

> *Under section 32 of the Act, it is unlawful for a person to contravene a disability standard. A complaint about an alleged contravention can be made to the Human Rights and Equal Opportunity Commission. Section 34 of the Act provides that, if a person acts in accordance with a disability standard, Part 2 of the Act does not apply to the person's action or, in other words, the person's action complies with the Act and is not made unlawful by it.*[39]

Therefore, an Applicant cannot escape the DSE. The weaker the DSE, the weaker the DDA. A Respondent who is well-versed in the DSE and the DDA will bring the DSE into a claim, even if the Applicant has not raised it, as the DSE provide protections for Respondent education providers, that the DDA does not.

In terms of scope, the same lack of protection for students in segregated schools occurs in the enrolment standard where if a segregated school has an enrolment practice which disadvantages all its students, one cannot compare the enrolment practice to that which occurs in a mainstream school, despite the education provider being the same (Part 4.2 (1)). The same issue arises in standards for support services (Part 7.2 (1).

It is recommended that the application of the DSE be paused until the DSE is properly reviewed in order that it achieves its stated aim of being subordinate legislation to the DDA, which includes being consistent and compliant with the DDA.

D. Unclear Whether Federal Courts Have the Jurisdictional Power to Hear Victimisation Complaints

People with disabilities have reported both overt and covert victimisation after making a complaint under discrimination legislation.

The victimisation of people with disabilities, especially children with disabilities particularly when they are non-verbal and cannot convey their experiences to others, deserves the highest level of protection. The ongoing school relationship is one which requires complete trust, as teachers are acting in loco parentis for six hours a day. People with disabilities in ongoing employment relationships, or ongoing accommodation relationships, are in environments which pose a risk to their physical and psychological safety if a complaint is made about those who have an ongoing immediate relationship with them.

[39] Introduction DSE p4

Under the DDA, victimisation is a criminal offence rather than a civil cause of action.[40] The DDA itself does not empower courts to hear discrimination complaints. Rather, this power is sourced from the AHRCA.[41] However, this provision provides the Federal Court and Federal Circuit Court with jurisdiction only in relation to civil matters.[42] As such, it is unclear whether applicants can utilise the prohibition against victimisation, nor whether Courts should treat this as a civil or criminal matter. For potential applicants, this has created a lack of confidence in this provision, leading to considerations as to whether it should be avoided altogether.

This jurisdictional issue has been explored briefly in various cases. Disappointingly, it has been raised since at least 2007, and there has been no legislative reform since to rectify it.[43] In Dye v Commonwealth Securities Limited (No 2), the Full Federal Court was required to consider the victimisation provision under the Sex Discrimination Act 1984.[44] This decision was a beneficial interpretation for complainants, allowing victimisation complaints to be considered a civil cause of action. Relevantly, the Court found that:[45]

> *"Thus, the AHRC Act, read together with s 94 of the Sex Discrimination Act, creates a range of remedies for victimisation that includes damages, being expressly within the definition of unlawful discrimination s 3(1) of the AHRC Act."*

Shortly after the decision in Dye, the victimisation provisions in discrimination legislation were considered again in *Walker.*[46] While Gray J decided that ultimately it was not necessary to come to a definitive conclusion on the issue; there were strong reasons to suggest that the Court could not turn a victimisation complaint into a civil cause of action, nor was this intended by parliament.[47]

Most recently, it was considered in *Tropoulos v Journey Lawyers*.[48] After demonstrating the inconclusive case law on this issue, Collier J felt that he could accept the Court had jurisdiction because the claim could be dismissed for other reasons.[49] Collier J did however state that this remained a "live issue."[50]

This lack of clarity has reduced confidence in the DDA for potential applicants. It is our experience that often applicants will avoid this issue all together and abandon potential victimisation complaints. Considering effectively addressing the issue only requires a minor amendment, the continued inaction from the Commonwealth

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[40] *DDA* (n8), s 42.
[41] *AHRCA* (n273) s 49B.
[42] Ibid.
[43] *Penhall-Jones v New South Wales* [2007] FCA 925
[44] *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118
[45] Ibid, [71].
[46] *Walker v State of Victoria* [2012] FCAFC 38
[47] *Walker* (n 429), [97]-[100].
[48] *Tropoulos v Journey Lawyers Pty Ltd* [2019] FCA 436.
[49] Ibid, [319].
[50] Ibid.

government has been disappointing.

We note that other jurisdictions have ensured this issue does not arise. An obvious example is the EOAV.[51]

The *Disability Discrimination Act 1992* should be amended to ensure that the victimisation prohibition is a civil cause of action

E. Define the term "access"

Due to repeated complaints on the subject of communication access, we recommend having a definition of that term based on the CRPD in s4 as follows.

> *"access" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology, and provision of the relevant interpreters.*

F. Definition of "Disability Aid"

To ensure the Disability Discrimination Act keeps pace with emerging access solutions, the definition of 'disability aid' in s 9 (3) must be updated to include modern sensory and communication supports. We suggest adding the underlined to the current definition.

> *(3) For the purposes of this Act, a disability aid, in relation to a person with a disability, is equipment (including a palliative or therapeutic device) that:*
> *(a) is used by the person; and*
> *(b) provides assistance to alleviate the effect of the disability; and*
> *(c) includes:*
> *i. assistive listening systems;*
> *ii. captioning and transcription services;*
> *iii. sign language interpreting;*
> *iv. tactile wayfinding tools;*
> *v. communication tools;*
> *vi. accessible digital platform; and*
> *vii. other evolving assistive technologies.*

[51] *EOAV* (n 8), s 103.

ENDORSEMENTS

This submission is endorsed by the following organisations:

AED Legal Centre

Brain Injury Matters

Deaf Victoria

Disability Advocacy Victoria Inc.

Disability Justice Australia Inc.

Disability Rights and Culture

Federation of Community Legal Centres (Victoria) Inc.

Leadership Plus

Melbourne East Disability Advocacy (MEDA)

Mental Health Legal Centre Inc.

South-East Monash Legal Service Inc.

SOUTHWEST ADVACACY ASSOCIATION

VALID

Victorian Aboriginal Legal Service

Villamanta Disability Rights Legal Service


FEDERATION
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Leadership
Plus


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EAST
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ADVOCACY


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centre


SOUTH-EAST
MONASH
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SERVICE INC.


SWAA
SOUTHWEST ADVOCACY
ASSOCIATION


VALiD


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DISABILITY RIGHTS LEGAL SERVICE


Victorian Aboriginal
Legal Service


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