

# **Submission to the Review of the Disability Discrimination Act**

**November 2025**

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# 1 Introduction

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) welcomes the Attorney-General's Department's Review of the Disability Discrimination Act (**Review**).

As an independent statutory authority, the Commission has functions under the *Equal Opportunity Act 2010* (Vic) (**EO Act**), the *Racial and Religious Tolerance Act 2001* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) and the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

Under the EO Act, Victoria's anti-discrimination law, the Commission has broad powers and functions including resolving complaints, undertaking research, education, advocacy, monitoring, investigation, and intervention in legal proceedings.

The *Disability Discrimination Act 1992* (Ch) (**DDA**) was added to the suite of Australian discrimination laws in 1992. At the time, it was described as a 'landmark' piece of legislation with an important role in furthering equality and human rights in Australia.<sup>1</sup> The DDA set a new standard for disability protections around the country.

However, there have been significant social and legal changes in the 33 years since the DDA was enacted, including the drafting and ratification of the *Convention on the Rights of Persons with Disabilities* (**CRPD**). In Victoria, other notable developments include the commencement and operation of the Charter, two updated versions of the *Equal Opportunity Act 1977* (Vic) being introduced in 1995 and 2010, and the Yoorrook Justice Commission's truth telling inquiry on past and ongoing injustices experienced by First Nations people, including people with disability, handing down its findings earlier this year.

At a federal level, the Royal Commission on Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) was established in 2019 and in 2023 provided a blueprint for some of these necessary reforms.

This time has also heralded changes in the way society views people with disability and the structures that entrench discrimination. At the time of the DDA's introduction, the social model of disability – that 'disability' is the result of the interaction between people with disability and an environment of physical, attitudinal, communication and social barriers – was just starting to shape the decisions of policy makers.<sup>2</sup> This model is now central to almost all government decisions relating to people with disability.

It's time for the DDA to reflect these changes.

The Commission receives more complaints of disability discrimination than any other attribute protected by the EO Act. We see the impact that discrimination has on people's ability to live a meaningful life, whether it be in accessing a quality education, securing meaningful employment, finding safe and secure housing, or receiving goods and services without discrimination.

Ensuring that the DDA reflects modern-day challenges is vital to ensuring equality for all people with disabilities.

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<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 976 (Bill Shorten, Parliamentary Secretary for Disabilities and Children's Services).

<sup>2</sup> People with Disability Australia, 'Social model of disability' (Web Page) <<https://pwd.org.au/resources/models-of-disability/>>.

One recommendation from the Disability Royal Commission was the introduction of a disability rights act. The Commission notes the July 2024 joint statement of 12 disability representative organisations advocating for a human rights act over a disability rights act.<sup>3</sup> The statement shows the support for the benefits of a human rights act alongside reforms and modernisation of the DDA.

As one of the 3 state or territory jurisdictions with a human rights charter or equivalent legislation, the Commission has deep knowledge of the benefits of such a human rights law. The positive rights of the Victorian Charter improve the interpretation and operation of anti-discrimination laws by including rights such as the right to equality before the law,<sup>4</sup> the right to privacy,<sup>5</sup> and freedom from degrading treatment,<sup>6</sup> that can be considered in determining whether a person has been discriminated against.

The Commission agrees that any reform to the DDA would be enhanced by a federal human rights act, drafted with CRPD principles. Indeed, the project of implementing the CRPD is not complete until these positive rights are enshrined in Australian law.

The Commission notes that Australia's broader anti-discrimination framework sits outside the scope of this review. The Commission's views in this submission are necessarily formed through the experience of administering the EO Act. Many of the positions in this submission are shaped by what people in Victoria have told the Commission about their experiences navigating the complex interaction between state and federal discrimination laws. In this way, we hope that state and federal jurisdictions can learn from each other on the road to reform.

We acknowledge that the Australian Human Rights Commission may be provided with extra responsibilities from changes to the DDA. We strongly recommend that any extra powers be accompanied by adequate resourcing, including funding to properly oversee these functions.

The Commission recognises that First Peoples' cultural understandings of inclusion do not align with Western concepts of disability.<sup>7</sup> While First Peoples are more likely to have a disability,<sup>8</sup> some are reluctant to obtain a formal assessment or diagnosis, or engage with services, particularly government services.<sup>9</sup>

As such, many of the Commission's positions are informed by the Yoorrook Justice Commission's findings, recognising the pressing need for an intersectional approach to eliminating discrimination.

The Commission welcomes the opportunity to submit to the review. We consider these reforms, as well as greater harmonisation with other anti-discrimination and human rights laws, are a key step towards achieving the DDA's aim of eliminating discrimination as far as possible against people with disability.

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<sup>3</sup> Women with Disabilities Australia, 'Strengthening protection of the rights of people with disability through a national Human Rights Act' (Position Statement, 19 July 2024) <<https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/>>.

<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8.

<sup>5</sup> *Ibid*, s 13.

<sup>6</sup> *Ibid*, s 10.

<sup>7</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 9, 33.

<sup>8</sup> Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander peoples with disability' (Web Page, 2022) <<https://www.abs.gov.au/articles/aboriginal-and-torres-strait-islander-peoples-disability-2022>>.

<sup>9</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 9, 33.

# 2 Definition of 'disability'

## 2.1 Defining disability

The DDA contains a relatively broad definition of 'disability', including behaviour that is a symptom or manifestation of a disability.<sup>10</sup>

This definition largely aligns with Victoria's EO Act, using language like 'malfunction', 'malformation' and 'disfigurement'.<sup>11</sup>

The Commission hears regularly from people with disability that this deficit language presents a barrier in their communities and shapes a negative portrayal of them within the broader society. This type of language reinforces stereotypes about disability, where having disability means lacking something or that something is wrong. This can be harmful and does not match one of the overarching objects of the DDA, which is to eliminate discrimination against people with disability as far as possible.<sup>12</sup>

On the other hand, the current definition of disability has the benefit that it is broad and clear enough for people with disability to prove that they have a disability or disabilities in a legal case. The current definition has also benefited from decades of legal jurisprudence.

As such, any change to the definition of 'disability' should aim to remove the deficit language without creating legal barriers to proving applicants have a disability.

If the definition retains deficit language, the Commission recommends that the preliminary section of the DDA acknowledge the impact that deficit language has on persons with disability and emphasises the overall purpose of the Act is to promote substantive equality.

The Commission also notes that any definition of 'disability' should be specific enough to ensure that people from all cultural backgrounds, including First Peoples, culturally and racially marginalised communities and young people, can easily identify whether they have a disability.

## 2.2 Factors to be included

In 2009, the DDA was amended to clarify that disability includes a symptom or manifestation of a disability. This codified the 2003 High Court decision of *Purvis v New South Wales (Department of Education and Training)*.<sup>13</sup> However, there is still room for further clarification of the broad nature of the definition.

In Victoria, the Commission has been advocating for such changes under the EO Act.

For example, the Victorian Legislative Council Legal and Social Issues Committee recently recommended making it clear that where medication is prescribed to a person with a disability, and taken in accordance with that prescription, or they are receiving medical

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<sup>10</sup> *Disability Discrimination Act 1992* (Cth) s 4.

<sup>11</sup> See *Equal Opportunity Act 2010* (Vic) s 4.

<sup>12</sup> *Disability Discrimination Act 1992* (Cth) s 3(1).

<sup>13</sup> *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

treatment for a disability, it should be considered a characteristic of their disability.<sup>14</sup> The Commission advocated for and supports this addition to the definition of 'disability'.

Additionally, the definition of 'disability' will be further clarified when Victoria's anti-vilification reforms commence. 'HIV' and 'AIDS' will be specifically included as examples that meet the definition of disability in the EO Act.<sup>15</sup>

The Commission considers similar reforms should be made to the DDA.

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<sup>14</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Workplace drug testing in Victoria* (Parliamentary Inquiry Final Report, Aug 2024) 35.

<sup>15</sup> *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 32.

### 3 Addressing intersectionality

There is a pressing need to recognise the impact of compounding factors of disadvantage in our discrimination laws, including the DDA.

The Commission supports the need for recognition of the impact of intersectional discrimination. This would acknowledge the reality of the additional barriers and disadvantage arising from multiple intersecting characteristics.

For example, during the consultations for the Commission's submission to the 2020 Victorian Parliamentary Inquiry into Anti-vilification Protections, we heard that hate speech toward women with disability was likely to be intersectional, targeting their gender and disability.<sup>16</sup>

The Commission also notes that the CRPD outlines that 'States Parties recognise that women and girls with disabilities are subject to multiple forms of discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms'.<sup>17</sup>

A clear provision providing people with the ability to bring a claim of discrimination on this basis would reflect the reality of discrimination experienced by some people with disability.

It is currently possible for a person to bring a discrimination claim with multiple attributes protected by the EO Act.<sup>18</sup> Furthermore, reforms to commence in 2026 will confirm that a person can bring a vilification complaint to the Commission based on more than one protected attribute.<sup>19</sup> The Explanatory Memorandum to the Bill introducing this reform notes that this is intended to include a combination of protected attributes and acknowledges the intersectional experiences of vilification.<sup>20</sup>

In the ACT's *Discrimination Act*, direct discrimination is said to have occurred if a person treats, or proposes to treat, another person unfavourably because the other person has "one or more protected attributes".<sup>21</sup> In 2024, the Queensland government also passed amendments to expressly provide that direct discrimination includes discrimination on the basis of "a combination of two or more attributes".<sup>22</sup>

The Commission supports drafting similar to the Queensland or ACT models, which would amend the definition of discrimination to allow intersectional complaints to be clearly brought under the DDA. This 'combination' model ensures that protected attributes are not considered separately, but as the whole of the discrimination being experienced by the applicant.

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<sup>16</sup> Victorian Equal Opportunity and Human Rights Commission, Submission to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into anti-vilification protections* (31 January 2020) 64.

<sup>17</sup> *Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 6.*

<sup>18</sup> *Equal Opportunity Act 2010* (Vic) s 6.

<sup>19</sup> *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic), ss 14 and 15.

<sup>20</sup> Explanatory Memorandum, *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) 19.

<sup>21</sup> *Discrimination Act 1991* (ACT) s 8(2).

<sup>22</sup> *Respect at Work and Other Matters Amendment Act 2024* (Qld), section 7A amending section 8 of the *Anti-Discrimination Act 1991*. NB this reform has been delayed. This wording would clarify that discrimination on the basis of an attribute of a person who has two or more attributes includes discrimination in relation to any of the attributes, two or more of the attributes, or the combined effect of two or more of the attributes.

# 4 Direct discrimination

## 4.1 Definition of direct discrimination

Direct disability discrimination occurs when a person is treated unfairly because of their disability. However, the test for direct discrimination differs depending on what law is used.

Under the DDA, direct discrimination is said to occur if, because of a person's disability, a discriminator treats, or proposes to treat, the aggrieved person less favourably than they would treat a person without the disability in circumstances that are not materially different.<sup>23</sup>

In contrast, the 'unfavourable treatment' test for direct discrimination under the EO Act required only that a person is treated less favourably than someone without the protected attribute.<sup>24</sup> Instead, the focus is on whether there has been unfavourable treatment of the complainant because of their disability. It does not require a comparison with a hypothetical person without that disability in the same circumstances.

When this reform was made in 2010, Parliament's intention in shifting away from the 'comparator test' was to simplify the definition of direct discrimination by avoiding the unnecessary technicalities often associated with identifying an appropriate comparator.<sup>25</sup> The Commission has received feedback from key stakeholders that this change has made the EO Act preferable to the DDA when making claims of direct discrimination in Victoria.

The Commission considers the 'unfavourable treatment' approach should be taken as the test for direct discrimination in the DDA and the comparator test should be removed.

## 4.2 Onus of proof

The Disability Royal Commission recommended that a respondent should have the burden of proving that the treatment or proposed treatment was not on the ground of the applicant's disability.<sup>26</sup>

Placing the burden on the applicant to prove the reason why a respondent treated them unfavourably creates unnecessary barriers to satisfying the test for direct discrimination. This is because it is the respondent who holds the knowledge of why the applicant was treated the way they were.

Reversing the burden of proof would be in line with the test for a general protections claim under the *Fair Work Act 2009*.<sup>27</sup>

It is important to note that if an act is done for two or more reasons and one of those reasons is the person's disability, then for the purposes of the DDA it is taken as being done because of the person's disability.<sup>28</sup> This would need to be retained for the reversal of the onus of proof to have its intended effect.

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<sup>23</sup> *Disability Discrimination Act 1992* (Cth) s 5.

<sup>24</sup> *Equal Opportunity Act 2010* (Vic) s 8.

<sup>25</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).

<sup>26</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 302.

<sup>27</sup> *Fair Work Act 2009* (Cth) s 361.

<sup>28</sup> *Disability Discrimination Act 1992* (Cth) s 10.

# 5 Indirect discrimination

## 5.1 Definition of indirect discrimination

Indirect discrimination on the basis of disability occurs when there is a rule or policy that applies to everyone but has an unfair effect on people with a particular disability.<sup>29</sup>

Victoria's EO Act outlines that indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with a protected attribute, and that is not reasonable.<sup>30</sup> The EO Act provides a non-exhaustive list of factors that can be taken into account in assessing reasonableness.<sup>31</sup> The burden of proof that the requirement, condition or practice is reasonable is on the person imposing the condition, practice or requirement.<sup>32</sup>

While the test of indirect discrimination in the DDA similarly provides that a person must be disadvantaged by a requirement or condition, there is an extra hurdle that, because of their disability, the aggrieved person did not or would not comply, or was not able to comply, with the requirement or condition.<sup>33</sup>

This additional hurdle creates barriers for people with disabilities to prove indirect discrimination. In many cases, a person with a disability might be able to comply with a condition, practice or requirement that is imposed, but may still be placed at significant disadvantage to a person without their disability.

The Commission recommends that the definition for indirect discrimination be amended to remove the requirement that the person does not comply or is not able to comply with the condition or requirement.

## 5.2 Reasonableness test

The Disability Royal Commission recommended that the 'reasonableness' test for indirect discrimination be replaced by a test requiring a respondent to show that avoiding the discrimination would impose unjustifiable hardship on them.<sup>34</sup>

This would shift the focus on whether the requirement or condition is reasonable to whether there would be unjustifiable hardship on the decision maker in removing that requirement or condition.

In line with the discussion relating to adjustments (**discussed in chapter 7: adjustments**), removing reasonableness from the test for indirect discrimination could bring clarity for duty holders and people with disability. The starting point would be that any condition or requirement that disadvantages people with disability is discriminatory. It would then be on

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<sup>29</sup> Australian Human Rights Commission, *Disability discrimination: know your rights* (Brochure, 2012) 2.

<sup>30</sup> *Equal Opportunity Act 2010* (Vic) s 9.

<sup>31</sup> *Ibid*, s 9(3).

<sup>32</sup> *Ibid*, s 9(2).

<sup>33</sup> *Disability Discrimination Act 1992* (Cth) s 6.

<sup>34</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 304.

the duty holder to prove that removing the condition or requirement would impose unjustifiable hardship on them, making it lawful under the DDA.

The Commission recommends that reasonableness is removed from the test for indirect discrimination in the DDA and replaced with a test for unjustifiable hardship.

Regardless of whether the reasonableness test for indirect discrimination is retained or is changed to unjustifiable hardship, the factors that can be considered should be listed in the DDA.<sup>35</sup>

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<sup>35</sup> Guidance could be taken from section 9(3) of the *Equal Opportunity Act 2010* (Vic).

# 6 Positive duty

## 6.1 A positive duty to eliminate discrimination

Victoria has had a positive duty to eliminate discrimination since 2011.

Under the EO Act, people and organisations have a positive duty to take reasonable and proportionate steps to eliminate discrimination, sexual harassment and victimisation as far as possible.<sup>36</sup>

The Commission supports a similarly broad framing of a positive duty in the DDA, meaning that organisations must ‘act’, not just ‘react’.<sup>37</sup> That is, employers, educational authorities, service providers and other duty holders must take positive steps to prevent discrimination happening in the first place. This would help target the systemic causes of discrimination, rather than addressing discrimination through complaints processes where the discrimination has already occurred.

Most people who experience discrimination do not make a complaint due to a range of barriers, meaning the treatment often goes unaddressed. A positive duty to eliminate discrimination would help shift the burden away from complainants and ensure that organisations turn their minds to practical and innovative ways of tackling discrimination.

This promotes broad education and acceptance of the need to be proactive.<sup>38</sup>

## 6.2 Powers of the Australian Human Rights Commission

Under the EO Act, alleged breaches of the positive duty cannot be the subject of an individual complaint. However, if the Commission becomes aware serious issues that affect a group of people, it can decide to investigate if the matter meets the legislative criteria.<sup>39</sup>

Currently, if through an investigation the Commission finds that a person has breached the positive duty, it can take any action it sees fit including:

- a) take no further action
- b) enter into an agreement with a person about action required to comply with the Act
- c) refer a matter to the Tribunal
- d) make a report with respect to the matter to the Attorney-General
- e) make a report with respect to the matter to the Parliament.<sup>40</sup>

The original drafting of the EO Act included powers for the Commission to impose compliance notices for a breach of the positive duty. However, this power was removed before the changes commenced.<sup>41</sup>

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<sup>36</sup> *Equal Opportunity Act 2010* (Vic) s 15(2).

<sup>37</sup> Victorian Equal Opportunity and Human Rights Commission, *Independent Review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police* (Phase One Report, 2015) 45.

<sup>38</sup> Victorian Equal Opportunity and Human Rights Commission, *Submission to the Royal Commission into Family Violence* (28 May 2015) 19.

<sup>39</sup> *Equal Opportunity Act 2010* (Vic) s 127.

<sup>40</sup> *Equal Opportunity Act 2010* (Vic) s 139.

<sup>41</sup> *Equal Opportunity Amendment Act 2010* (Vic) s 146, as amended by *Equal Opportunity Amendment Act 2011* (Vic) s 21.

In contrast, under the positive duty in the *Sex Discrimination Act 1984* (Cth) (**SDA**), the Australian Human Rights Commission (**AHRC**) has the power to issue compliance notices.<sup>42</sup> The DDA should allow for a similar power for the AHRC, as well as a power to seek financial penalties against people who breach the positive duty.

The AHRC has advocated for this ability under the SDA positive duty.<sup>43</sup> In community consultations, the AHRC heard that this would act as a deterrent and may encourage duty holders to proactively ensure they are compliant.<sup>44</sup> Any changes to the DDA to introduce financial penalties could model the civil remedy provisions in the *Fair Work Act 2009* (Cth).<sup>45</sup>

Any new investigation powers relating to a positive duty for the AHRC must be supported by appropriate resourcing, including funding.

Because a positive duty has already been introduced at a federal level under the SDA,<sup>46</sup> and already exists in some State and Territory jurisdictions, a positive duty in the DDA will have a limited compliance burden on duty holders. Indeed, the Commission considers that including a positive duty in the DDA is a practical next step towards greater harmonisation of the federal and state anti-discrimination laws. A more integrated suite of anti-discrimination laws will lead to greater certainty among duty holders and ultimately less discrimination.

### 6.3 Actions to comply with a positive duty

There are no exceptions to the positive duty in the EO Act. The Commission recommends that a positive duty in the DDA replicate this principle.

Exceptions are not necessary because the specific measures or actions required will vary according to the size of the organisation and the resources available.

The positive duty in the EO Act sets out factors that enable determination of whether a measure to eliminate discrimination, sexual harassment or victimisation is reasonable and proportionate.<sup>47</sup>

Determining factors of whether a measure is reasonable and proportionate include:

- a) the size of the person's business or operations
- b) the nature and circumstances of the person's business or operations
- c) the person's resources
- d) the person's business and operational priorities
- e) the practicability and the cost of the measures.<sup>48</sup>

The Commission has identified five minimum standards that small, medium and large organisations must meet to comply with their positive duty to eliminate discrimination, sexual harassment and victimisation.<sup>49</sup> The five minimum standards are:

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<sup>42</sup> *Sex Discrimination Act 1984* (Cth) s 47B.

<sup>43</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (Report, 2021) 158-159.

<sup>44</sup> Australian Human Rights Commission, *Speaking from Experience: What needs to change to address workplace sexual harassment* (Report, June 2025) 66-68.

<sup>45</sup> *Fair Work Act 2009* (Cth) s 539.

<sup>46</sup> *Sex Discrimination Act 1984* (Cth) s 47C.

<sup>47</sup> *Equal Opportunity Act 2010* (Vic) s 15(2).

<sup>48</sup> *Ibid.*

<sup>49</sup> Victorian Equal Opportunity and Human Rights Commission, 'Positive duty' (Web Page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>.

- 1) knowledge and understanding
- 2) policies and procedures
- 3) organisational culture
- 4) reporting and response, and
- 5) continuous improvement.

These minimum standards help determine what actions may be required in a particular context.

The AHRC has similarly developed its 'Guidelines for Complying with the Positive Duty under the *Sex Discrimination Act 1984* (Cth)'.<sup>50</sup>

These resources could be adapted for a positive duty in the DDA with appropriate resourcing, including funding for the AHRC.

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<sup>50</sup> Australian Human Rights Commission, 'Guidelines for Complying with the Positive Duty under the *Sex Discrimination Act 1984* (Cth)' (August 2023).

# 7 Adjustments

## 7.1 A stand-alone duty

Making adjustments is central to the social model of disability and crucial to eliminating discrimination against people with disability.

Under the CRPD, Australia must take all appropriate steps to ensure accommodations are made without imposing a disproportionate or undue burden on people with disability.<sup>51</sup>

In Victoria, the EO Act contains stand-alone duties to make reasonable adjustments in the areas of employment, employment-related areas, education and the provision of services.<sup>52</sup>

In contrast, the DDA contains a requirement to make reasonable adjustments within the tests for direct and indirect discrimination.<sup>53</sup>

The Disability Royal Commission recommended that the DDA be amended to include a stand-alone duty to make adjustments.<sup>54</sup>

As the Disability Royal Commission noted, “it is a core principle of the CRPD which suggests the failure to make an adjustment should be recognised as a form of discrimination, not just an element of direct or indirect discrimination”, but this is not without limits.<sup>55</sup>

This recommendation was made in the wake of the case of *Sklavos v Australian College of Dermatologists*,<sup>56</sup> in which the Federal Court found that the applicant must prove that the failure to provide the adjustment was caused by the person's disability.<sup>57</sup> This decision has meant that there is no longer an effective requirement to make adjustments in the DDA, and has made this reform not just desirable, but essential.

The Commission agrees that failure to make an adjustment should constitute a form of discrimination in itself, consistent with Australia's international treaty obligations.

The Commission recommends that the DDA be amended to create a stand-alone duty to provide adjustments. This stand-alone duty should cover all relevant areas of life.

## 7.2 Reasonableness test

The Disability Royal Commission recommended that all references to ‘reasonable adjustments’ be replaced with ‘adjustments’.<sup>58</sup> There would be an exception, when the duty holder would face ‘unjustifiable hardship’ to implement the adjustment.<sup>59</sup>

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<sup>51</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) articles 2, 5, 24, 27.

<sup>52</sup> *Equal Opportunity Act 2010* (Vic) ss 20, 33, 40 and 45.

<sup>53</sup> *Disability Discrimination Act 1992* (Cth) ss 5 and 6.

<sup>54</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 309.

<sup>55</sup> *Ibid*, 308.

<sup>56</sup> *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128

<sup>57</sup> *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 at [53] (Bromberg J).

<sup>58</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 309.

<sup>59</sup> *Ibid*.

The Commission considers removing this qualifier 'reasonable' could bring clarity for duty holders and people with disability. The obligation should begin with making the adjustment, unless it would impose an unjustifiable hardship on the duty holder.<sup>60</sup>

Guidance on what amounts to unjustifiable hardship is found in section 11 of the DDA, although it would benefit from the Disability Royal Commission's recommendations on new factors to be considered (**discussed in chapter 8: unjustifiable hardship**).<sup>61</sup>

It could also help strike a better balance between ensuring people with disability have access to adjustments and acknowledging there are limits to what adjustments can be provided by a duty holder, namely if it would cause unjustifiable hardship.

The Commission recommends the DDA be amended to remove reference to 'reasonable' in a stand-alone duty to make adjustments, with the onus on the duty holder to show there would be unjustifiable hardship to implement the adjustment.

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<sup>60</sup> While section 4(1) of the DDA highlights that a 'reasonable adjustment' refers to "an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person", the Commission still considers that the use of the word 'reasonable' creates barriers to inclusion and the test would benefit from its removal.

<sup>61</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 338.

# 8 Unjustifiable hardship

The test for when discriminatory action amounts to ‘unjustifiable hardship’ takes on new importance if there are reforms to the DDA tests for indirect discrimination and providing adjustments for people with disability.

The Disability Royal Commission recommended that the existing factors to determine whether there is unjustifiable hardship should be expanded.<sup>62</sup> Expanded factors would include the nature and extent of a duty holder’s consultations with a person with disability, and the duty holder’s consideration of all available and appropriate alternative measures or actions.<sup>63</sup>

The Disability Royal Commission also recommended that the DDA be reformed to require the party relying on unjustifiable hardship to:

- a) create and retain all documents recording their consideration of the relevant factors, and
- b) provide reasons to the person concerned, if requested, for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.<sup>64</sup>

The Commission considers that these proposed amendments should be made to the unjustifiable hardship section in the DDA.

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<sup>62</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 338.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

# 9 Exclusion and suspension in education

Every student has the right to the best possible education society can provide, whether or not they have a disability.

The DDA currently provides that it is unlawful for an educational authority to discriminate against a student on the ground of the student's disability by denying the student access to any benefit, or by expelling the student or by subjecting the student to any other detriment.<sup>65</sup>

This wording is replicated in the EO Act.<sup>66</sup>

The Commission's report 'Held Back: the experiences of students with disabilities in Victorian schools' highlighted that suspension and expulsion can have serious negative effects on the student, including increased risk of disengagement from school, and that school suspension may also increase the likelihood of antisocial and violent behaviours over time.<sup>67,68</sup>

Noting that some Victorian schools already had a 'no suspension or expulsion of students with disability' policy, the report recommended that this approach be examined by education authorities with a view to mandating this in all schools.<sup>69</sup>

The Disability Royal Commission recommended that the DDA should be amended to cover 'suspension and exclusion' as well as expulsions.<sup>70</sup> The Commission agrees that this recommendation should be implemented.

While the use of suspension and exclusion may fall under "any other detriment" found in section 22 of the DDA, the Commission considers the inclusion of explicit reference to these concepts would make it clear to educational authorities that these punishments can be forms of discrimination if they are linked to a student's disability.

These terms would need to be defined in the DDA. The Commission notes that the Disability Royal Commission defined 'exclusionary discipline' as:

- "actions by an educational authority or educational institution that results in the withdrawal of education or training from students with disability, including suspensions and expulsion",<sup>71</sup> and

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<sup>65</sup> *Disability Discrimination Act 1992* (Cth) s 22(2).

<sup>66</sup> *Equal Opportunity Act 2010* (Vic) s 38(2).

<sup>67</sup> Victorian Equal Opportunity and Human Rights Commission, *Held Back: The experiences of students with disabilities in Victorian schools* (Report, 2012) 103.

<sup>68</sup> The Commission has also worked with Victorian government schools to provide a series of fact sheets on discrimination in education called 'Inclusive Education Pathways', including a specific resource addressing difficult behaviours. The resources can be found on the Commission's website: <<https://www.humanrights.vic.gov.au/resources/inclusive-education-pathways-resources/>>

<sup>69</sup> Victorian Equal Opportunity and Human Rights Commission, *Held Back: The experiences of students with disabilities in Victorian schools* (Report, 2012) 13.

<sup>70</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 7, 14.

<sup>71</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) Executive Summary, 319.

- “the exclusion of a student from a classroom, extracurricular activities or a school in response to what is perceived as negative or disobedient behaviour”.<sup>72</sup>

The Commission considers that exceptions to this provision should be limited.

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<sup>72</sup> Ibid, 96.

# 10 Harassment and offensive behaviour

## 10.1 The test for harassment, offensive behaviour and vilification

People with disability are regularly targets of harassment, offensive behaviour and vilification.

The Disability Royal Commission recommended that the DDA be amended to address such discrimination.<sup>73</sup> This would be achieved by inserting a new provision relating to offensive behaviour because of disability. This provision would make it unlawful for a person to do a public act that:

- a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and
- b) is done because of the other person's disability or because some or all of the people in the group have or are perceived by the first person to have a disability.<sup>74</sup>

The wording of this recommendation is largely sourced from the *Racial Discrimination Act 1975* (Cth) (**the RDA**) and the prohibition of sexual harassment under s 28A of the SDA.

Section 18C of the RDA offers protections from offensive behaviour because of race, colour or national or ethnic origin.<sup>75</sup> This section prohibits conduct that is reasonably likely to 'offend, insult, humiliate or intimidate' and was modelled on the SDA provision that prohibits unwelcome sexual conduct that could reasonably 'offend, humiliate or intimidate'.<sup>76</sup>

The Victorian Government recently strengthened Victoria's anti-vilification laws, extending anti-vilification laws from the current laws protecting racial and religious vilification to other protected attributes, including disability.<sup>77</sup>

The Commission's submission to the Victorian Parliamentary Inquiry into Anti-vilification Protections recommended that the test for vilification in the EO Act mirror section 18C of the RDA.<sup>78</sup> This was because a harm-based test sets a high threshold for the seriousness of prohibited conduct, while protecting against consequences that are "more serious than mere personal hurt, harm or fear".<sup>79</sup> Using an 18C model would also mean that decision-makers would benefit from the existing jurisprudence.

The Commission supports the inclusion of a test for harassment, offensive behaviour and vilification in the DDA, modelled on section 18C of the RDA.

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<sup>73</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Sept 2023) vol 4, 31-32.

<sup>74</sup> *Ibid*, 31.

<sup>75</sup> *Racial Discrimination Act 1975* (Cth) s 18C.

<sup>76</sup> *Sex Discrimination Act 1984* (Cth) s 28AA.

<sup>77</sup> *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025*, s 102B.

<sup>78</sup> Victorian Equal Opportunity and Human Rights Commission, 'Submission to the Parliamentary Inquiry into Anti-Vilification Protections' (Feb 2020) 9.

<sup>79</sup> *Ibid*, 68.

## 10.2 Acts performed in good faith

Freedom of speech and other acts done in good faith are adequately protected by the exemptions in section 18D of the RDA.

Section 18D allows for actions said or done in good faith in artistic works, during the course of genuine academic, artistic or scientific, or public interest purposes, or a fair comment on any matter of public interest if it is an expression of a genuine belief held by the person.<sup>80</sup>

This is a robust exemption that still allows for informed discussion and debate but does not provide a free pass for offensive behaviour. For example, in the 2011 case of *Eatock v Bolt*, the applicants successfully argued that the respondent's actions were unlawful under section 18C of the RDA.<sup>81</sup> The respondent suggested that the newspaper columns in question should not be unlawful because they were 'fair comment' under section 18D. However, Bromberg J considered the exemption did not apply because of "the manner in which the articles were written, including that they contained erroneous facts, distortions of the truth and inflammatory and provocative language".<sup>82</sup>

The Commission considers the wording under section 18D strikes the right balance between offensive behaviour and fair comment.

The Commission recommends an equivalent of section 18D of the RDA be included in the DDA.

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<sup>80</sup> *Racial Discrimination Act 1975* (Cth) s 18D.

<sup>81</sup> *Eatock v Bolt* [2011] FCA 1103.

<sup>82</sup> *Eatock v Bolt* [2011] FCA 1103, at 8.

# 11 Services provided by police officers

## 11.1 Interactions with police

People with disabilities, particularly people with intellectual disabilities, are more likely to interact with police.<sup>83</sup>

As the Disability Royal Commission noted:

*“People with disability come into contact with the police as alleged offenders, victims or witnesses to crime. In addition, people with disability also interact with police via welfare checks, where the police are requested to attend (to) a person either in their home or in the community to confirm their health and safety.”<sup>84</sup>*

The Disability Royal Commission recommended that the DDA be amended to expressly include ‘services provided by police officers in the course of performing policing duties and powers’ in the definition of ‘services’ in section 4.<sup>85</sup>

The Commission notes that the DDA does currently capture the actions of federal police through the prohibition of discrimination in the administration of Commonwealth laws and programs.<sup>86</sup> However, state and territory police are unlikely to be captured under the DDA unless they are exercising functions or powers under a Commonwealth law or program.

## 11.2 State laws and programs

This gap also exists under Victoria’s EO Act. Under the EO Act, there is no clear area of public life covering the administration of State laws and programs and it is difficult to characterise certain interactions with public authorities (such as police) as a ‘service’.<sup>87</sup> This means that many actions of state police, correctional and child protection public authorities are not covered by anti-discrimination protections in Victoria.

It is notable that people with disabilities are more likely to come in contact with corrections<sup>88</sup> and child protection,<sup>89</sup> as well as police.

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<sup>83</sup> Marie Henshaw and Stuart Thomas, ‘Police encounters with people with intellectual disability: prevalence, characteristics and challenges’ (2011) *Journal of Intellectual Disability Research*.

<sup>84</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report*) vol 8, 259.

<sup>85</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report*) vol 8, 276.

<sup>86</sup> *Disability Discrimination Act 1992* (Cth) s 29.

<sup>87</sup> *Equal Opportunity Act 2010* (Vic) s 4.

<sup>88</sup> Australian Institute of Health and Welfare, ‘The health of people in Australia’s prisons 2022, Health conditions or disabilities that affect everyday activities’ (Web Page, last updated 15 Nov 2023) <<https://www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/human-function-and-disability/health-conditions-or-disabilities-that-affect-ever>>.

<sup>89</sup> The Centre for Excellence in Child and Family Welfare, *Fostering children with disability in Victoria* (Report, May 2024) 9.

The Yoorook Justice Commission recently recommended that Victoria reform its anti-discrimination legislation to include 'the administration of State laws and programs' as an area of public life.<sup>90</sup>

The Commission supports amendments to the DDA broader than the Disability Royal Commission recommendation to more clearly capture the interactions between people with a disability and state and territory police, corrections and child protection services.

The Commission considers that this could be achieved by extending the 'administration of Commonwealth laws and programs' to the states and territories.

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<sup>90</sup> Yoorook Justice Commission, *Yoorook for Justice: Reporting into Victoria's Child Protection and Criminal Justice Systems* (Report, Aug 2023) 35.

# 12 Exceptions and exemptions

## 12.1 Insurance and superannuation

Like most of the population, people with disability rely on insurance to protect them against unexpected events, whether it is for their home, their car, their health or when they go on holidays.

The DDA and the EO Act both provide for exceptions allowing insurance and superannuation companies to discriminate on the ground of a person's disability if it is based on actuarial or statistical data and is reasonable, based on that data and any other relevant circumstances.<sup>91</sup>

In 2019, the Commission released the report of an investigation into the insurance industry's practices of mental health discrimination in travel insurance.<sup>92</sup>

The 'Fair-minded Cover' report found that all three of the travel insurers who were parties to the investigation had discriminated against people with a mental health condition by including a blanket mental health exclusion in their travel insurance policies and failing to indemnify people under those policies.<sup>93</sup>

The report found that the insurers were unable to establish they could rely on the data exception to show this discrimination was lawful.<sup>94</sup>

The Commission also found that the insurers had failed to take reasonable and proportionate steps to eliminate discrimination in accordance with the positive duty in the EO Act.<sup>95</sup>

The investigation recommended that insurers make better use of available data and better manage any data limitations, and that there be stronger regulation to ensure the insurance industry is achieving best practice.<sup>96</sup>

Similarly, the Australian Law Reform Commission has recommended a review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.<sup>97</sup>

The ACT has reformed the insurance and superannuation exception to require the discrimination to be "reasonable, proportionate and justifiable in the circumstances".<sup>98</sup> The words "proportionate and justifiable" add an extra layer of protection against unfair discrimination.

The Commission supports the wording of the ACT Discrimination Act to be added to the insurance and superannuation exception in the DDA.

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<sup>91</sup> See section 46 of the *Disability Discrimination Act 1992* (Cth) and section 47 of the *Equal Opportunity Act 2010* (Vic).

<sup>92</sup> Victorian Equal Opportunity and Human Rights Commission, *Fair Minded Cover: Investigation into discrimination in the travel insurance industry* (Report, June 2019).

<sup>93</sup> *Ibid*, 4.

<sup>94</sup> *Ibid*, 9.

<sup>95</sup> *Ibid*, 19.

<sup>96</sup> *Ibid*, 14.

<sup>97</sup> Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws* (Issues Paper, 12 Sept 2012) 133.

<sup>98</sup> *Discrimination Act 1991* (ACT) s 28(2)(c).

# 13 Further options for reform

## 13.1 Volunteers

Currently volunteers are not protected from discrimination under the DDA, yet almost a quarter of all volunteers in Australia have disabilities.<sup>99</sup>

The Commission considers the definition of 'employment' should be amended to specifically mention volunteers in recognition that workers with disability should be protected from discrimination and provided adjustments, whether or not they are being paid.

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<sup>99</sup> Volunteering SA&NT, 'Barriers to volunteering: people with disability' (Fact Sheet, 2024) <[https://vsant.org.au/wp-content/uploads/2024/12/Barriers-to-Volunteering\\_People-With-Disability-1.pdf](https://vsant.org.au/wp-content/uploads/2024/12/Barriers-to-Volunteering_People-With-Disability-1.pdf)>



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