THE LAW SOCIETY
OF NEW SOUTH WALES

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26 September 2025

Dr. James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
BRADDON, ACT 2612

By email: adam.fletcher@lawcouncil.au

Dear Dr Popple,

REVIEW OF THE *DISABILITY DISCRIMINATION ACT 1992* (CTH)

Thank you for the opportunity to provide feedback to the Law Council to inform its submission to the Attorney General's Department with respect to its review of the *Disability Discrimination Act 1992* (Cth) (***DDA***). The Law Society's Human Rights, Public Law, Employment Law, Criminal Law, Diversity and Inclusion and Elder Law and Succession Committees contributed to this submission.

The Law Society welcomes this consultation, which considers implementation of recommendations arising from the Disability Royal Commission and other possible amendments designed to modernise and strengthen the *DDA*. It is important that such legislation reflects contemporary understandings of disability and keeps pace with advances in other jurisdictions with respect to anti-discrimination and broader human rights protections for persons with disabilities.

We note that the Law Society recently made a submission to the NSW Law Reform Commission (**NSWLRC**) to inform its review of the *Anti-Discrimination Act 1977* (NSW).[1] Many of the issues raised in the context of that review are also relevant to this consultation, for example, definitions around direct and indirect discrimination, the duty to provide adjustments, the appropriate operation of exemptions and the development of mechanisms to achieve substantive equality, such as a duty to prevent or eliminate unlawful conduct. As such, many of our responses to the NSWLRC are directly reflected in this submission, albeit by reference to the *DDA*.

The Law Society considers that, where possible, consistency between state/territory and Commonwealth anti-legislation is desirable. As the review by the NSWLRC and the Attorney-General's Department are being undertaken concurrently, we suggest that it may be of benefit to both consultations for perspectives to be exchanged before publication of the findings arising from the two reviews.

We also note that the effectiveness of legislative reforms to the *DDA* from an access to justice perspective will depend, to a significant degree, on the ability of the Australian Human Rights Commission (**AHRC**) to ensure

[1] Law Society of NSW, Submission to the NSW Law Reform Commission on the *Review of the Anti-Discrimination Act 1977 (NSW)* (2 September 2025).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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that it can carry out its core functions effectively, including its investigation, complaint and conciliation functions.

Our responses to select questions in the Consultation Paper are set out at Attachment A.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

ATTACHMENT A - REVIEW OF THE *DISABILITY DISCRIMINATION ACT 1992* (CTH)

PART 1 – UPDATING UNDERSTANDINGS OF DISABILITY AND DISABILITY DISCRIMINATION

Addressing intersectionality

Question 3: Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?

We consider it appropriate for the *DDA* to expressly provide that claims alleging unlawful discrimination may include discrimination on the basis of intersecting or combined protected attributes, including multiple disabilities.

The *DDA* currently allows for a person to make a complaint where the discrimination occurred for multiple reasons by virtue of s 10 ('Act done because of disability and for other reason'). However, an applicant who wishes to allege discrimination on the basis of multiple protected attributes in a court would be required to bring claims under different anti-discrimination laws. While experienced lawyers representing applicants would be adept at navigating the different legislative schemes, self-represented litigants may struggle with the task of addressing each attribute with reference to multiple pieces of legislation. Expressly allowing claims to be brought for multiple or combined attributes would therefore improve the accessibility of the *DDA* and reduce the burden on self-represented litigants.

Amending the definition of direct discrimination

Question 5: What test should be used to ensure that the definition of direct discrimination is easy to understand and implement for both duty holders and people with disability, and why?

The *DDA* currently uses the comparator test for direct discrimination. This requires the applicant to prove they have been treated less favourably compared with the treatment of a person who does not have their disability in similar circumstances.[2]

The comparator test is reported by our members to create conceptual difficulties, particularly in matters which are factually dense. It is also of concern that the comparator test is artificial, and a fair or realistic comparison may not always be possible. These conceptual difficulties are compounded in cases where a person is experiencing intersectional disadvantage (i.e., they have multiple, intersecting protected attributes or a range of disabilities), where it can be difficult to identify an appropriate comparator.

We suggest that it would be appropriate to replace the comparator test with an unfavourable treatment or detriment test, which removes the requirement of the hypothetical comparator, and focuses on whether the person has been treated unfavourably because of their disability. While lawyers arguing a matter may seek to make out 'unfavourable treatment' by making comparisons with a person without the relevant disability, the fact that evidence of how a comparator would have been treated is not mandatory would lend the *DDA* greater

[2] *Disability Discrimination Act 1992* (Cth) s 5.

clarity and flexibility.[3] We suggest that simplifying the test in this way would promote a better understanding of direct discrimination and improve access to justice.

Question 6: How should the burden of proof be addressed in the Disability Discrimination Act?

Under the *DDA*, the complainant bears the burden of proof. For direct discrimination, for example, they must make out that they have been treated less favourably and that the reason for their treatment was because of their disability.[4] In the experience of our members, there are considerable difficulties faced by complainants in terms of gathering evidence and proving causation. Typically, it is the respondent who possesses knowledge and records around their policies, practices and decision-making, including for example the effects of their requirements and the extent to which they are being followed.

In terms of possible changes to the burden of proof, we suggest it would be appropriate to incorporate similar provisions to those under ss 351 and 361 of the *Fair Work Act 2009* (Cth) (***FWA***) in relation to adverse action, where the complainant is required to make out a prima facie case that they have been subjected to discrimination, before the onus shifts to the respondent. We note, however, that the term 'adverse action' is specific to the *FWA*, and any changes to the *DDA* would need to reflect the relevant language around direct discrimination.

This would bring the *DDA* into alignment with other jurisdictions, including the United Kingdom, European Union and Canada.[5]

Amending the definition of indirect discrimination

Questions 8: Should the reasonableness element in the definition of indirect discrimination be:

a) **removed**
b) **retained and supplemented with a list of factors to consider**
c) **replaced by a legitimate and proportionate test**
d) **other?**

Across anti-discrimination law, meeting the statutory requirements to make out a claim for indirect discrimination is generally recognised as being more complex than making out a claim of direct discrimination. The current definition of indirect discrimination under the *DDA* includes a 'reasonableness element' i.e., the

[3] For an example of how the 'unfavourable treatment' test has been applied, see *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132 [22] where the test was explained as follows: 'The ACT Discrimination Act... does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or if the conditions imposed or proposed would disadvantage that person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person'.

[4] *Disability Discrimination Act 1992* (Cth) s 5(1).

[5] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 205 citing EU Directive 2000/78/EC, Council directive establishing a general framework for equal treatment in employment and occupation, Article 31; *Equality Act 2010* (UK) s 136; *Ontario Human Rights Commission and O'Malley v Simpsons Sears Ltd* [1985] 2 SCR 536; *Bhinder v Canadian National Railway Co* [1985] 2 SCR 56I.

condition, requirement or practice is not indirect discrimination if it is a reasonable requirement, condition or practice.[6]

We share the concerns raised in Commonwealth anti-discrimination law reviews that the reasonableness test is ambiguous and may give rise to different interpretations, given the difficulties of identifying 'the limits of indirect discrimination claims using this approach'.[7]

In the interests of consistency with definitions of indirect discrimination across other Commonwealth and state and territory anti-discrimination laws, it may be preferable to retain the reasonableness element. However, we suggest that there should be a non-exhaustive list of factors to consider when determining whether a requirement is reasonable, noting that the decision-maker should be required to consider the circumstances of both the complainant and the respondent. For example, in addition to the financial and economic circumstances/business interests of the respondent and their ability to accommodate the needs of the complainant, the nature and extent of the disadvantage to the complainant should also form part of the analysis. We suggest that the approach in Victoria is an appropriate test, where the reasonableness of a requirement, condition or practice depends on all the relevant circumstances, and support the items included on its non-exhaustive list.[8]

Question 9: Should the language of 'does not or would not comply, or is not able or would not be able to comply' be removed from the definition of indirect discrimination?

We agree that the 'inability to comply' element should be removed from the definition of indirect discrimination under s 6 of the *DDA* in the interests of simplifying the definition. It does not serve a useful purpose given that it is already necessary to make out that the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

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

Question 10: Should the Disabilities Convention be included in the objects provision of the Disability Discrimination Act?

As noted in the Consultation Paper, both the common law and the *Acts Interpretation Act 1901* (Cth) allow for principles of international law to be considered to some extent in the process of statutory interpretation.[9] We support including a reference to the Disabilities Convention in the objects provision of the *DDA* in order to foreground human rights considerations impacting persons with disabilities.

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[6] *Disability Discrimination Act 1992* (Cth) s 6(2).
[7] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 296; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Report, December 2008) [11.13], [11.17].
[8] *Equal Opportunity Act 2010* (Vic) s 9(3).
[9] Attorney General's Department, *Disability Discrimination Act 1992 Review* (Consultation Paper, 2025) 39.

Question 11: Should the Disability Discrimination Act be expressly required to be interpreted in a way that is beneficial to people with disability, in line with human rights treaties?

In our view, it would be unusual to expressly require interpretation in a way that is 'beneficial to people with disability'. While the *DDA* could be described as beneficial legislation, there are parts of the *DDA* that are not intended to be read beneficially, for example exemptions to the unlawfulness of failing to provide access to a benefit. We suggest that if the Disabilities Convention is included in the objects provision as contemplated at Question 10, this would be sufficient to provide clear indication within the *DDA* of its beneficial legislative intent.

PART II: POSITIVE DUTY TO ELIMINATE DISCRIMINATION

Positive duty for duty holders to eliminate discrimination

Question 12: If there was a positive duty in the Disability Discrimination Act, who should it apply to?

The Law Society considers that the introduction of a positive duty to eliminate discrimination, harassment and victimisation of persons with disabilities that applies to all employers and persons conducting a business or undertaking would assist in making the *DDA* less reactive. Rather than focusing solely on individual complainants, positive obligations on duty holders would help to ensure prevention of discrimination in the first place. A focus on systemic discrimination could assist more people than a solely complaints-based regime, as businesses would be required to account for their cultures and organisational practices.

Most recently, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) modified the *Sex Discrimination Act 1984* (Cth), including by the introduction of a positive duty for employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, and victimisation in relation to those grounds. In our view, the duty under the *DDA* should mirror that contained in s 47C of the *SDA*.

PART III: ENCOURAGING INCLUSION OF PEOPLE WITH DISABILITY IN EMPLOYMENT, EDUCATION AND OTHER AREAS OF PUBLIC LIFE

Strengthening the duty to provide adjustments

Question 16: Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?

The Law Society considers that it is in the interests of encouraging a proactive approach to inclusion and to promote substantive equality for persons with disabilities for the *DDA* to contain a standalone duty to provide adjustments as occurs in the *Equal Opportunity Act 2010* (Vic).[10]

We suggest this would help overcome some of the difficulties with the current provisions on reasonable adjustments under the *DDA* identified by the Disability Royal Commission, including that they are not well

[10] *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.

understood by employers and education providers and place the onus on the person with disability.[11] It would also be in line with obligations arising under the Disabilities Convention, which requires the reasonable accommodation of people with a disability to fully enjoy their human rights.

It would also help to overcome the difficulties created by the decision of the Full Court of the Federal Court in *Sklavos v Australian College of Dermatologists* (**Sklavos**), which required the person with disability to show that the failure to provide a reasonable adjustment which leads to a disadvantage was because of the person's disability.[12] In practice, *Sklavos* means that a person with disabilities experiencing less favourable treatment has no right to reasonable adjustment, unless there is a demonstrable discriminatory motivation for the decision-maker's failure to make such adjustments. This has been criticised as rendering the reasonable adjustments test under the *DDA* as unenforceable.

We suggest that it would be appropriate that a person with a protected attribute should request an adjustment, before the obligation to provide one is triggered. For example, an employer may not be apprised of the need to make an appropriately tailored adjustment if the employee has not in the first instance communicated this need (e.g., flexible working hours during a period of physical or mental illness). However, there may be some cases of persons with intellectual disabilities, for example, who are unable to communicate their need to access certain reasonable adjustments. We suggest in such cases that the *DDA* provide a mechanism through which such adjustments can be requested e.g., through a carer, family member or friend.

Question 18: Would removing the word 'reasonable' from the term 'reasonable adjustments' to align the language with the legal effect create any unintended consequences?

We do not oppose removing 'reasonable' from the term 'reasonable adjustments'.[13] As noted by the Disability Royal Commission:

> In *Watts v Australian Postal Corporatio*n, Mortimer J (now the Chief Justice of the Federal Court) explained the adjective 'reasonable' has no qualitative character, in the sense that the adjustment has to be assessed against a standard of reasonableness. The expression 'reasonable adjustment' simply means 'alteration or modification'. Accordingly, an adjustment has nothing to do with whether an adjustment is reasonable, or if a request for an adjustment is reasonable or if a respondent's response to the request is reasonable.[14]

We do not consider this would result in unintended consequences if the unjustifiable hardship defence is maintained.

[11] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7, part B, 392.
[12] *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 [23]-[53].
[13] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Art 1.
[14] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7, part A, 307.

Definition of and considerations for unjustifiable hardship

Question 19: What is your preferred approach to achieving greater fairness and transparency in claims of unjustifiable hardship:

a) the Disability Royal Commission amendment as proposed
b) a new definition of unjustifiable hardship
c) other

We support the proposal by the Disability Royal Commission to include additional factors under s 11(1) of the *DDA* to be taken into account in determining whether an unjustifiable hardship is imposed. These include consultation with the person with disability and available alternative measures to eliminate or reduce hardship.[15]

In our view, consideration of all the circumstances of the particular case, including the further mandatory considerations proposed above, would provide greater clarity than the more subjective test proposed in the Consultation Paper which balances benefit to the person and community with detriment and costs to another person.

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

Section 21A of the *DDA* provides an exception to a claim of discrimination where a person with disability is unable to carry out the inherent requirements of the work, even if the employer has made reasonable adjustments for the person. We note the criticism by the Disability Royal Commission in relation to this exception, particularly the fact that it may discourage employers from engaging in 'discussions with prospective or existing employees regarding adjustments or job design'.[16]

We therefore consider it appropriate that further factors are included as mandatory considerations in determining whether a person with disability is able to meet a role's inherent requirements, including the nature and extent of any adjustments made, and the extent of consultation with the person with disability, given the individual with disability will be best placed to articulate the adjustments that they require.

PART 4 – IMPROVING ACCESS TO JUSTICE

Offensive behaviour and vilification protections

30. Given the recent legislative developments, are there any further gaps in the legislative framework that could be addressed by amendments to the Disability Discrimination Act to protect people with disability from vilification?

We note that recent amendments to the *Criminal Code Act 1995* (Cth) expanded the protected groups under ss 80.2A(1)(a) and 80.2B(2)(d), including persons with disabilities. These offences concern the advocating for the use of force or violence against groups or members of groups with protected attributes. There are also a

[15] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7, part A, 337.
[16] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7, part B, 389.

range of other Commonwealth and state and territory-based offences that deal with conduct motivated by hatred.[17] In our view, the *DDA* should remain a civil scheme and should not be used to plug perceived gaps in criminal law protections for protected groups, including persons with disabilities.

Services provided by police officers

31. How could the Disability Discrimination Act be amended to ensure that it covers policing?

Our members have noted that a lack of clarity around the definition of 'services' means that it is often difficult for people to assert their rights in a discrimination claim where they have been discriminated against by police.[18] This may pose a particular hurdle for Aboriginal and Torres Strait Islander communities, who are over-represented as the subjects of the exercise of police powers and may be the target of discriminatory policing, as well as people with disability, who come into contact more frequently with the criminal justice system, as documented by the Disability Royal Commission.[19]

We consider that both suggestions to address this absence of protection outlined in the Consultation Paper are acceptable. Policing could be included within the definition of services, with an explicit note made that this includes interactions with suspects and persons who have committed a criminal offence.

Alternatively, a new provision could be included in the *DDA* to cover policing. The Consultation Paper suggests that such a provision could also extend to the 'justice system'. It would be necessary to clarify what is covered by that term, as its use could cause potential confusion given the separation of powers. For example, while federal courts are part of the 'justice system', judicial immunity would prevent judges and federal magistrates from being held civilly liable for conduct undertaken in the exercise of their judicial functions.[20]

A third option would be to extend the operation of s 29 of the *DDA*, which prevents discrimination in the administration of Commonwealth laws and programs to state and territory laws and programs. This would capture police, as well as certain other criminal justice system employees involved in the administration of laws and programs, e.g. corrections officers and juvenile justice officers.

PART 5 – EXEMPTIONS

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

We support a voluntary process whereby the AHRC is empowered to grant special measure certificates. As noted in AHRC's *Free and Equal Report*, this would assist in providing certainty to duty-holders who wish to

[17] For a summary of the relevant offences on hate at the Commonwealth and NSW level, see Department of Communities and Justice, *Review of criminal law protections against the incitement of hatred* (Issues Paper, June 2025) 6-7.
[18] See *Commissioner of Police (NSW) v Mohamed and Others* (2009) 262 ALR 519, 536 [87] which states that initial investigations of complaints of violence and the protection of victims of violence provide services, but this does not mean decisions around prosecution or arresting alleged perpetrators are also services within s 19 of the *DDA*.
[19] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8, 3.
[20] *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3 [12], [74]-[114] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

ensure that their conduct falls within the scope of a 'special measure' and does not amount to unlawful conduct.[21]

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

We support inclusion of a definition of 'special measures' to ensure they are interpreted as positive measures and align with international legal standards. In this respect, we note the approach outlined in s 12 of the *Equal Opportunity Act 2010* (Vic), where a person can take a special measure for the purpose of promoting or achieving substantive equality for members of a group with a protected attribute.

However, we suggest that it is important for special measures to be implemented in consultation with persons with disabilities. In our view, this is particularly important, given that community consultation has been held not to be a requirement for the introduction of special measures under the *Racial Discrimination Act 1975* (Cth).[22]

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

We suggest it would be appropriate to define 'temporary exemption' in order to further clarify the circumstances in which such an exemption applies and distinguish between temporary exemptions and special measures.

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

We consider that the process for applying to the AHRC for a temporary exemption under s 55 of the *DDA* is appropriate.

[21] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 127-128.
[22] *Maloney v The Queen* [2013] HCA 28 [24] (French CJ), [91] (Hayne J), [128]–[136] (Crennan J), [186] (Kiefel J), [240] (Bell J), [357] (Gageler J).