

# **Australia's Disability Strategy Advisory Council**

## ***Disability Discrimination Act 1992 Review Submission***

## Introduction

The Australia's Disability Strategy (the Strategy) Advisory Council (the Council) welcomes the opportunity to provide a submission to the Review of the *Disability Discrimination Act 1992 (Cth)* (the DDA Review). This submission focusses on the following areas:

- Part 1 – Modernising discrimination complaint processes and supports
- Part 2 – Introducing a positive duty to eliminate discrimination
- Part 3 – Encouraging inclusion of people with disability in employment, education and other areas of public life and
- Part 4 – Improving access to justice
- Part 5 – Exemptions
- Part 6 – Further options for reform

## About the Advisory Council

The Strategy is Australia's national disability policy framework. It sets a vision for an inclusive Australian society that ensures people with disability can fulfil their potential, as equal members of the community. It also plays an important role in protecting, promoting and realising the human rights of people with disability, consistent with Australia's commitment under the United Nations Convention on the Rights of Persons with Disabilities

The Council provides independent, high-level advice to the Australian, state and territory Disability Ministers and governments (including local governments) on the implementation, monitoring, and evaluation of Strategy. This is so that people with disability have a direct line of advice to decision makers on matters that impact their lives. Further, the Council is an independent body, funded by government but not part of government, and provides independent advice.

This submission reflects the views of the Council and does not represent the position of the Department of Health, Disability and Ageing, or any other government department.

## Part 1 – Modernising discrimination complaint processes and supports

This part of the Council's submission looks at changes which could be made to the DDA to modernise it. Specifically, the Council's advice is in relation to potential changes to the DDA's complaints system.

### **1. No cost mechanism**

#### **Context**

The Australian Human Rights Commission's website provides information about how the DDA makes it illegal to discriminate against someone, or treat them unfairly, because they have a disability and how to make a complaint if discrimination is experienced. It says what constitutes a valid complaint, that a complaint has to be made in writing, and that it does not cost anything to make a complaint to the Commission. The requirements for putting forward a complaint include providing sufficient details about allegations about what happened, when and where it happened, and who was involved.

The website also states that the role of the Commission is to get both sides of the story and help those involved to resolve the complaint by conciliation. If the complaint is not resolved, the complainant has the option of taking the complaint to the Federal Court or the Federal Circuit Court.

Volume 4 of the Final Report of the Disability Royal Commission (*'Realising the human rights of people with disability'*) looked at the issue of complaints costs in the recommendations of the

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Productivity Commission's *Review of the Disability Discrimination Act 1992 (Cth), Final inquiry report* (2004):

"The Productivity Commission examined whether the DDA had achieved its stated objectives, including any success in promoting community recognition and acceptance of the rights of people with disability. It found the DDA 'appears to have contributed to improvements in community awareness of disability issues and attitudes towards people with disabilities, but there [is] scope for further improvement'. (Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth), Final inquiry report*, Report no. 30, vol 1, April 2004, p 283 [Finding 10.18])

The Productivity Commission made 32 recommendations for amendments or actions in relation to the DDA. The Australian Government accepted 26 of those recommendations either in full, in part or in principle. It rejected the remaining recommendations, included those relating to:

- a no-costs model for disability discrimination proceeding
- allowing disability organisations with a 'demonstrated connection to the subject matter of a complaint' to initiate complaints in their own right."

### **Council feedback**

The Australian Government's response to Productivity Commission recommendation on a no-cost model for disability discrimination proceedings is acknowledged. However, notwithstanding the absence of direct cost for making an initial complaint in writing to the Commission about discrimination, the Council believes that, in reality, achieving a satisfactory outcome through the current complaints system places financial and emotional burden on individuals with disability. For this reason, the Council supports a no-cost mechanism for discrimination complaints to make justice more accessible, consistent with the Productivity Commission's recommendations.

There may, for example, be costs involved in accessing the internet for making the initial complaint, time off work to gather evidence (and associated loss of income) and costs with accessing legal advice or advocacy services, if conciliation to resolve the complaint is not satisfactory.

Council members have reported instances where complaints were either delayed or dismissed not due to a lack of merit, but because the complainants were unable to meet associated costs or were deemed to lack sufficient proof, despite presenting comprehensive documentary evidence.

For this reason, the Council believes that the scope of the no-cost mechanism could be broadened to include funded legal assistance, systemic test cases, and stronger compensatory and deterrent remedies, ensuring that justice is both accessible and meaningful.

The Council notes that the Strategy, as Australia's framework for implementing the UN Convention of the Rights of Persons with Disabilities, emphasises that accessibility is a fundamental right and must be built into all systems, not treated as optional or negotiable (Article 9 on Accessibility and General Comment No. 2).

Assuming independence as the norm overlooks the reality of interdependence and embeds ableism into policy design. People with higher support needs are too often treated as exceptions, forced to navigate extra burdens or make personal sacrifices to engage. It signals that inclusion is conditional. True equity requires recognising and meeting different access needs without requiring justification or exception.

## **2. Cultural safety and inclusion**

### **Council feedback**

The Council is also concerned about the cultural safety of the complaints process for First Nations people and requests that the DDA Review explicitly consider intersectionality and culturally safe mechanisms.

The establishment of a First Nations Disability Forum was called for in Disability Royal Commission Recommendation 9.10. In the Australian Government response to this recommendation, the Australian Government committed to working First Nations people with disability and other key stakeholders to develop options for the establishment of the forum or other appropriate shared decision-making mechanism. The Council considers this as a positive first step with respect to this issue.

Ensuring cultural safety and inclusion for First Nations people with disability within the DDA complaints mechanisms is not only a matter of equity, it is a foundational requirement for meaningful access to justice. First Nations communities experience disability through diverse cultural lenses, and many individuals face systemic barriers rooted in historical trauma, geographic isolation, and institutional discrimination. Discrimination may also be compounded by intersectionality (i.e. on the basis of other layers of identity such as gender, age and sexuality). The DDA Review Issues Paper points out that a person's lived identity can intersect across multiple identities.

Without culturally safe processes, complaints risk being misunderstood, dismissed, or never lodged at all. Embedding trauma-informed, respectful, and inclusive practices—such as culturally appropriate communication, First Nations-led engagement, and recognition of invisible disability—will help restore trust and ensure that the DDA serves all Australians fairly. This also aligns with Australia's obligations under the UN Convention on the Rights of Persons with Disabilities and the UN Declaration on the Rights of Indigenous Peoples.

Complaints processes must be accessible in remote and regional areas, supported by clear, culturally appropriate information. Embedding intersectionality as a cross-cutting principle in DDA reforms will ensure systemic change that reflects the lived experiences of First Nations people and drive better outcomes across the disability and justice sectors. It will also ensure policy coherence with the *Sex Discrimination Act 1984 (Cth)* and other federal equality laws.

## **3. Burden of proof**

### **Context**

The DDA Act currently requires a person with disability to establish the following factors to prove they have experienced direct discrimination:

- They have been treated less favourably than a person without disability in similar circumstances (the comparator test) and
- The treatment they experienced was because of the disability (causation).

### **Council feedback**

The Council advocates for the evidentiary burden for this current two-step test for direct discrimination be rebalanced by means of the adoption of a two-step model based on the following: where the complainant establishes unfavourable treatment linked to disability, the duty holder must then justify their conduct. This would reduce barriers for individuals without legal representation.

## **4. Direct and indirect discrimination tests**

### **Context**

The current definition of indirect discrimination in the *Disability Discrimination Act* has four elements:

- a requirement to comply with a condition, requirement or practice
- the condition, requirement or practice disadvantages people with disability
- the person does not or would not comply, or is not able or would not be able to comply, because of their disability
- the condition, requirement or practice is not indirect discrimination if it is a reasonable requirement, condition or practice (reasonableness element).

### **Council feedback**

Consistent with the findings of the Disability Royal Commission, the Council agrees with the Disability Royal Commission that DDA legal tests for direct and indirect discrimination should be simplified to ensure accessibility for non-lawyers. It also supports a detriment-based test for both direct and indirect discrimination and the removal of 'reasonableness' language from the test (to guide consistent interpretation, examples or an explanatory appendix could be provided).

## **Part 2 – Introducing a positive duty to eliminate discrimination**

### **1. Enforceable positive duty**

#### **Context**

In 2022, the *Sex Discrimination Act 1984 (Cth)* was amended to introduce a positive duty on employers and 'persons conducting a business or undertaking' to eliminate sexual harassment and sex discrimination in connection with work, as far as possible. However, the DDA does not currently impose any duties on duty holders to take steps to proactively eliminate disability discrimination.

The Disability Royal Commission recommended the introduction of a positive duty on all duty holders, including public and private sector entities, modelled on the duty in the *Sex Discrimination Act*. A positive duty is intended to shift the emphasis from a reactive, complaints-based model to one where duty holders are required to proactively assess their compliance with their obligations and ensure people with disability are not being subjected to discrimination. The DDA Review seeks feedback on how a positive duty could be implemented in the DDA, including reflecting on the experience with the positive duty under the *Sex Discrimination Act*, to ensure the duty is effective in addressing and preventing disability discrimination.

#### **Council feedback**

The Council strongly supports introducing a positive duty under the DDA, requiring organisations to proactively prevent discrimination, extending to all sectors with no broad exemptions (including employment, education, services, and digital platforms).

The Council emphasised that the duty must be enforceable, not merely a recommendation, to ensure accountability and cultural change. Without enforcement, organisations may continue to rely on 'unjustifiable hardship' to avoid accessibility obligations and the onus of enforcing the elimination of disability discrimination may fall back on complainants (see the Council's views on the current complaints system in Part 1).

The experience of implementing the positive duty under the *Sex Discrimination Act*, following the Respect@Work Report, demonstrates the critical importance of enforceability in driving real change.

The Australian Human Rights Commission was empowered to monitor and enforce compliance, including through inquiries and compliance notices. This has shifted organisational behaviour from passive compliance to active prevention, embedding a culture of accountability and continuous improvement.

Without similar enforcement mechanisms under the DDA, the positive duty risks becoming symbolic rather than transformative. Embedding enforceability—through oversight, guidance, and consequences for non-compliance—is essential to ensure that duty holders take meaningful steps to eliminate disability discrimination, rather than treating it as a discretionary or aspirational goal.

Consistent with Recommendation 19 of the Respect@Work Report, the Council supports the Australian Human Rights Commission (AHRC) being given the function of assessment and investigation of compliance with the positive duty and enforcement. A key role in providing oversight and guidance could be provided by the Disability Discrimination Commissioner (currently Rosemary Kayess).

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

### ***1. Clarification of unjustifiable hardship and reasonable adjustments***

#### ***Context***

The DDA requires duty holders, such as employers, to provide a person with disability with any reasonable adjustments required to support their participation. An adjustment is not reasonable if it would impose an “unjustifiable hardship” on the duty holder. The DDA also provides an exception to unlawful discrimination in employment if an employer can establish that a person with disability is unable to perform the ‘inherent requirements’ of a particular job.

#### ***Council feedback***

The Council believes that the definition of “unjustifiable hardship” should be tightened and clarified, especially regarding financial hardship. Examples include situations where venues have undergone expensive renovations but have not included accessible toilets, reasoning that their inclusion would have been an “unjustifiable hardship”.

To ensure the duty to provide adjustments is effective, the concept of ‘reasonable adjustments’ must also be clearly defined to prevent misuse or misinterpretation. In practice, vague definitions allow organisations and individuals to claim that adjustments are too costly, complex, or disruptive, often without evidence or accountability.

This undermines the intent of the DDA and places the burden back on people with disability to challenge these claims. A clearer, more objective definition—supported by practical guidance and examples—would help duty holders understand their obligations and reduce reliance on unjustifiable hardship as a default excuse. It would also promote consistency in decision-making and strengthen the legal and cultural expectation that inclusion is a standard, not an exception.

## **2. Inherent requirements**

### **Council feedback**

The Council also believes that clearer definitions and examples could be provided in relation to the definition of 'inherent requirements', such as, for example, clarifying where 'driver's licence required' could be replaced with 'ability to travel'.

## **Part 4 – Improving access to justice**

### **1. Explicit prohibitions of harassment, vilification and exclusion**

#### **Context**

The DDA prohibits harassment in specific areas of public life. However, there is no general prohibition on offensive behaviour or vilification.

The DDA also prohibits discrimination in the provision of services, which generally covers the interaction between police and witnesses, victims of crime and members of the public. However, the courts have determined that the DDA does not consistently cover interactions between police and those suspected of committing an offence.

#### **Council feedback**

Consistent with the protections under the *Racial Discrimination Act 1975 (Cth)*, the Council advocates for explicit prohibitions in the DDA of harassment, vilification and exclusion of persons with disability, including online vilification and digital hate speech. The Council also recommends the recognition of policing as services under the DDA, with obligations for reasonable adjustments and trauma-informed practice.

## **Part 5 – Exemptions**

### **1. Tighter definitions**

#### **Context**

The DDA sets out ten permanent exemptions which set out when discrimination against people with disability is not unlawful. The AHRC can also grant temporary exemptions, which balance the DDA's purpose of eliminating disability discrimination with other competing policy priorities.

#### **Council feedback**

The Council advocates for tighter definitions for temporary exemptions and believes that there are risks in granting indefinite exemptions without the implementation of mandatory regular reviews. The Council opposes 'special measure certificates,' as recommended by the AHRC.

## **Part 6 – Further options for reform**

### **1. Modernising the definition of disability**

#### **Context**

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) defines persons with disability as including those who have long-term physical, mental, intellectual or sensory



impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

### **Council feedback**

The Council supports the DDS adopting or referencing the UNCRPD's conceptualisation of disability as arising from the interaction between impairment and environmental/attitudinal barriers. This aligns with reforms proposed contemporary disability law internationally and presents an opportunity to have the revised definition grounded in human rights and to remove deficit-based language (e.g. "loss," "malfunction," "disturbed") and explicitly recognise psychosocial disability and neurodiversity.

## **2. Accessibility and scope**

### **Context**

The DDA Review seeks views on other ways the DDA could be reformed to ensure it works for people with disability, sets out clear obligations for duty holders, and remains fit-for-purpose into the future. It also seeks views on other ways the DDA could be reformed to ensure that it works for people with disability, sets out clear obligations for duty holders, and remains fit-for-purpose into the future.

### **Council feedback**

The Council noted that accessibility issues in physical infrastructure are often excluded from the DDA and governed by other legislation. There are national legally-binding standards which set out technical requirements for those building or upgrading premises to ensure people with disability can access and use buildings, as required by the DDA. AHRC has published a guideline on the application of these standards to assist people to implement them. However, often inadequate or inappropriate management, maintenance and housekeeping practices can make otherwise accessible premises inaccessible – for example, keeping accessible toilets locked or using them for storage.

While provisions governing accessibility issues are governed by separate legislation, they intersect with the DDA, which makes it unlawful to discriminate against people with disability in relation to access and use of public premises. This applies to places such as shops, cafes, restaurants, banks, cinemas, theatres and sporting venues. Public 'premises' can also include an aircraft or vehicle, a place (whether enclosed or built or not), or a part of a premise (for example, customer bathrooms).

The Council also emphasises that the DDA must include provisions that go beyond the technical requirements of the Australian Building Code to ensure full accessibility in both existing and newly constructed premises. While the Building Code sets minimum standards, it lacks a complaints mechanism or enforcement pathway for individuals to challenge non-compliance. As a result, many premises—particularly older buildings—remain inaccessible, and new constructions sometimes meet only the bare minimum, failing to provide inclusive access in practice. The DDA must include clear levers to address these gaps, such as enforceable obligations for ongoing accessibility, mechanisms for individuals to raise concerns, and consequences for non-compliance. This would ensure that accessibility is treated as a fundamental right, not a discretionary feature, and that people with disability are not excluded from public life due to avoidable physical barriers.

It is the view of the Council that service provision discrimination should be considered under the DDA when accessibility is lacking. In addition, the DDA should have similar enforcement mechanisms as the *Americans with Disabilities Act 1990* (US), where the government enforces accessibility and non-compliant organisations cannot access government funding.



### ***3. Digital and technological discrimination***

#### ***Council feedback***

To ensure that the DDA is future-proofed with respect to emerging technologies and digital services design, the Council also recommends that the scope of the DDA be broadened to include explicit coverage of discrimination arising from automated systems. These could include AI, algorithms and inaccessible digital platforms.

### ***4. Systemic oversight and continuous review***

#### ***Council feedback***

The Council recommends statutory reviews of the DDA every five to seven years, co-designed with people with disability, and the establishment of a public data dashboard on discrimination trends and outcomes.

### ***5. Assistance animals***

#### ***Context***

Under the DDA, it is unlawful to discriminate against a person because they have an assistance animal in areas of public life covered by the DDA.

#### ***Council feedback***

The Council supports a nationally consistent approach to the regulation of assistance animals, including a nationally consistent definition.

### ***6. Action plans***

#### ***Context***

Duty holders may voluntarily prepare and implement an action plan under the DDA. The purpose of an action plan is for organisations to set out a strategy to address practices which might result in discrimination against people with disability, as well as implementing specific policies and practices to promote the rights of people with disability.

#### ***Council feedback***

The Council supports minimum content requirements for Action Plans under the DDA and the implementation of time limited reviews. The Council also recommends that the AHRC should have the power to reject non-compliant plans.

### ***7. Disability standards***

#### ***Context***

Disability Standards are legally binding legislative instruments that are made under the DDA and supplement and support the DDA by providing more detail on rights and responsibilities. It is unlawful for a person to breach a Disability Standard.

#### ***Council feedback***

The Council believes that the AHRC should provide additional guidance to duty holders on how to self-report on the Disability Standards in disability action plans.