14 November 2025

Proper Officer
Australian Government
Attorney-General's Department
Email only: DDAReview@ag.gov.au

Dear Officer,

Submission on the Disability Discrimination Act 1992 (Cth) Review 2025

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission on the NSW Law Reform Commission's review of the *Disability Discrimination Act* (Cth) (the **DDA**). We consent to this submission being published.

About Kingsford Legal Centre

KLC is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney and across NSW. We have been providing specialist discrimination law advice and representation to people since 1981. Our purpose encompasses advocating for social justice and human rights and empowering our community. KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education to its law students.

We specialise in discrimination law and run a state-wide Sexual Harassment & Discrimination Legal Service and the Employment Rights Legal Service (ERLS)[1]

In 2024 / 2025 our service helped 128 clients experiencing disability discrimination, providing legal advice and representing clients in their discrimination claims. We provide advice and representation in all discrimination jurisdictions, including Anti-Discrimination NSW, the NSW Civil and Administrative Tribunal, Fair Work Commission, Australian Human Rights Commission (AHRC), Federal Court of Australia and Federal Circuit and Family Court of Australia.

We have long-held policy expertise in discrimination law and human rights. We have undertaken significant international human rights work co-ordinating civil society engagement around Australia's international human rights compliance. We also conduct extensive community legal education to our community around discrimination law and human rights with a current particular focus on sexual harassment and young people.

We draw on all this experience in commenting on the Review.

[1] in collaboration with Inner City Legal Centre and Redfern Legal Centre.

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Overall Comments

We welcome the opportunity to comment on the Attorney-General Department's Review of the *Disability Discrimination Act 1992.* This is an important and overdue opportunity to reform the law to make it more effective for people with disability and to ensure it reflects human rights standards and community values. This is an important piece of law that secures the rights of people living with a disability to full participation and realisation of human rights. It is, therefore, important, that the law reflects human rights obligations but is workable and accessible in reality.

We believe guiding principles should include:

- ensuring Australia's anti-discrimination laws are harmonised and are fully compliant international human rights principles;
- ensuring that anti-discrimination law works in conjunction with a Human Rights Act to effectively realise rights;
- ensuring the law is accessible and removing unnecessary complexity – with a particular focus on people living with a disability;
- reflecting the breadth of experiences of people with disability in the co-design of laws impacting them, including people who experience intersectional discrimination;
- addressing significant gaps in discrimination laws;
- improving the fairness of the process by reducing undue burdens on applicants in disability discrimination matters and promoting systemic responses that improve the lives of all;
- elevating the proactive and educational role of anti-discrimination laws and enforcement agencies in preventing disability discrimination from occurring;
- ensuring our National Human Right Institution the AHRC is properly resourced to lead this work.

It is also essential that the reform process involves consultation and co-design with people with lived experience of disability, in keeping with the principles of independence and participation set out in the Convention of the Rights of Persons with Disabilities.[2]

Our submission draws on KLC's experience advising people across NSW in relation to their rights under anti-discrimination and sexual harassment law. We have included anonymised case studies to illustrate some our concerns with the current DDA and

[2] *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force for Australia 16 August 2008), Article 3.

potential avenues for reform. Names and some identifying details have been changed for confidentiality, indicated with an asterisk (*).

Improvements to the DDA will go a long way to preventing discrimination but further reform is urgently required to fully realise human rights. For the full realisation of human rights in Australia, KLC reiterates our calls for harmonised anti-discrimination legislation and a federal Human Rights Act. The experience of jurisdictions like Victoria, Queensland and the ACT has shown that Human Rights Acts can complement anti-discrimination legislation. Together, these Acts would contribute to the realisation of disability rights in Australia.

Recommendation 1: the Government should enact a single harmonised anti-discrimination act that addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies including against systemic and intersectional discrimination.

Defining disability

It is important to maintain an expansive definition of 'disability' in the DDA to ensure that all people with disabilities are protected from discrimination. The Queensland Human Rights Commission recommended modernising terms in the *Disability Discrimination Act 1992* (Cth), such as 'malfunction', 'malformation' and 'disfigurement'.[3] We support the removal of stigmatising language from the DDA (in consultation with disability groups), with a particular focus on ensuring that broad coverage for people with disabilities is maintained.

While the current definition is generally quite broad, KLC has assisted clients who have found it difficult to pursue a DDA complaint in circumstances where they had a reasonable expectation that they would be protected by disability discrimination laws.

Case study: Gili* worked as a caretaker in a school. This involved a lot of manual labour and maintenance. Gili's boss repeatedly made comments about his weight. One day his boss told him: "You'd be much faster at your job if you just lost some weight" and gave him a book of low-calorie recipes. Gili declined the book and told his boss that he had no right to make comments about his private life. Gili's boss continued to make comments about joining a gym and getting weight-loss counselling, which Gili ignored. Gili eventually resigned from his job, as the comments were getting too much. Gili's discrimination case was difficult to run, including because there is no protected attribute for physical features and Gili did not have any diagnosed underlying health conditions.

Some concerns with the definition of 'disability' would be addressed by the creation of new attributes under the DDA. We recommend either amending the definition of disability or adding an additional attribute of 'physical features' to protect people with,

[3] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 271

for example, facial differences (like prominent scarring) or who have larger bodies. 'Genetic information' should also be a separate attribute, rather than being included under the definition of disability generally, in order to protect against current or future discrimination based on genetic heritage.[4] An attribute of 'medical condition' (or 'medical record' or 'health status') should also be included, as some people living with HIV or neurodiverse people do not identify as having a disability.

Recommendation 2: The language in the DDA should be amended to remove language that is stigmatising based on consultations with people with a disability and disability groups, while maintaining broad coverage**.**

Recommendation 3: The DDA should include a new attribute to protect against discrimination on the basis of physical features like weight, height and facial features.

Recommendation 4: The DDA should include a separate attribute to protect against discrimination on the basis of genetic information.

Recommendation 5: The DDA should include a new attribute to protect against discrimination on the basis of a medical condition (or medical record or health status).

Recognising intersectionality

KLC and community legal centres have a long-held position that discrimination law should recognise the distinct experience of intersectional discrimination. This is a major impediment for many marginalised groups being able to assert their rights under the current law.

The DDA should protect against intersectional discrimination. Many people who experience disability discrimination experience compounding, complex discrimination on the basis of multiple attributes or at the intersection of attributes. This is a major barrier to the full realisation of rights in Australia.

Case study: Dinah*, an Aboriginal woman, worked in a sorting facility on a casual basis for many years. She experienced mental health conditions which required her to take periods of sick leave, and was also the primary carer for her child, requiring additional periods of leave for her caring responsibilities. She was fired for taking too much time off, despite having communicated that she required additional days for both her own health and for her caring responsibilities. She also experienced racist and sexist comments from her co-workers that were never dealt with by management.

Case study: Leah* worked in a marketing role in a small organisation. She had pre-existing mental health conditions which she disclosed early on in her employment. Her employer made some negative comments about her mental health. She experienced sexual harassment from her boss at work. After Leah told her work that she was pregnant and planning to go on parental leave, she was made redundant. She was told there was no more work for her but soon afterwards Leah saw a job ad online for her

[4] *Disability Discrimination Act 1992* s 4 'disability' (j).

role. Leah made a complaint to the AHRC about disability discrimination, sex discrimination and sexual harassment. There was no mechanism in the process for weighing up the cumulative and overlapping effects of Leah's experiences.

Commonwealth anti-discrimination law should be amended to protect people from discrimination on the basis of a combination or intersection of attributes. The ACT and Canada provide possible models for this. We prefer the Canadian approach, which protects against discrimination on the basis of one or more protected attributes ("prohibited grounds") or "on the effect of the combination of prohibited grounds."[5] As discussed by the Queensland Human Rights Commission,[6] the ACT approach, which prohibits discrimination on the basis of "1 or more protected attributes"[7] in our view does not adequately protect against discrimination that occurs only at the *intersection* of two (or more) attributes, which is distinct from discrimination on more than one attribute.

If changes are made to the DDA to allow for claims based on intersectional discrimination, other pieces of Commonwealth anti-discrimination legislation (like the *Race Discrimination Act 1975,* the *Sex Discrimination Act 1984* and the *Age Discrimination Act 2004*) should be similarly amended. Applicants should be explicitly allowed to bring intersectional claims that bridge multiple anti-discrimination acts. In the longer term, it would be preferable that Commonwealth anti-discrimination law should be harmonised in a single act. This would be similar to some state-based anti-discrimination laws,[8] which protect against discrimination on the basis of a range of attributes within a single piece of legislation.

Recommendation 6: The DDA should prohibit discrimination on the basis of one or more protected attributes, or on the basis of the effect of a combination of protected attributes.

The legal test for discrimination

Before considering possible reforms to the tests for 'direct' and 'indirect' discrimination, it is first necessary to consider the appropriateness of these categories.

The current division between direct and indirect discrimination under the DDA creates an artificial distinction between forms of discrimination. Whether discrimination is direct or indirect is often a matter of how the facts are characterised and is particularly challenging for applicants given much of the evidence about the factual context is held by the respondent. For example, a child with a learning disability might be banned from attending an excursion because of behaviours associated with their disability (direct discrimination). The school might also have blanket rules that only students with good behavioural records can attend excursions, which is more difficult for children with

[5] *Canadian Human Rights Act*, RSC 1985 c H-6 pt I, 3.1.
[6] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 109.
[7] *Discrimination Act 1991* (ACT) s 8 (2) and (3).
[8] See e.g. *Equal Opportunity Act 2010* (Vic), *Discrimination Act 1991* (ACT).

some kinds of learning disabilities to comply with (indirect discrimination). However, the current drafting might suggest that direct and indirect discrimination are mutually exclusive concepts, confusing applicants and duty holders.

An approach to addressing this complexity and overlap between the two tests would be to adopt a unified test for discrimination. International jurisdictions in the USA, Canada, South Africa and New Zealand do this.[9] The Northern Territory has also adopted a unified discrimination test.[10]

We prefer the ACT's approach[11] of defining discrimination to include direct discrimination, indirect discrimination or both. This approach clarifies that direct and indirect discrimination might arise from the same facts but still refers explicitly to the concepts of direct and indirect discrimination. Explicitly referring to the types of discrimination is consistent with most Australian jurisdictions.[12] It also has an important educative function, particularly for self-represented respondents who might not be familiar with the concept of indirect discrimination. We note, for example, that that the Australian Parliament amended the *Racial Discrimination Act 1975* (Cth) in 1990[13] to clarify that indirect racial discrimination was also prohibited and to prevent "covert discriminatory practices".[14]

Recommendation 7**: The DDA should define discrimination to include cases of direct discrimination, indirect discrimination, or both direct and indirect discrimination, modelled on s 8(1) of the *Discrimination Act 1991* (ACT)*The comparator test***

This review is an important opportunity to abandon the comparator test in the law. This test has created unnecessary complexity and unfairness and has limited the effectiveness of discrimination laws, especially for people with a disability. Modern discrimination law tests should not be based on a comparator.

We believe the comparator test should be abandoned in favour of a test of 'unfavourable treatment'. The need to demonstrate 'less favourable'[15] treatment via a real or hypothetical comparator introduces unnecessary technicality and a lack of clarity into discrimination claims. This results in uncertainty and often, injustice, for our clients as well as confusion for duty holders as to the relevant test.

Case study: Mark* was employed as a junior accountant. He had ADHD and mental health conditions, which he managed with medication. Mark was facing disciplinary proceedings at work because his boss said he was frequently unfocussed and often late. Mark asked for simple workplace accommodations to help him focus. He also

[9] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 86.
[10] *Anti-Discrimination Act 1992* (NT) s 20.
[11] *Discrimination Act 1991* (ACT) s 8(1).
[12] See e.g. *Equal Opportunity Act 2010* s 7(1)(a).
[13] *Law and Justice Amendment Act 1990.*
[14] Hansard, Law and Justice Amendment Bill (12 November 1990, Daryl Melham).
[15] See e.g. *Anti-Discrimination Act 1977* (NSW) s 7(1).

requested to start work later because his medication made him drowsy in the morning. Mark's boss refused and continued to treat the issue as a disciplinary matter.

We advised Mark about his options for making a discrimination claim. We advised Mark there was a risk that a court would see the comparator as a person without a disability who was also unfocussed and frequently late. This would have seriously weakened Mark's case.

Mark chose to settle his matter for a modest amount of money rather than risk the time, money and reputational damage associated with pursuing a discrimination claim.

Case study: Justin* has a psychosocial disability that impacts on his emotional regulation. One day Justin got into an argument with another patron at his local club. Justin reacted angrily and swore at the other person. Despite the club knowing about Justin's disability and its impact on him, the club permanently banned Justin from the club and refused to reconsider. The club was a central part of Justin's social life and activities.

When advising Justin about making a discrimination claim, we had to tell him there was a risk that a court compare his treatment to a person without a disability who was aggressive to other patrons.

As shown by Mark and Justin's examples, the identification of the comparator is a crucial factor in the likelihood of success for a discrimination claim. The identification of a comparator is particularly challenging for direct discrimination based on the characteristics of an attribute. The High Court's reasoning in *Purvis* shows the pitfalls of identifying a comparator in disability discrimination cases.[16] Amendments to the DDA to include behavioural symptoms or manifestations of a disability within the definition of 'disability' have not been successful in addressing this problem.[17] The issue of the comparator – whether real or hypothetical – continues to be subject to large amounts of conjecture when we give advice, and adds to the uncertainty for people who wish to bring claims. This detracts from the substance of the conduct and creates further legal hurdles and additional cost in running matters. The lack of clarity around the characteristics of the comparator does not provide the certainty required for the law to be effective for respondents or applicants. This reduces the efficacy of the law.

Each year, our service advises clients on hundreds of potential instances of discrimination, including about the evidence a client would need to bring, and the likely merits of their case. For clients who go on to self-represent, the legal technicality of the comparator test is difficult to navigate. Complainants must satisfy the comparator test *in addition to* bearing the onus of proving that the unfavourable treatment was, linked

[16] *Purvis v New South Wales* [2003] HCA 62; 2017 CLR 92.
[17] *Disability Discrimination Act 1992* s 4 'disability': "To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability."

to their disability. This is an unnecessary hurdle in an already very technical jurisdiction.

KLC supports the adoption of an 'unfavourable treatment' test, as currently applied in Victoria and the ACT,[18] and as was recommended by the Queensland Human Rights Commission in their review of the *Anti-Discrimination Act 1991* (Qld).[19] This test would reduce the complexity of discrimination law and focus on the issues at the heart of discrimination. This would better allow applicants to bring direct evidence within their knowledge of the 'unfavourable treatment' and would result in better use of the time in Australian Human Rights Commission (AHRC) processes and Federal Court proceedings to argue the substance of the claims. This would improve the overall effectiveness of the law.

An 'unfavourable treatment' test would also facilitate claims based on intersectional discrimination (discussed in relation to Questions 3 and 4).

Recommendation 8: The DDA should define direct discrimination as 'unfavourable treatment', modelled on the *Equal Opportunity Act 2010* (Vic) and *Discrimination Act 1991* (ACT).

Indirect discrimination

The concept of indirect discrimination is largely misunderstood in the community and is unnecessarily legally technical. Similar to the comparator test in direct discrimination, the comparative disproportionate impact test in indirect discrimination has made the law highly ineffective by imposing evidentiary requirements that most complainants are unable to meet. It often relies on statistics that are in the control of the respondent, or do not exist. Given the preponderance of indirect discrimination, it is important that the law reflects a workable test that focuses on the real issue, which is addressing systemic discrimination.

The comparative disproportionate impact test should be replaced with a disadvantage test, in line with Victorian and ACT anti-discrimination legislation and the *Age Discrimination Act 2002* (Cth) and *Sex Discrimination Act 1984* (Cth).[20]

Case study: Marianne* came to KLC after facing discrimination in a recruitment process. Marianne asked for adjustments to be made to the recruitment process to accommodate her needs as a person living with autism. The employer refused.

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[18] *Equal Opportunity Act 2010* (Vic) s 8(1); *Discrimination Act 1991* (ACT) s 8(2); Queensland Human Rights Commission*, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 95.

[19] Queensland Human Rights Commission*, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 95.

[20] *Equal Opportunity Act 2010* (Vic) s 9(1); *Discrimination Act 1991* (ACT) s 8(3); *Age Discrimination Act 2004* (Cth) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B, as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 29.

There were significant difficulties fitting Marianne's situation under the current definitions of direct and indirect discrimination. For example, Marianne was required to complete an online test which was timed, but due to the impact of her disability on her processing speed there was no way she could complete the test. There were two issues in determining whether indirect discrimination had occurred under the law – firstly, should the "persons who do not have that disability" be defined as non-autistic people or as people who did not have Marianne's specific processing speed challenges? Secondly, how could Marianne find out if a "substantially higher proportion" of people in that group could complete the test?

The specific drafting of the test should be based on the ACT model of a "disadvantaging the other **person**"[21] (emphasis added) as compared to the Victorian approach of "disadvantaging **persons** with an attribute".[22] As discussed in the Queensland Human Rights Commission's *Building Belonging* report,[23] requiring proof that the class of persons with the attribute was affected, as compared to the individual, can be problematic for attributes like disability where people with the same condition can be differently affected by a requirement.

Adopting the ACT approach addresses the core issue of discrimination law (that the person is treated unfairly because of an attribute, like disability) and avoids unintentionally reintroducing statistical analysis of attribute groups.

Recommendation 9: The comparative disproportionate impact test should be replaced with a disadvantage test modelled on s 8 of the *Discrimination Act 1991* (ACT).

The reasonableness component of the test for indirect discrimination should be replaced with a 'legitimate and proportionate' test. To be lawful under this test, a requirement or condition that had the effect of disadvantaging a person with a protected attribute would need to be a proportionate means of achieving a legitimate aim. This mirrors the approach of European and UK lawmakers,[24] and was recommended by the AHRC in its report *Free and Equal: A Reform Agenda for Federal Discrimination Laws.*[25]

In our opinion, a legitimate and proportionate test would more clearly guide the Court's reasoning towards weighing the (legitimate) benefit sought by the duty holder and the burden on the applicant. In the alternative, a non-exhaustive list of factors to be considered in determining 'reasonableness' would help to clarify the reasonableness test. We consider the Victorian legislation to be a suitable model.[26] Notably, the list of

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[21] *Discrimination Act 1991* (ACT) s 8(3).
[22] *Equal Opportunity Act 2010* (Vic) s 8(1)(a).
[23] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 100.
[24] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 296.
[25] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 297.
[26] *Equal Opportunity Act 2010* (Vic) s 9(3).

factors includes "whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice".[27]

We note the Disability Royal Commission's (DRC) recommendation to re-examine the reasonableness element with a view to removing it from the test for indirect discrimination, with respondents to instead rely on a defence of unjustifiable hardship.[28] This would not be our preference. First, the reasonableness element in the indirect discrimination test requires examination on the requirement of the condition imposed by the duty holder, rather than the impact on the applicant or the hardship imposed on the respondent. That is, it has a function that is distinct from the analysis in the 'unjustifiable hardship'test. Secondly, there is a risk that courts reinterpret the unjustifiable hardship test to make it easier for respondents to satisfy. Thirdly, for intersectional discrimination it might be unworkable to have different tests for indirect discrimination across different federal anti-discrimination laws.[29]

Recommendation 10The 'reasonableness' element of indirect discrimination should be replaced with a 'legitimate and proportionate' test.

Recommendation 11: In the alternative, the test for indirect discrimination should include a non-exhaustive list of factors to be considered when determining 'reasonableness', based on s 9(3) of the *Equal Opportunity Act 2010* (Vic).

'Not able to comply test'

The 'not able to comply' element of the indirect discrimination test should be removed. For many of our clients, while it might be technically possible to comply, the condition imposed is often unrealistically burdensome or so onerous that it cannot be considered a real and viable option for the complainant.

Case study: Marie* owns an apartment in a large block. Marie is elderly and has physical disabilities which make it hard for her to walk. To access the lobby, Marie has to walk up a small set of stairs. This has become very difficult for Marie recently, so that she can only leave her apartment when her son comes over to help her with the stairs. Marie has been using a side entrance which is easier for her. The Owners Corporation have told her to stop using that door as it is supposed to stay locked.

The Owners Corporation for the block has also refused to make changes to the lobby so that Marie can access it without assistance.

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[27] *Equal Opportunity Act 2010* (Vic) s 9(3)(b).
[28] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 304.
[29]Though it should be noted that this would also be an issue for other changes to the tests for discrimination in the DDA if the changes were not replicated in other Commonwealth anti-discrimination acts. This points to the need to harmonise Commonwealth anti-discrimination law in a single act (see recommendation above).

While Marie can technically comply with the requirement to only enter and exit the block via the lobby if she has assistance, this approach restricts her freedom to come and go from her home.

While courts and tribunals have not tended to interpret the phrase 'not able to comply' literally,[30] the phrase has operated practically to unnecessarily increase the evidentiary burden on clients like Marie. We think a better focus in these cases is the impact of the requirement on the person with the protected attribute, and whether it disadvantages them. The focus on compliance moves away from the real purpose of the Act, which is to remove systemic barriers to full participation in areas of public life.

KLC recommends the removal of the 'not able to comply' element in favour of the 'unfavourable treatment' approach in ACT and Victorian legislation. Differential ability to comply would still be addressed as part of a proportionality (or reasonableness) standard – see above.

Recommendation 12: The DDA should be changed to remove the 'not able to comply' element from the definition of indirect discrimination.

Burden of Proof

Discrimination law places a significant evidentiary burden on applicants. Generally, in discrimination law individual applicants bring matters against better resourced respondents. This power imbalance is often exacerbated in disability discrimination cases, where applicants must manage the process of their complaint as well as the impacts of their disability. In our experience, many matters do not proceed simply because an applicant does not hold or have access to the requisite evidence to discharge their burden of proof. For example, in employment matters, employers are usually the only party to know why a candidate didn't get the job.

It has been recognised that individual applicants that bring claims also bring benefits to the wider community. Reform of discrimination law should ease the burden on individuals who bring claims, recognising, that the broader community benefits from people enforcing their rights.

Case study: Sufjan* worked full time at a restaurant for two years. He had to take some days off due to a medical condition that required surgery and hospitalisation. He was terminated from his position and informed he could re-apply for a casual position when he was well enough. However, when he applied for a new full-time position some months later, he was told that they did not believe he was suitable, despite having medical clearance. In this case,

In this case, it was hard for Sufjan to prove that the reason for not being given the role was his disability. Sufjan did not have clear information about the decision-making

[30] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 98.

process, and the onus was on Sufjan to prove discrimination with evidence he did not have.

Case study: Patricia* is 35 years old and applied for a job as a childcare worker. The interview went well, and Patricia was asked to do a medical examination. Patricia was flagged as being at high risk of injury by a doctor because of her high BMI. The doctor also flagged a historical back injury as being of concern. Patricia was not offered the job. Patricia was confused because she couldn't see the relevance of her medical history to not being able to do the job. She was particularly confused by the reference to the back injury because it was a netball injury from her teens and didn't cause her any current issues. She had limited evidence though as to what was the employer's mind in not offering her the role.

Case study: Daniel* applied for a job as a support worker. He was told by the interviewer that they wanted to hire him on-the-spot but that he needed to complete some more checks. The company asked Daniel for a full medical history, including any physical or mental health diagnoses. Daniel disclosed that he had been diagnosed with schizoaffective disorder, which was currently well-managed. The company didn't proceed with Daniel's job offer despite telling him that he had been the preferred candidate. Daniel had a strong suspicion that his disclosure meant he did not get the role but did not have evidence to show this as it was in the employer's possession.

Case study: Sadia* applied for a job in a warehouse. She had passed most parts of the application process, including a written application and an interview. She had discussed start dates with the employer and was told the company was looking to hire as soon as possible. Sadia was then asked to complete a medical assessment. Sadia disclosed a prior workplace injury (five years prior), which had since resolved. She did not need any adjustments for the previous injury. The company stopped contacting Sadia and then eventually withdrew the offer saying she couldn't safely perform the role. Sadia did not have access to the documentation that the employer relied on to come to this conclusion.

As shown by the above cases, the evidence to connect a person's treatment with their attribute is often held entirely by the duty holder. A shifting burden of proof is an appropriate response to address the structural disadvantage faced by claimants in discrimination claims. In our view a shifting burden would also increase the efficacy of pre-filing complaints and conciliations at the AHRC as it would prompt respondents to be open and transparent around their decision-making. This would allow applicants to better understand the purported reasons for the conduct and assess the merits of the case.

Where the burden of proof lies has only increased in importance in the context of algorithmic discrimination by AI systems. In many cases, it will be very difficult for applicants to determine the actual basis on which an apparently discriminatory decision was made. A shifting burden of proof would be fairer for applicants and encourage duty holders to responsibly use technology and be more transparent about their decision making.

KLC supports a burden shifting approach similar to section 361 of the *Fair Work Act 2009* (Cth). This approach was supported by the Disability Royal Commission.[31] The applicant would need to show that they had an attribute and were treated unfavourably. The burden would then shift to the respondent to show that the unfavourable treatment was not because of their attribute.

In the alternative, KLC supports a burden-shifting model similar to the UK's *Equality Act 2010*. This approach has been adopted in Queensland and was recommended by the AHRC.[32]

Recommendation 13: The DDA should contain a shifting burden of proof for direct discrimination, similar to section 361 of the *Fair Work Act 2009* (Cth).

Recommendation 14: In the alternative, the DDA should adopt a burden-sharing model for direct discrimination similar to the UK *Equality Act 2010*.

Objects Clause

We support the recommendation of the Disability Royal Commission that the objects clause in the DDA should state that an object of the Act is to give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities.[33]

Recommendation 15: The objects clause of the DDA should refer to the Convention on the Rights of Persons with Disabilities.

The Act is beneficial legislation

We support the recommendation of the Disability Royal Commission that the interpretation clause of the DDA should clarify that the legislation should be interpreted in a manner that is beneficial to people with disability (to the extent that it is possible to do so consistently with the DDA's objects, and the international conventions referenced by the DDA).[34]

Under general principles of statutory interpretation, the DDA should already be interpreted beneficially.[35] However, as discussed by Rees, Rice and Allen, Australian courts have not consistently interpreted anti-discrimination laws liberally or beneficially.[36] We think there would be a benefit to strengthening the textual basis for a beneficial, human rights-oriented approach to interpreting the DDA.

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[31] Disability Royal Commission, *Final Report* (Report, Chapter 4, September 2023) 302.
[32] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 210.
[33] *Disability Royal Commission Report* Volume 4, 344.
[34] *Disability Royal Commission Report* Volume 4, 344-245.
[35] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press 2018) 25, citing DC Pearce and RS Geddes, *Statutory Interpretation in Australia 8th ed* (LexisNexis Butterworths Sydney 2014) 359 – 360.
[36] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press 2018) 24-30.

Recommendation 16: The interpretations clause of the DDA should clarify that the DDA should be interpreted in a manner that is beneficial to people with disabilities.

Addressing systemic discrimination – positive duties

The DDA should include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct, also known as a positive duty.

A positive duty shifts the emphasis away from individual complaints following unlawful conduct to requiring schools, businesses and other duty holders to prevent discrimination before it occurs. A positive duty already exists in Victoria, the Northern Territory, the ACT, and in the *Sex Discrimination Act 1984* (Cth).[37]

KLC supports the requirement that duty holders take reasonable and proportionate measures to eliminate unlawful conduct. As in other jurisdictions, it may be useful to guide the determination of what is reasonable and proportionate by providing a non-exhaustive list of considerations including the nature and size of the organisation, the resources of the organisation or person, and the practicability and cost of the steps. This approach allows consideration of the varying capacity that different organisations and individuals may have to prevent unlawful conduct.

The positive duty should extend to preventing discrimination, victimisation, offensive conduct / harassment and vilification (where applicable). Subject to the limitations on areas of public life explained below, the duty should apply to anyone who has an obligation under the DDA not to engage in unlawful conduct.

The positive duty should apply to duty holders in all the areas of areas of public life explicitly articulated in the DDA. This would be more expansive than the current approach in the *Sex Discrimination Act 1984* (Cth), which imposes a positive duty only on employers and people conducting a business or undertaking and only in relation to sexual harassment. In KLC's experience, this limited approach is undesirable as it is inconsistent and creates a hierarchy of rights.

However, we also recognise that for a positive duty to be practical and effective it is important to provide clarity about when the duty applies. For this reason, we recommend the positive duty be limited to the areas of public life explicitly identified in the DDA (rather than, for example, 'public life' more broadly). This would create greater certainty for duty holders, rights bearers and AHRC as the regulator.

Case study: KLC advised Sarah* who had experienced sexual harassment at work in a small business. Sarah's employer claimed that it had complied with the positive obligation under the SDA by telling new employees to read a large volume of policies. No time was provided to read these policies and there was no follow up to check if the policies had been read. There was also no in-person training on sexual harassment.

[37] *Equal Opportunity Act 2010* (Vic) s 15; *Anti-Discrimination Act 1992* (NT) s 18B; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1998* (Tas) s 104; *Sex Discrimination Act 1984* (Cth) s 47C.

KLC's experience advising clients under the *Sex Discrimination Act 1984* has shown that it is important that the positive duty requires duty holders to take meaningful action beyond just having training or policy documents available, as in Sarah's case. A recent report by the Australian Human Rights Commission on measures to address workplace sexual harassment, *Speaking from Experience,* pointed to weaknesses in the implementation of the positive duty to prevent sexual harassment.[38] Workers reported that the positive duty was poorly understood by many employers and that compliance measures were lacking. The Commission ultimately recommended introducing civil penalties for breaches of the Sex Discrimination Act's positive duty.[39]

To be effective, it is important that the AHRC is given the appropriate powers and resources to monitor compliance with the DDA's positive duty and any duty to promote equality, and that civil penalties are available. The DDA could include an explanatory memorandum to provide guidance on what the positive duty may require and examples of where a positive duty would not have been complied with.

KLC would also support a duty to promote equality that applies only to public authorities, as in the United Kingdom. This would increase the requirement to consider equality in public policy decisions.[40]

Recommendation 17: The DDA should include a positive duty that requires anyone with an obligation not to engage in unlawful conduct under the DDA to take reasonable and proportionate measures to eliminate unlawful conduct. The duty should apply in all areas of public life specifically identified in the DDA.

Recommendation 18: The AHRC should be given the necessary powers and resources to monitor and enforce the positive duty, including imposing civil penalties.

The duty to provide adjustments

The duty to provide adjustments should be a separate duty as in Victoria or the ACT,[41] rather than being incorporated into the definition of discrimination. KLC favours this approach because it is consistent with Australia's international human rights obligations[42] and creates clarity for rights and duty holders. A separate duty also encourages proactive steps to prevent discrimination.

KLC believes that fitting the duty to make adjustments into the tests for discrimination creates additional complexity and provides a barrier for complainants who may be

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[38] Australian Human Rights Commission, *Speaking from Experience: What Needs to Change to Address Workplace Sexual Harassment* (June 2025) 66 - 71.
[39] Australian Human Rights Commission, *Speaking from Experience: What Needs to Change to Address Workplace Sexual Harassment* (June 2025) 71.
[40] *Equality Act 2010* (UK).
[41] *Discrimination Act 1991* (ACT) s 74; Equal Opportunity Act 2010 (Vic) s 20, s 22A, s 33, s 40, s 45.
[42] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 308. *Convention on the Rights of Persons with Disabilities*, art 5.

required to formulate the adjustment that has been sought and refused in order to prove discrimination.

Case study: Jemma*, who lives with epilepsy, worked as a casual server in a cafe for many years without any incidents. After experiencing a seizure at work, her boss said that he could not attend work as it was no longer safe. Jemma tried to cooperate with the workplace to talk about adjustments which would make it safe for her to work. As a casual she was left without pay during this process. Despite her doctors clearing her for work, Jemma's boss decided to end her employment as it "was too difficult". For Jemma to make a discrimination claim, she would be required to prove what adjustments should have been made to her work.

Clients like Jemma would benefit from a separate duty to provide adjustments which, combined with a positive duty, would encourage employers to proactively create disability-friendly workplaces.

Recommendation 19: The DDA should include a separate duty to provide adjustments.

The DDA should be amended to impose a duty to provide adjustments within the areas of public life that are explicitly articulated. A duty to provide adjustments would put the onus on the person who operates in the area of public life to proactively ensure that they are not discriminating, and increase awareness, equality and participation.

We note the DRC's recommendation that the duty to provide adjustments "should apply generally to all contexts and settings" and should not be "confined to the particular areas or settings identified in Part 2 of the *DDA"*.[43] As discussed in relation to positive duties, for a duty to provide adjustments to be practical and effective it is important to provide clarity about when the duty applies and who bears the duty. This would be challenging, for example, in shared households between housemates, or for customers *purchasing* goods or services, who would arguably have a duty to provide adjustments to providers of goods and services.

Any provision for a positive duty to provide adjustments must be formulated in a way that makes clear that it is not always up to the person living with disability to fully particularise the precise adjustment requirement. In some cases, an employer or education institution will have a greater capacity to explore available adjustments, whether they relate to assistive technology, time-tabling, space or other considerations. It may not be possible for the person living with disability, their carers or other supports to be fully across all possible adjustments suitable to their disability. In these cases a person's complaint should not fail, just because they cannot specify the exact type of adjustment requested, so long as they are clear about what the adjustment should aim to address.

[43] DRC Report 4, p 309.

Recommendation 20: The DDA should impose a duty to provide adjustments in the areas of public life specifically identified in the DDA.

Recommendation 21: The DDA's new positive duty to provide adjustments should require duty holders to make reasonable efforts to identify suitable adjustments.

We support proposals to remove 'reasonable' from the term 'reasonable adjustments'. In our work representing clients seeking adjustments, we have observed that the 'reasonableness' element is often poorly understood by duty holders. Some employers, for example, will assert that inconvenience to the business means that an adjustment is 'unreasonable'. This should more appropriately be dealt with as part of 'unjustifiable hardship' provisions.

Case study: Leanne* experiences PTSD following traumatic incidents in a past relationship, which has been disclosed to her manager. Leanne requested regular planning sessions and different start times with her manager to assist in managing her focus and mental health, and found these very beneficial. When her manager changed, they stopped the adjustments. Leanne found this decreased her ability to do her work.

In Leanne's matter, the reasonableness of the adjustments being sought and implemented was an area of potential difficulty. It would have been simpler for Leanne to demonstrate that the adjustments related to her disability, and for the employer to raise any concerns in relation to 'unjustifiable hardship'.

Recommendation 22: References in the DDA to 'reasonable adjustments' should be amended to 'adjustments'.

Unjustifiable hardship

We support the DRC's recommendation to include 'consideration of available alternative measures to eliminate or reduce hardship' as a factor in determining unjustifiable hardship' and 'consultation with any person with disability concerned' as part of the definition of unjustifiable hardship.

Additionally, the DDA should include a separate requirement to proactively consult in relation to adjustments. Duty holders should consult or otherwise proactively provide avenues for rights bearers to discuss their needs and any required adjustments. This is because the purpose of this duty should be to shift the burden away from the person with disability and encourage proactive steps toward inclusion, accessibility and participation.

KLC understands that a proactive obligation to consult may not be appropriate in all circumstances. The Department should carefully consider the areas of public life in which consultation should be proactive. Based on our experience working with clients who have experienced discrimination due to lack of adjustments, the areas of education and employment should be included as a minimum.

We make this recommendation against the backdrop of our other recommendations to improve the tests for discrimination and impose a positive duty to prevent disability discrimination. Together, these changes mean that duty holders in other contexts may

already have an obligation to make adjustments and failure to do so may be enforceable under other provisions of the DDA.

Recommendation 23: The definition of 'unjustifiable hardship' should include "consideration of available alternative measures to eliminate or reduce hardship" and "consultation with any person with disability concerned".

Recommendation 24: The DDA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

Inherent requirements

We support the DRC's recommendation that the evaluation of whether an employee can satisfy the inherent requirements of a role should consider the:

- Nature and extent of any adjustments made, and
- Extent of consultation with any person with disability concerned.[44]

Too often, our clients have been rejected from jobs without any discussion about the nature of their disability or any discussion about adjustments. KLC is particularly concerned by the practices of some employers in requesting invasive and irrelevant medical information from potential employees as a condition of employment. These types of decisions only serve to entrench economic disadvantage amongst people with disability.

Case study: Minh applied for a job as an executive assistant in a medium-sized business. She was successful in the application, and was given an employment contract to sign. At this point Minh told her manager that she needed to start at 9:30am instead of 9am on Thursdays, so that she could attend her regular psychologist appointment, but that she was happy to work back later on those days. This was the only adjustment she required. Her job offer was immediately withdrawn. KLC represented Minh in a disability discrimination complaint against the business, but this could not get her the job back. The experience caused Minh a lot of stress and psychological harm, and impacted on her ability to keep applying for work.

As shown in Minh's case, people currently face discrimination on the basis of their previous and current disabilities without proper discussion about a person's ability to perform the role. Potential adjustments are rarely discussed, with deleterious assumptions being made by many employers and potential employers about the person with disability.

Although the DDA already references 'reasonable adjustments' in its definition of 'inherent requirements', our clients would benefit from provisions that encourage employers to consult with employee about adjustments, and to consider a range of possible adjustments.

[44] DRC Volume 7, 31.

These changes could also be supported by introducing a positive duty to consult on adjustments. Duty holders should be required to consult or otherwise proactively provide avenues for rights bearers to discuss their needs and any required adjustments. This is because the purpose of this duty should be to shift the burden away from the person with the protected attribute and encourage proactive steps toward inclusion, accessibility and participation. KLC understands that a proactive obligation to consult may not be appropriate in all circumstances. The Department should carefully consider the areas of public life in which consultation should be proactive. Based on our experience working with clients who have experienced discrimination due to lack of adjustments, the areas of education and employment should be included as a minimum. We make this recommendation against the backdrop of our other recommendations to improve the tests for discrimination and impose a positive duty to prevent disability discrimination and harassment. Together, these changes mean that duty holders in other contexts may already have an obligation to make adjustments and failure to do so may be enforceable under other provisions of the DDA.

Recommendation 25: Section 21A of the DDA should be amended to expand the factors to be considered when determining whether a person meets the inherent requirements of a role including, the nature and extent of adjustments made and the extent of consultation with any person with disability concerned.

Recommendation 26: The DDA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

Exclusionary discipline and suspension

We have had the benefit of reading a draft of the Australian Centre for Disability Law's submission on this point and endorse their comments. Exclusion and exclusionary discipline should be defined to include 'gatekeeping' practices (like limiting students to part-time) and exclusionary discipline should be used only as a last resort, and only to prevent serious harm to the student, other students or staff. Schools should be equipped with guidance on how to better include students with disability and properly resourced to comply with their obligations under the DDA.

Offensive behaviour and vilification protections

People with disability need greater protection from vilification. KLC supports the approach taken in the recent reforms to vilification in Victoria (and proposed reforms in Queensland) and recommends vilification provisions that include an incitement-based test alongside a harm-based test.[45]

A harm-based test should be included in civil vilification protections in the DDA. We believe that this appropriately places the focus on how vilification is experienced by

[45] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic); *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed.

those who are targeted. A harm-based test is also clearer and reduces the evidentiary burden on a complainant.

KLC supports a formulation similar to the new test in Victoria or the proposed test in Queensland.[46] That is, a person must not, because of the protected attribute of a person or group of people, engage in a public act that a reasonable person with that protected attribute would in the circumstances consider hateful towards, seriously contemptuous of, reviling or seriously ridiculing the other person.

Alongside the harm-based test, KLC also supports a formulation of the incitement-based test similar to the new test in Victoria or the proposed test in Queensland. That is, a person must not, by a public act, engage in conduct that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute.[47] Although the test for incitement sets a high bar, we believe this is mitigated by the additional harm-based provision.

KLC is concerned that the terms 'severe ridicule' and 'serious contempt' might be difficult to understand and apply. These terms provide significant discretion for decision-makers and have not operated effectively. Greater clarity could be provided through examples in a note or in the explanatory memorandum about the kind of conduct that would or would not amount to vilification under both the incitement- and harm-based tests.

The new Victorian reforms also provide exceptions to vilification, including for artistic works, for academic, religious or scientific discussion, and to report on matters of public interest.[48] This could be a model for similar exemptions in the DDA.

Recommendation 27: The DDA should include a harm-based test for vilification alongside an incitement-based test based on the test in the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) and the proposed test in the *Respect at Work and Other Matters Amendment Act 2024* (Qld).

Recommendation 28: The DDA should provide further clarification on the kinds of conduct that would constitute vilification under both the incitement- and harm-based tests either in a note or in the explanatory memorandum.

Vilification

[46] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 102D; *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed s 124C.
[47] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 102E; *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed s 124CD.

The Issues Paper notes that the Federal Government recently passed criminal hate crimes legislation[49] and asks whether vilification is now sufficiently addressed within criminal law.[50]

We support having both civil and criminal vilification remedies. NSW, for example, currently prohibits vilification under the ADA[51] and also has provisions for criminal vilification.[52] It is appropriate to have civil remedies co-existing with criminal sanctions, especially in instances where police decline to lay criminal charges.

Policing

KLC is concerned about the legal complexities facing people who experience discrimination by police and has had experience advising clients in these situations. The current approach of treating policing as a 'service' for the purposes of the DDA (and state legislation) led to uncertain and inconsistent coverage.

Case study: Pedro* was concerned about discriminatory treatment by police when he asked for assistance, while he was being interviewed, and when he later made a complaint at a police station. Whether or not the police were providing a service such that Pedro would be protected by the anti-discrimination law varied depending on the stage of the process. The classification of certain police conduct as a service also depended on information held by police. For example, whether Pedro was being interviewed as a victim or as a potential suspect may have influenced whether the interview was covered by the DDA.

As shown by Pedro's example, police activities should be more clearly protected under anti-discrimination law. We note the Disability Royal Commission's recommendation that the DDA should be amended to include 'services provided by police officers in the course of performing duties and powers'.[53] There is a risk that using the frame of 'services' still risks excluding some types of policing activities from protection under anti-discrimination law.

As an alternative to prohibiting discrimination within specifically identified areas of public life, the DDA should apply generally to all areas of public life. To avoid unnecessary uncertainty, the DDA should still articulate a non-exhaustive list of areas of public life that are covered, including all areas currently covered by the DDA, and new areas of public life to address gaps (like strata and possibly policing). Within the non-exhaustive list, policing could better be covered by through expansion of the "Administration of Commonwealth laws and programs" to also apply to state and local government laws and programs. Alternatively, as suggested by the Discussion Paper,[54]

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[49] Criminal Code Amendment (Hate Crimes) Act 2025 (Cth), cited by Attorney-General's Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025), 69.
[50] Issues paper 69 Attorney-General's Department, *Disability Discrimination Act 1992 Review* (Issues Paper, August 2025), 69.
[51] *Anti-Discrimination Act* 1997 (NSW) ss 20C, 38S, 49ZE, 49ZT, 49ZXB.
[52] *Crimes Act 1900* (NSW) s 93Z.
[53] DRC Final Report, Vol 8, 26.
[54] Discussion Paper, 73.

a new area of public life could be inserted into the DDA to cover policing and the justice system.

Recommendation 29: The DDA should apply generally to all areas of public life and include a non-exhaustive list of areas covered.

Recommendation 30: The DDA should clearly include policing within a non-exhaustive list of areas covered, by amending the government laws and programs provision, or by adding a new area of public life.

Assistance animals

Earlier this year, KLC provided a response to the Consultation Paper on the National Principles for the Regulation of Assistance Animals.[55] We supported efforts to streamline the accreditation processes for assistance animals, but emphasised the importance of making the system of accreditation accessible - for people on low incomes, in regional and remote areas and for people who have self-trained animals.

Discrimination against people who use assistance animals is unfortunately common. KLC's clients and their assistance animals have been turned away from shopping centres, government services, and housing. Refusals have caused our clients significant distress, and in some cases prevented them from accessing basic rights like housing and equal access to government services. This has a significant impact on the ability of people who use assistance animals to go about their day-to-day life.

Case study: Toby* came to us for advice. Toby is currently homeless and relies on the use of his assistance dog Pavel* to manage his psychosocial disability. Despite Pavel having completed his training through a specialist organisation, Toby was refused accommodation because 'pets' were not allowed.[56] The accommodation service refused to recognise Pavel as assistance animal. We advised Toby that he can make a discrimination claim under the DDA, but that he might need to wait 9 to 12 months for a conciliation date.

Case study: Joanna* suffers from anxiety and depression. Her assistance dog, Sparky*, helps her feel safe and enables her to go into public spaces to do her normal day-to-day tasks. Joanna came to KLC for help after an employee of a large retail store told her Sparky had to leave the store, even though he was dressed in his assistance jacket and card. Eventually a manager allowed Joanna and Sparky to continue in the store however the incident caused Joanna to feel a great deal of anxiety and resulted in her feeling great unease shopping at her local centre. KLC helped Joanna negotiate with the store

[55] www.unsw.edu.au/content/dam/pdfs/law/kaldor/resources/2025-06-assistanceanimals/2025-06-assistance-animals-submission.pdf

[56] This incident occurred before rental reforms came into force in New South Wales on 19 May 2025. See *Residential Tenancies Act 2010* (NSW) Division 8 for current legislation in relation to pets.

who agreed to make a donation to a charity supportive of assistance animals as well as delivering training to all staff members about assistance animals. Joanna was very happy with the result as she felt it resolved her complaint and contributed to ensuring the discrimination won't happen to other assistance animal users in future.

As shown by Toby and Joanna's cases, some businesses and social service organisations continue to discriminate against people who use assistance animals. From our discussions with opposing parties in discrimination matters, it is clear that many people are sceptical of the training that assistance animals undertake and their importance to people with disabilities. This is particularly true for animals that assist with psychosocial disabilities. Many people in the general community are unaware of the role of assistance animals in managing psychosocial disabilities, an issue which is compounded by the general discrimination faced by people who are neurodiverse or experience mental ill health.

While complaints under the DDA are possible, the long wait times for a conciliation date at the Australian Human Rights Commission (AHRC) leave clients like Toby without meaningful access to justice. Delay often means clients cannot travel, find a place to live, or access services in the way most people take for granted.

People who have self-trained animals under s 9(c) of the DDA should continue to be protected

We support measures to establish a central accreditation scheme for assistance animals under section 9(a) of the DDA. However, assistance animals users should still be able to self-train animals under s 9(c).

The ability to self-train animals under section 9(c) of the DDA contributes to the accessibility of assistance animals, particularly in the context of high demand for animals from formal training programs.[57] In our experience assisting people who have faced this type of discrimination, clients who have self-trained animals (as they are entitled to under the DDA) face particularly strong opposition from some duty holders. There is a risk that creating legislative protections that do not apply to self-trained animals would create a two-tiered system which would disadvantage many assistance animal users.

Case study: Thomas* had trained his cat Cleo* to alleviate the effects of his psychosocial disability. He carried evidence of his disability and the significant training that he had undertaken with Cleo. We represented Thomas in several discrimination complaints against businesses and government services that refused to admit Thomas and Cleo. Many businesses were under the mistaken belief that only dogs could be

[57] Some services like Assistance Dogs Australia have currently closed their waitlist due to high demand: Assistance Dogs Australia, *FAQs* <https://www.assistancedogs.org.au/about-us/faqs/> (accessed 28 May 2025).

assistance animals and that only animals from formal training organisations had the protection of discrimination law.

Recommendation 31: The Federal Government should establish a central accreditation scheme for assistance animals that would meet the requirements of section 9(a) of the DDA. Accreditation under this scheme should be an option, but not a requirement, for establishing that an animal is an assistance animal as contemplated by section 9 of the DDA.

There is currently a gap in protection under discrimination law while an assistance animal is being trained. During this time, animals do not meet the DDA's definition of assistance animals, which require animals to be accredited or trained.[58] It can take some time for assistance animal training to be completed. According to the Australian Support Dogs website, training could take two years.[59] MindDog suggests that if a person is training their own animal it could take 12 to 15 months before an animal is ready to take the Public Access test.[60] This means that many people are effectively excluded from having an assistance animal.

Case study: Lara* came to us at a community outreach asking for tenancy advice. She had been recommended an assistance animal by her GP for anxiety and was looking into getting a dog through the provider mindDog. Lara would have limited protection while her dog was in training and she did not believe her landlord would approve a pet.[61] Lara said she probably wouldn't bother trying to get an assistance animal.

Case study- Hugo*, a pensioner with several physical and psychological disabilities, came to KLC for assistance after his owners corporation issued him with a notice to remove his assistance animal, Patch*, a Jack Russell.[62]

Hugo got Patch after his doctor recommended that he have an assistance animal to assist him with everyday living. Hugo had Patch as a puppy and was in the process of having him trained through an accredited assistance animal training organisation. As Patch was still in training, he had not yet completed his training or received any certification. Despite Hugo providing extensive medical and training evidence about Patch, the owners corporation refused to agree to let Patch stay.

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[58] *Disability Discrimination Act 1992* s 9.
[59] Australian Support Dogs, *Home* <https://www.asdog.org.au/> (accessed 27 May 2025).
[60] mindDog, *The Process* <https://www.minddog.org.au/the-process/> (accessed 27 May 2025).
[61] This case study occurred prior to tenancy reforms to make it easier for people to have pets. See *Residential Tenancies Act 2010* (NSW) Division 8 for current legislation.
[62] This case study occurred prior to strata reforms and tenancy reforms to make it easier for people to have pets. See *Strata Schemes Management Act 2015* (NSW) s 137B, *Strata Schemes Management Regulation 2016* (NSW) s 36A, and *Residential Tenancies Act 2010* (NSW) Division 8 for current legislation.

KLC assisted Hugo to make a disability discrimination complaint to the AHRC and assisted him throughout the complaints process. This process took many months and was very stressful and upsetting for Hugo as he was also living alongside members of the owners corporation throughout this time. Before the complaint was resolved, Hugo moved out of the premises and withdrew his complaint due to the distress and stress that the process was causing him.

Lara and Hugo's cases demonstrate the challenges that people with disabilities face while training their assistance animals. While Lara and Hugo's positions would have been different following NSW pet reforms to strata and tenancy law,[63] the cases demonstrate an ongoing vulnerability for people with animals in training in other areas of public life.

Some governmental organisations have procedures in place for animals in training (like Transport for NSW's recognition of animals being trained by recognised organisations or temporary training permits for self-trained animals),[64] however our clients tend to face pushback from smaller private entities (like private landlords).

The DDA should be amended to specifically state that an animal in the process of completing their training should also be treated as an assistance animal. New Zealand's *Dog Control Act 1996* for example, defines a 'disability assist dog' as a dog certified as a dog that has been "trained (*or is being trained*) to assist a person with a disability" (emphasis added).[65]

Recommendation 32: The DDA should be amended to make clear that its protections extend to assistance animals that are in the process of being trained.

Disability Standards

We have had the benefit of reading the Australian Discrimination Law Expert Group's (ADLEG) submission to this inquiry.[66] We support ADLEG's recommendations in relation to disability standards,[67] including independent prosecutorial power (e.g. by the AHRC) to challenge breaches of disability standards. The content of disability standards should be regularly reviewed and avenues for expert input should be resourced.

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[63] Ibid.

[64] Transport for New South Wales, *Apply for an Assistance Animal Permit* <https://www.service.nsw.gov.au/transaction/apply-for-an-assistance-animal-permit> (accessed 26 May 2025); Transport for New South Wales

[65] *Dog Control Act 1996* (New Zealand) s 2.

[66] Australian Discrimination Law Experts Group, *Submission of the Australian Discrimination Law Experts Group in Response to the Commonwealth Attorney-General's Department Review of the Disability Discrimination Act* (16 October 2025).

[67] Australian Discrimination Law Experts Group, *Submission of the Australian Discrimination Law Experts Group in Response to the Commonwealth Attorney-General's Department Review of the Disability Discrimination Act* (16 October 2025) 110-122.

Further areas for reform

Strata schemes

This is an area requiring urgent reform. Approximately four million Australians live in strata and community title properties.[68] Despite this, there is a lack of clarity in the DDA about its coverage when discrimination happens in the context of strata accommodation. There are no federal discrimination law judgments to provide guidance in these matters. In most cases, owners and tenants need to characterise their complaints as relating to the provision of goods and services by their owners corporation, which inadequately characterises this relationship and can lead to it falling within a 'grey' area. KLC has had experience advising and representing clients in these situations, particularly in relation to disability discrimination complaints.

Case study: Norma* owns her unit in a strata block that has a lift. There are five steps leading into the building foyer. Norma's health has deteriorated over the past five years; she now uses a wheelchair and can no longer climb the steps leading into the building foyer. There are no alternative ways to get in and out of the building, meaning that Norma has effectively become a prisoner in the home she has lived in for 20 years. Because the steps and foyer are common property, Norma has no control over getting modifications done, such as a simple ramp. Norma spent a whole year trying to negotiate a solution with her owners committee to no avail, even though her proposed, simple modifications would have benefitted everyone in the building. The committee argued that they were not under any obligations under discrimination laws to provide modifications to common areas. It was not until KLC became involved and lodged a formal complaint for Norma that the owners corporation seriously considered her proposals- a process that in itself took over two years.

Coverage of strata schemes could be improved. As discussed above, KLC believes the DDA should apply to all areas of public life, and include a non-exhaustive list of areas where discrimination protections apply. Strata schemes should be included within this list in order for the DDA to better protect people with disability in their own homes, whether they are owners or tenants.

Recommendation 33: The DDA should apply generally to all areas of public life and include a non-exhaustive list of covered areas, including strata schemes.

Employment-like relationships and volunteers

The DDA should ensure it protects all kinds of workers, including people in employment-like relationships and volunteers. For employment, the DDA could broadly define the kinds of relationships of authority to which protections against discrimination in employment apply. The definition should be broad enough to capture employee-like

[68] Hazel Easthope, Charles Sampford, Hugh Breakey, 'Many Strata Managers who Handle Apartments are Conflicted: Here's How, *UNSW Newsroom* 11 September 2024 <https://www.unsw.edu.au/newsroom/news/2024/09/many-strata-managers-handling-apartments-conflicted>.

relationships, such as on digital platforms that exercise a high degree of control. The DDA could define these relationships by reference to the level of control or authority exercised. The DDA should also protect volunteers who experience disability discrimination.

Case study: Rohan lives with disability and supports himself with part-time work and the Disability Support Pension. He volunteered with a local sports club organising their disability league and was paid a stipend for doing so. He loved this volunteer work and it was an important part of his life. One of the non-disabled workers at the club was calling Rohan names and telling him he couldn't do the job properly because of his disability. Rohan complained about this and the club told him he should stop volunteering with them.

Rohan came to KLC for advice. We had to tell him that the protections in the DDA did not apply to his volunteering situation. There was little that Rohan could do about what had happened to him at the club.

As previously discussed, KLC believes the DDA should apply to all areas of public life and include a non-exhaustive list of areas where discrimination protections apply. Employment-like relationships and people working in a volunteer capacity should be included on this list.

Recommendation 34: The DDA should apply generally to all areas of public life and include a non-exhaustive list of covered areas, including employment-like relationships and volunteers.

Future proofing the DDA: discrimination involving AI

Unlawful discrimination by companies using AI is a huge and emerging area. AI is increasingly being used to screen job applications and pick between prospective tenants. We believe that duty holders who use AI should be held accountable for any discriminatory outcomes arising from using AI tools.

AI might pose challenges to liability under the DDA. While there is supportive case law for the principle that a discriminatory motive is not required for discrimination,[69] discrimination law experts have suggested the phrasing 'on the grounds of' might imply some kind of human reasoning process.[70] As a result, there is a risk that discriminatory decisions 'made' by AI might not be included.

The DDA should hold duty holders liable for using tools that are discriminatory. This should extend to a duty for AI users to understand the technology to a sufficient degree to know whether technology is discriminatory. It should not be a defence that

[69] Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 109.
[70] Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 108.

the duty holder did not know how the AI tool worked or was not aware that the tool operated in a discriminatory manner.

AI also poses evidentiary challenges for applicants. Because most applicants will not have access to the software used to discriminate against them, they will be at a disadvantage when trying to explain the discriminatory nature of their treatment. The DDA should empower the AHRC to compel AI companies to produce evidence in relation to potential discrimination by their AI tools. This power could either be invoked at the request of individual applicants, or as part of an own motion inquiry by AHRC.

Ultimately, it is important for AI tools to be robustly regulated and for consumers to be able to bring claims directly against AI companies. Proactive regulation could be helpful --- we note the EU's approach to regulating 'high risk' AI technologies, like AI employment-screening tools.[167] Given the pace of change in AI technologies and the laws regulating them, the DDA (alongside other Commonwealth anti-discrimination acts) should be reviewed within 5 years with a particular focus on its ability to respond to discrimination by AI systems.

Recommendation 35: The DDA should ensure that duty holders are liable for the use of discriminatory AI tools.

Recommendation 36: The AHRC should be empowered to compel AI companies to produce evidence in relation to whether AI tools operate in a discriminatory manner.

Recommendation37: The DDA should be reviewed within 5 years of its enactment.

Resourcing the AHRC

Our clients currently experience lengthy delays when waiting for a conciliation at the AHRC. In our experience, clients are often waiting 6-12 months for a conciliation date after making their complaint.

Delay is a barrier to justice for our clients. While clients are waiting for a conciliation, they often continue to have their rights breached. The AHRC must be properly resourced to ensure that people who experience disability discrimination (and other forms of discrimination) are able to have their complaints heard within a reasonable time period.

The AHRC should be further resourced to take on a proactive in enforcing anti-discrimination law and changing community attitudes to discrimination. As part its proactive role, the AHRC should be empowered (and resourced) to conduct own-motion enquiries of potential breaches of anti-discrimination law and standards. The AHRC should also be funded to conduct large-scale public educational efforts. These measures would take some of the pressure of individuals and empower the AHRC to address systemic discrimination.

Furthermore, there needs to be greater resourcing of legal assistance services and disability organisations to support people to bring complaints and ensure the effectiveness of the law.

Recommendation 38: The AHRC should be adequately resourced to efficiently manage complaints, to proactively enforce anti-discrimination law and to educate the community about discrimination.

Recommendation 39: Any amendments to the DDA should be accompanied by an educational campaign so that duty holders are aware of their obligations under anti-discrimination law.

Recommendation 40: Greater resourcing needs to be provided of legal assistance services and disability organisations to support people to bring complaints and ensure the effectiveness of the law.

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,
KINGSFORD LEGAL CENTRE

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Appendix – Full List of Recommendations

Recommendation 1:

The Government should enact a single harmonised anti-discrimination act that addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies including against systemic and intersectional discrimination.

Recommendation 2:

The language in the DDA should be amended to remove language that is stigmatising based on consultations with people with a disability and disability groups, while maintaining broad coverage.

Recommendation 3:

The DDA should include a new attribute to protect against discrimination on the basis of physical features like weight, height and facial features.

Recommendation 4:

The DDA should include a separate attribute to protect against discrimination on the basis of genetic information.

Recommendation 5:

The DDA should include a new attribute to protect against discrimination on the basis of a medical condition (or medical record or health status).

Recommendation 6:

The DDA should prohibit discrimination on the basis of one or more protected attributes, or on the basis of the effect of a combination of protected attributes.

Recommendation 7:

The DDA should define discrimination to include cases of direct discrimination, indirect discrimination, or both direct and indirect discrimination, modelled on s 8(1) of the *Discrimination Act 1991* (ACT).

Recommendation 8:

The DDA should define direct discrimination as 'unfavourable treatment', modelled on the *Equal Opportunity Act 2010* (Vic) and *Discrimination Act 1991* (ACT).

Recommendation 9:

The comparative disproportionate impact test should be replaced with a disadvantage test modelled on s 8 of the *Discrimination Act 1991* (ACT).

Recommendation 10

The 'reasonableness' element of indirect discrimination should be replaced with a 'legitimate and proportionate' test.

Recommendation 11:

In the alternative, the test for indirect discrimination should include a non-exhaustive list of factors to be considered when determining 'reasonableness', based on s 9(3) of the *Equal Opportunity Act 2010* (Vic).

Recommendation 12:

The DDA should be changed to remove the 'not able to comply' element from the definition of indirect discrimination.

Recommendation 13:

The DDA should contain a shifting burden of proof for direct discrimination, similar to section 361 of the *Fair Work Act 2009* (Cth).

Recommendation 14:

In the alternative, the DDA should adopt a burden-sharing model for direct discrimination similar to the UK *Equality Act 2010*.

Recommendation 15:

The objects clause of the DDA should refer to the Convention on the Rights of Persons with Disabilities.

Recommendation 16:

The interpretations clause of the DDA should clarify that the DDA should be interpreted in a manner that is beneficial to people with disabilities.

Recommendation 17:

The DDA should include a positive duty that requires anyone with an obligation not to engage in unlawful conduct under the DDA to take reasonable and proportionate measures to eliminate unlawful conduct. The duty should apply in all areas of public life specifically identified in the DDA.

Recommendation 18:

The AHRC should be given the necessary powers and resources to monitor and enforce the positive duty, including imposing civil penalties.

Recommendation 19:

The DDA should include a separate duty to provide adjustments.

Recommendation 20:

The DDA should impose a duty to provide adjustments in the areas of public life specifically identified in the DDA.

Recommendation 21:

The DDA's new positive duty to provide adjustments should require duty holders to make reasonable efforts to identify suitable adjustments

Recommendation 22:

References in the DDA to 'reasonable adjustments' should be amended to 'adjustments'.

Recommendation 23:

The definition of 'unjustifiable hardship' should include "consideration of available alternative measures to eliminate or reduce hardship" and "consultation with any person with disability concerned".

Recommendation 24:

The DDA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

Recommendation 25:

Section 21A of the DDA should be amended to expand the factors to be considered when determining whether a person meets the inherent requirements of a role including, the nature and extent of adjustments made and the extent of consultation with any person with disability concerned.

Recommendation 26:

The DDA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

Recommendation 27:

The DDA should include a harm-based test for vilification alongside an incitement-based test based on the test in the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) and the proposed test in the *Respect at Work and Other Matters Amendment Act 2024* (Qld).

Recommendation 28:

The DDA should provide further clarification on the kinds of conduct that would constitute vilification under both the incitement- and harm-based tests either in a note or in the explanatory memorandum.

Recommendation 29:

The DDA should apply generally to all areas of public life and include a non-exhaustive list of areas covered.

Recommendation 30:

The DDA should clearly include policing within a non-exhaustive list of areas covered, by amending the government laws and programs provision, or by adding a new area of public life.

Recommendation 31:

The Federal Government should establish a central accreditation scheme for assistance animals that would meet the requirements of section 9(a) of the DDA. Accreditation under this scheme should be an option, but not a requirement, for establishing that an animal is an assistance animal as contemplated by section 9 of the DDA.

Recommendation 32:

The DDA should be amended to make clear that its protections extend to assistance animals that are in the process of being trained.

Recommendation 33:
The DDA should apply generally to all areas of public life and include a non-exhaustive list of covered areas, including strata schemes.

Recommendation 34:
The DDA should apply generally to all areas of public life and include a non-exhaustive list of covered areas, including employment-like relationships and volunteers.
Recommendation 35: The DDA should ensure that duty holders are liable for the use of discriminatory AI tools.

Recommendation 36:

The AHRC should be empowered to compel AI companies to produce evidence in relation to whether AI tools operate in a discriminatory manner.

Recommendation 37:

The DDA should be reviewed within 5 years of its enactment.

Recommendation 38:

The AHRC should be adequately resourced to efficiently manage complaints, to proactively enforce anti-discrimination law and to educate the community about discrimination.

Recommendation 39:

Any amendments to the DDA should be accompanied by an educational campaign so that duty holders are aware of their obligations under anti-discrimination law.

Recommendation 40:
Greater resourcing needs to be provided of legal assistance services and disability organisations to support people to bring complaints and ensure the effectiveness of the law.