

November 2025

**Submission to the Attorney-General's Department**

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## **Physical Disability Australia's Review of the Disability Discrimination Act**



## Acknowledgements

Physical Disability Australia pays our respects to the Traditional Owners of the lands on which this submission was written and throughout Australia. We recognise their continuing connections to land, waters and skies and pay our respects to Elders past, present and emerging.

PDA also acknowledges people with disability, past and present, those who are living full and complete lives and those who have needs that are not yet being met. We ask you to reflect on this and to work with us to bring about the changes that will give ALL people with disability an opportunity to live an ordinary life.

## Contents

Acknowledgements .....	2
<b>Introduction</b> .....	6
<b>Part 1: Updating understandings of disability and disability discrimination</b> .....	7
The definition of ‘disability’ .....	7
Intersectionality.....	10
Direct and Indirect Discrimination.....	12
Burden of Proof.....	14
<b>Part 2: Positive Duty to Eliminate Discrimination</b> .....	15
Lessons that can be derived from the <i>Sex Discrimination Act 1984</i> (Cth) .....	17
Shifting the burden .....	17
Clear guidance and standards .....	17
Reasonable and proportionate measures .....	17
The importance of understanding intersectionality.....	17
Cultural change through leadership .....	17
The importance of the Australian Human Rights Commission .....	18
Potential Costs and Impacts of Positive Duty.....	19
Potential cost areas could include: .....	19
The positive impacts of the above recommendations being implemented are: ....	19
Exceptions or limits to Positive Duty .....	20
<b>Part 3: Encouraging Inclusion in employment, education and other areas of public life</b> .....	21
Defining Inherent Requirements.....	23
Burden of Proof for Inherent Requirements .....	23
<b>Part 4: Improving Access to Justice</b> .....	25
Expertise in Decision Making on Disability Prejudice Complaints .....	25
Extending Coverage to Policing and Justice .....	26
Defences in Policing and Justice Administration .....	26
<b>Part 5: Exemptions</b> .....	27
Amendments to Section 21A and 21B: Clarifying Defences .....	27
Consultation Requirement Prior to Determining Exemption Applications.....	28

<b>Part 6: Modernising the <i>Disability Discrimination Act</i></b> .....	29
Establishment of a National Assistance Animal Accreditation Framework .....	29
Standards for Hygiene and Public Behaviour .....	29
Frequency and Process of Review: .....	29
Proof of Accreditation or Licensing: .....	30
Accessible Assessment Mechanisms: .....	30
Delegation of Accreditation Authority: .....	30
Mandatory Disability Action Plans for Large Organisations and Government Agencies .....	31
Co-Design of Disability Equality Indicators .....	31
Content and Development of Action Plans .....	31
Duration of Voluntary and Mandatory Action Plans .....	31
Amendments to Section 11(1)(e) of the <i>Disability Discrimination Act</i> .....	32
Expanded Functions of the Australian Human Rights Commission .....	32
Independent Prosecutorial Powers for Non-Compliance .....	32
Empowering Disability Organisations to Make Complaints .....	32
Public Accessibility of Relevant Australian Standards .....	33
Regular Review of Disability Standards .....	33
Establishment of Expert Advisory Groups .....	33
Removal of the Unjustifiable Hardship Defence for 2022 Compliance Obligations ..	33
Clarifying the Definition of Adjustments in Education .....	34
Universal Design for Learning .....	35
Principle of Disability Ready and Responsive .....	35
Model Process for Building Access Administration .....	35
Alignment of Standards Review with National Construction Code .....	35
Inclusion of Non-Compliance and Timetables in Action Plans .....	36
Mandatory Data Reporting on Disability Standards .....	36
Establishment of a Dedicated Accessibility Standards Body .....	36
<b>Part 7: Further options for reform</b> .....	37
Empowering the Australian Human Rights Commission .....	37
Addressing Systemic Issues and Enhancing Collaboration .....	37

Ongoing Advisory and Monitoring Mechanisms .....	37
Ensuring Representation in Key Roles .....	38
Promoting Supported Decision-Making.....	38
Broadening Employer and Principal Liability .....	38

## Introduction

Physical Disability Australia (“PDA”) is a national peak Disability Peoples Organisation run by people with physical disability for people with physical and intersectional disability. PDA exists for its members, who fuel our mission to “enable every Australian living with a physical disability to realise their full potential”.

Through our work, we advocate to government, create equal opportunities, promote diversity and inclusion and ensure that our values within the organisation, and our representation of Australians living with physical disability, are reflected, upheld and defended.

With physical disability affecting 75.3% of Australia’s disability community, PDA welcomes the opportunity to provide a response to The Attorney-General’s Department’s (“The Department”) consultation paper on the Disability Discrimination Act 1992 (Cth) (“Disability Discrimination Act”) Review.

This submission has been largely informed by data collected from a PDA Members Survey conducted in mid-2025 which focused on the issues impacting the lives of people living with physical disabilities as well as submissions made by other Disability Representative Organisations for this Review.

# Part 1: Updating understandings of disability and disability discrimination

## The definition of ‘disability’

Part 1 addresses fundamental questions regarding the appropriate formulation of the definition of ‘disability’ within the *Disability Discrimination Act*. It considers whether the existing statutory definition ought to be maintained or whether a revised definition should be developed, incorporating language that is more inclusive and reflective of contemporary social and legal understandings of disability. Our response focuses on how the definition might be rearticulated to more effectively capture the lived experiences and expectations of people with disability in a modern context.

Currently, section 4(1) of the *Disability Discrimination Act* defines disability, in relation to a person, as:

- (a) total or partial loss of the person’s bodily or mental functions; or
  - (b) total or partial loss of a part of the body; or
  - (c) the presence in the body of organisms causing disease or illness; or
  - (d) the presence in the body of organisms capable of causing disease or illness; or
  - (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
  - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
  - (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
  - (i) previously existed but no longer exists; or
  - (j) may exist in the future (including because of a genetic predisposition to that disability); or
  - (k) is imputed to a person.<sup>1</sup>

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<sup>1</sup> Section 4(1) *Disability Discrimination Act (1992)* Cth.

This definition of ‘disability’ is intended to encompass behaviour that constitutes a symptom or manifestation of a person’s disability. This interpretation ensures that the scope of the definition is sufficiently broad to capture the full range of experiences associated with disability, including those that may not be immediately visible or traditionally recognised as impairments. While the definition is impairment-based, it remains both broad and inclusive and does not require a formal medical diagnosis as a precondition for protection. This approach appropriately recognises that disability may be experienced and expressed in diverse ways, and that access to legal protections should not depend upon the existence of a clinical or diagnostic label.<sup>2</sup>

Importantly, the current definition is not confined to conditions that are permanent, long-term, or severe. Instead, the Disability Discrimination Act provides protection to individuals who currently have, previously had, may in the future have, or are perceived to have a disability. This inclusive framing reflects a contemporary understanding of disability as a dynamic concept, acknowledging that a person’s experience of disability may fluctuate over time. It also reinforces the *Disability Discrimination Act’s* preventative and protective purpose by extending coverage to those who may be subject to discrimination based on assumptions or perceptions about disability status.

It is significant that this definition of ‘disability’ was examined by the Productivity Commission in its inquiry report, the Commission observed:

“The Disability Discrimination Act 1992 is based on a ‘social model’ of disability discrimination, but it uses a medically-based definition of disability. This integrated approach is appropriate...”<sup>3</sup>

PDA concurs with the Commission’s findings in part. Importantly, the definition of disability in the Disability Discrimination Act serves a distinct legislative purpose and should not be conflated with definitions utilised in other statutory frameworks, by service providers, or in the administration of government programs and services such as income supports or pensions. This definition is specifically designed to support the Disability Discrimination Act’s anti-discrimination objectives, rather than to determine eligibility for benefits or access to services.

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<sup>2</sup> Australian Discrimination Law Experts Group, *Review of the Disability Discrimination Act 1992 (Cth)*, 16 October 2025, p 27.

<sup>3</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report* (Report No 30, vol 1, Australian Government, 2004) 304, Finding 11.1.

Whilst PDA acknowledges the wide scope the current definition provides, we would urge the Department to utilise this opportunity to remove some of the outdated, ableist and deficit-based language that is currently featured.<sup>4</sup>

A strengths-based definition that has the social and human rights understanding of disability entrenched within would better align with contemporary understandings of ‘disability’. The removal of language reflecting the medical model of disability would serve to modernise the *Disability Discrimination Act* and ensure greater consistency with international human rights obligations and current community conceptions of disability. However, it is vital that any changes made to the current definition do not narrow the scope of its current application.

Overall, the breadth of the existing definition provides a strong foundation for promoting equality and inclusion, and with the removal of outdated language it will ensure the *Disability Discrimination Act* continues to operate consistently with Australia’s obligations under the *Convention on the Rights of Persons with Disabilities*. Any future consideration of amendments to the definition should therefore preserve this inclusive intent, ensuring that the legislation remains responsive to modern understandings of disability and continues to afford comprehensive protection against discrimination.<sup>5</sup>

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<sup>4</sup> Children and Young People with Disability Australia, *Strengthening the Disability Discrimination Act for children and young people with disability*, October 2025, p 13.

<sup>5</sup> Australian Discrimination Law Experts Group, *Review of the Disability Discrimination Act 1992 (Cth)*, 16 October 2025, p 27.

## Intersectionality

The *Disability Discrimination Act* would be strengthened by expressly allowing claims of discrimination to be brought on the basis of multiple or combined protected attributes. Such an amendment would better reflect the lived experience of many people with disability, who may face discrimination arising from the interaction of multiple aspects of their disability or from the combination of disability and other personal characteristics.

Many people experience disability in ways that are multifaceted and interconnected. Whilst PDA does not propose significant changes to the current definition, it is important that the *Disability Discrimination Act* explicitly protects people who experience discrimination due to the combined effects of multiple dimensions of disability. This concept, often described as ‘internal intersectionality’, recognises that the interaction of different aspects of disability can create distinct barriers to equality and inclusion.<sup>6</sup> Enabling people to bring claims that reflect these combined experiences would ensure that the *Disability Discrimination Act* operates consistently with its purpose of promoting substantive equality. Additionally, like all members of the community, people with disabilities may experience discrimination linked to other protected attributes, such as sex, age, race or sexual orientation. This ‘external intersectionality’ acknowledges that discrimination can arise from the interplay of multiple identity factors, producing unique and compounded disadvantages.

Recognising intersectional discrimination within the *Disability Discrimination Act* and related legislation would bring Australia’s legal framework into closer alignment with international human rights standards and ensure that the law reflects the complexity of real-world experiences of inequality. The *Disability Discrimination Act* does not currently make explicit provision for intersectionality in its complaint-handling or reasonable adjustment provisions. Amendments are therefore necessary to ensure clarity, consistency and the full realisation of human rights protections for people with disability.

Therefore, PDA recommends that the *Disability Discrimination Act* be amended to expressly confirm that its protections extend to people who experience discrimination arising from multiple or intersecting aspects of disability (*internal intersectionality*). The duty to make reasonable adjustments should likewise be clarified to ensure it applies to the combined and interacting effects of disability. Additionally, PDA also recommends a second amendment be made to expressly recognise intersectional discrimination

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<sup>6</sup> Australian Discrimination Law Experts Group, *Review of the Disability Discrimination Act 1992 (Cth)*, 16 October 2025, p 27.

involving disability and other protected attributes under federal discrimination and industrial laws (*external intersectionality*), ensuring comprehensive and inclusive protection against discrimination.

Finally, PDA recommends that the *Australian Human Rights Commission Act 1986* (Cth) be amended to require decision-makers to consider intersectional discrimination when assessing whether unlawful discrimination has occurred and when determining appropriate remedies or outcomes.

## Direct and Indirect Discrimination

In considering the appropriate test to define ‘direct discrimination’ and to ensure its clarity and practical application for both people with disability and duty holders, it is fundamental to begin with a clear and inclusive overarching definition of ‘discrimination’.<sup>7</sup> It is particularly important to recognise that direct and indirect discrimination are not mutually exclusive and often intersect in ways that affect people with physical disabilities.

People with physical disabilities frequently experience barriers that arise not only from explicit exclusion but also from policies, practices or environments that unintentionally disadvantage them.<sup>8</sup> The current distinction between direct and indirect discrimination often fails to capture the full impact of these experiences. For example, inaccessible infrastructure, rigid workplace policies, or inflexible service delivery methods may not appear to constitute *direct* discrimination but can still result in significant exclusion and hardship.<sup>9</sup> This uncertainty makes it difficult for individuals to determine how best to frame their complaints, often requiring them to allege both direct and indirect discrimination. This adds unnecessary complexity, cost, and delay to the complaints process and can discourage people with physical disabilities from pursuing their rights.

The current statutory definition also inadequately addresses systemic discrimination, which perpetuates barriers in areas such as employment, transport, public access and education. As discriminatory conduct has become increasingly implicit and embedded within organisational practices, the rigid distinction between direct and indirect discrimination has proven unworkable. It imposes procedural and evidentiary barriers that detract from the core inquiry: whether a person with disability has been treated unfairly or excluded.

A reformed, unified definition of discrimination within the *Disability Discrimination Act* would more accurately reflect the lived experiences of people with physical disabilities and better support its objective of achieving substantive equality. Such an approach would align with the *Convention on the Rights of Persons with Disability*, which does not differentiate between direct and indirect discrimination, and would be consistent with

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<sup>7</sup> Australian Discrimination Law Experts Group, *Review of the Disability Discrimination Act 1992 (Cth)*, 16 October 2025, p 27.

<sup>8</sup> Physical Disability Australia, Member’s Survey on Impacts of people with physical disability, September 2025.

<sup>9</sup> Physical Disability Australia, Member’s Survey on Impacts of people with physical disability, September 2025.

domestic precedent, particularly the *Discrimination Act 1991* (ACT), which adopts a single, comprehensive definition encompassing both forms.

The current requirement to use a comparator in defining direct discrimination makes the process unnecessarily complex and distracts from the key issue, whether a person has been treated unfairly because of disability.<sup>10</sup> For individuals with physical disabilities, this test often fails to reflect real-world experiences, where discrimination arises from environmental, structural and attitudinal barriers rather than individual characteristics.

Replacing the “less favourable” test with a standard based on “unfavourable treatment” would simplify the law and better align it with a social and human rights model of disability. This approach recognises that discrimination occurs when systems or practices exclude or disadvantage people with disabilities, rather than when their treatment can be compared to a hypothetical non-disabled person. It would also bring the Disability Discrimination Act into line with the *Equal Opportunity Act 2010* (VIC) and the *Discrimination Act 1991* (ACT), where the “unfavourable treatment” test is already in use.

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<sup>10</sup> Section 5, *Disability Discrimination Act 1992* (Cth).

## Burden of Proof

PDA supports the Justice and Equity Centre’s recommendation to introduce a *shifting burden of proof* for causation in discrimination matters. Once a person with disability demonstrates that they were treated unfavourably, it should be presumed that the conduct occurred for an unlawful reason. The responsibility would then shift to the respondent to show that the unfavourable treatment was not related to the person’s disability.<sup>11</sup>

This approach recognises the barriers people with disability often face in accessing evidence and proving discriminatory intent, particularly when multiple factors, such as disability, gender, race or socioeconomic status intersect. It also promotes fairness and aligns with the existing burden-shifting model under the *Fair Work Act 2009* (Cth) ensuring consistency across anti-discrimination and employment law frameworks.

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<sup>11</sup> Inclusion Australia, *Review of the Disability Discrimination Act*, October 2025, p 13.

## Part 2: Positive Duty to Eliminate Discrimination

A positive duty is a legal obligation to prevent unlawful conduct proactively. Historically, disability anti-discrimination legislation in Australia has operated primarily on a reactive basis, placing the onus on individuals with disability to identify, report and challenge discriminatory conduct. The proposed introduction of a positive duty into the *Disability Discrimination Act* represents a significant legal and cultural shift, placing the obligation on organisations and other duty holders to take proactive and reasonable steps to eliminate disability discrimination, harassment, and victimisation before it occurs.

The Positive Duty will reallocate responsibility from individuals to duty holders such as employers, service providers and institutions, who will be legally required to identify systemic risks and implement preventative measures to eliminate discriminatory practices. This approach is intended to foster a preventative and accountability-driven culture, compelling organisations to critically assess and modify their policies, practices, procedures and environments to ensure they do not directly or indirectly give rise to unlawful discrimination or exclusion.

In doing so, the positive duty supports a broader cultural transformation by embedding inclusive and non-discriminatory practices across all levels of an organisation, including but not limited to, leadership, governance, service delivery and workforce capability. This reform is designed to facilitate systemic change, moving beyond mere procedural compliance to the realisation of substantive equality for people with disability.

If there were a positive duty embedded within the *Disability Discrimination Act*, it should apply to the broad range of entities currently subject to the Act as it stands, with particular focus on those that have significant influence over access participation and inclusion at a systemic level. This includes:

- Employers in both the public and private sectors
- Government Agencies
- Educational Institutions
- Service Providers
- Developers and Planners
- Organisations delivering public functions or benefits.

However, similar to the positive duty embedded within the *Sex Discrimination Act 1984* (Cth), we believe that the *Disability Discrimination Act* may benefit from a “reasonable and proportionate” standard to ensure the duty is appropriately scalable based on the size, resources and influence of the organisation in question.

## Lessons that can be derived from the *Sex Discrimination Act 1984* (Cth)

There are several lessons from the operation of the positive duty within the *Sex Discrimination Act 1984 (Cth)* that can be applied to the *Disability Discrimination Act* reforms. A positive duty within the *Disability Discrimination Act* should impose a duty to take reasonable, proactive and proportionate measures to eliminate direct, indirect and systemic disability discrimination.

### Shifting the burden

Firstly, the shift from a complaint-based system to one of proactive prevention. Were a similar shift to occur within the *Disability Discrimination Act*, it could help reduce the systemic barriers faced by people with disability, especially within the education, employment and service provision sectors.

### Clear guidance and standards

Secondly, the development of clear benchmarks and tailored guidance of the obligations owed by duty holders would need to be established to illustrate positive duty obligations compliance. These guidelines could take the form of updated accessibility standards and/or inclusive design principles to ensure a clear example is set from the beginning.

### Reasonable and proportionate measures

Thirdly, the duty owed by duty holders must operate within a flexible context and have the “reasonable and proportionate” test applied, as the duty will vary depending on size, resources and the nature of the organisation in question. This flexibility principle is critical as accessibility solutions may vary within different contexts.

### The importance of understanding intersectionality

Within the *Disability Discrimination Act*, a positive duty should encourage recognition of how race, gender and age intersect with disability discrimination.

### Cultural change through leadership

The *Sex Discrimination Act 1984 (Cth)* highlights that organisational leadership and workplace cultures are central to effective implementation of a positive duty.

Emphasising the importance of proactive leadership and inclusive cultures within organisations through training, internal accountability procedures and policies would support long term change.

### The importance of the Australian Human Rights Commission

The Australian Human Rights Commission was granted new powers within the *Sex Discrimination Act 1984 (Cth)* to inquire into systemic issues, conduct own-motion investigations and enforce the positive duty. We should apply this to the *Disability Discrimination Act* as similar powers would be essential to address systemic disability discrimination that goes beyond individual complaints.

## Potential Costs and Impacts of Positive Duty

Introducing a positive duty under the Disability Discrimination Act would yield significant long-term benefits, both socially and economically but would involve initial and ongoing costs.

Potential cost areas could include:

### *Implementation and Compliance*

The development and implementation of Disability Access & Inclusion Plans as well as other inclusion policies and complaint handling mechanisms.

### *Training and Awareness*

Investing in disability awareness training that focuses on inclusive communication and anti-discrimination for staff and leadership at every level.

### *Infrastructure and Accessibility Upgrades*

Potential costs related to infrastructure and accessibility upgrades that could include physical building modifications, the procurement of assistive technology or updating websites to meet accessibility standards (WCAG 2.1+).

The positive impacts of the above recommendations being implemented are:

### *Innovation and Productivity*

It is a known fact that inclusive design benefits all users, not just people within the disability community i.e. utilising captions, ramps, flexible work arrangements.

### *Improved access and inclusion*

These changes would allow for the disability community to participate more fully with education, employment, access to service and greater public life.

### *Cultural change*

A proactive duty will help shift societal attitudes from mere compliance to inclusion as a core value.

### *Legal clarity*

With clear legislation, duty holders will know what their obligations are in meeting the positive duty, and what reasonable measures they must take to ensure equality.

## Exceptions or limits to Positive Duty

We do believe that whilst a positive duty is a vital component to the new *Disability Discrimination Act*, there should be certain limitations in order to balance the protection of disability rights and ensuring practicality, fairness and proportionality in implementation.

Whilst the intention of the *Disability Discrimination Act* is to promote equality and the rights of people with disability, it is important that a positive duty does not create unreasonable obligations that could indirectly discourage inclusion. Furthermore, legislative guidance and clarity of the expected duties and exceptions will assist organisations in understanding their role and reduce fear of non-compliance.

However, it is imperative that the limits and/or exceptions to positive duty do not undermine the equality the *Disability Discrimination Act* is instilling. Too many exemptions may risk weakening the positive duty which could allow systemic discrimination to persist.

A strong, consistent positive duty will instil that equality is a responsibility to be shared across all sectors, at every level. We recommend applying a context-sensitive model to the limits or exceptions of a positive duty, wherein the duty is applied universally, but its scope is scalable depending on an organisation's capacity, function and size. Exemptions should require transparency and justification when invoked, and should only be granted in well-defined, narrow circumstances.

## Part 3: Encouraging Inclusion in employment, education and other areas of public life

This section outlines recommended amendments to the *Disability Discrimination Act* and any disability standards established under section 31 of the Act. PDA believes an amendment to the *Disability Discrimination Act* is necessary so a stand-alone duty to provide adjustments is created. A stand-alone duty that provides adjustments should extend to duties of governments, thus to ensure people with disability have the option of being able to fully engage in the participation of compulsory and civic duties such as voting, jury service selection process, nomination for political election and becoming an elected member at all levels of government.

PDA recommends the *Disability Discrimination Act* and any *Disability Standards* made under section 31 of the Act be amended to replace the term ‘reasonable adjustment’ with adjustment wherever it occurs and revise the notes that refer to such adjustments to ensure they accurately reflect the scope of the obligation. It is proposed that the term ‘reasonable adjustment’ be replaced with the term ‘adjustment’ throughout the Act and in all related disability standards. This change should be applied wherever the term currently appears to ensure consistency and clarity in the legislation. In addition to updating terminology, PDA recommends that any notes referencing such adjustments be revised. These revisions should ensure that the notes accurately reflect the extent of the obligation imposed by the *Disability Discrimination Act*, providing clear guidance on the requirements related to adjustments for persons with disabilities.

When considering the preferred approach to achieving greater fairness and transparency, PDA recommends that the approach to determining unjustifiable hardship be adapted in line with the suggestions made by the *Disability Royal Commission*. This adaptation should also incorporate all of the principles currently embedded in section 4.1 of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth). Under this reframed approach, when a decision maker is required to assess whether unjustifiable hardship exists, they should specifically take into account the extent to which consultation has occurred with any person with disability. Additionally, consideration should be given to the alternative measures that are available to achieve improvements in equality for people with disability and to eliminate or reduce hardship. This approach aims to ensure that determinations are informed, inclusive, and focused on practical outcomes for people with disabilities.

It is further recommended by PDA that the definition of unjustifiable hardship in both the *Disability Standards for Accessible Public Transport 2002* (Cth) and the *Disability Standards for Education 2005* (Cth) be revised. The amended definition should incorporate all of the principles that are adopted in the revised section 11 of the *Disability Discrimination Act*. In addition, all notes within the disability standards that refer to unjustifiable hardship should be thoroughly reviewed to ensure consistency with the amended definition. This process will support greater clarity and alignment across relevant legislative instruments, further strengthening protections and obligations related to unjustifiable hardship.

The inherent requirements exception, as found in the *Disability Discrimination Act* and the associated disability standards, should be narrowly defined and strictly interpreted. This exception is intended to operate as a true and limited departure from the fundamental principle of equality. Its scope must be restricted solely to those tasks, functions, or competencies that are absolutely essential to the core purpose of a job or educational course, rather than being based on traditional, preferred, or more convenient approaches to fulfilling the role.

## Defining Inherent Requirements

It is essential that the *Disability Discrimination Act* clearly articulates that inherent requirements, whether under its provisions or within any related disability standards, must meet three criteria:

- They are necessary to the fundamental nature of the employment or educational program;
- They cannot be eliminated or modified without fundamentally changing the nature of that employment or program; and
- They are clearly distinguished from marginal, peripheral, or traditional practices which could be altered without impacting the fundamental nature of the role or course.

## Burden of Proof for Inherent Requirements

PDA recommends further amendments be made to the *Disability Discrimination Act* wherein the explicit requirement that any employer or educational institution relying on a person's alleged inability to meet inherent requirements bears the onus of proving that such requirements are genuinely inherent. This means demonstrating that the requirement:

- Is integral to the fundamental nature of the employment or educational program;
- Cannot be removed or changed without fundamentally altering that nature; and
- Is distinct from any marginal, peripheral, or traditional practices that could be modified without changing the essential character of the role or program.

The *Disability Discrimination Act* and associated Disability Standards should also clarify the proper analytical sequence to be applied when considering inherent requirements. The process should require duty bearers to:

1. Identify the inherent requirements of the role or program;
2. Identify all possible adjustments that could enable the person with disability to satisfy those requirements;
3. Determine what resources are available to implement such adjustments; and
4. Assess whether the inherent requirements can be met, with or without the proposed adjustments.

It is recommended that the *Disability Discrimination Act* be amended to provide explicit protection against discrimination in educational settings, as outlined in section 22 of the Act. Specifically, the amendment should clearly state that the prohibition of discrimination encompasses both ‘exclusion’ and ‘exclusionary discipline’.

PDA asserts that the terms ‘exclusion’ and ‘exclusionary discipline’ should be defined broadly within the *Disability Discrimination Act*. This broad definition should cover any temporary or permanent modification to a student’s enrolment, attendance, or participation in educational activities. Such changes may include, but are not limited to, suspension, expulsion, or any other disciplinary action that affects a student’s ability to engage in their educational program.

By expressly including these forms of exclusion, the amendment will ensure comprehensive protection for students with disability, safeguarding their right to education and participation in all related activities.

## Part 4: Improving Access to Justice

The *Disability Discrimination Act* should be strengthened to provide explicit protection for people with disability from offensive behaviour and harassment. PDA recommends that the *Disability Discrimination Act* be amended to repeal sections 35, 37 and 39, and to introduce a new provision broadly based on section 18C of the *Racial Discrimination Act 1975* (Cth).

This new provision should clarify several key points:

- Unlawful conduct does not need to be repeated to be actionable under the Act.
- The prohibition of such conduct applies equally to actions occurring in both public and private settings.
- This prohibition extends to all areas of life where discrimination is already unlawful under the Act, ensuring that individuals are protected regardless of their specific role or status in any situation.
- The scope of the prohibition should cover conduct that is ridiculing, demeaning, or derogatory, as well as behaviour that interferes with a person's mobility, communication, or the use of disability aids and equipment.

### Expertise in Decision Making on Disability Prejudice Complaints

PDA believes that decision makers responsible for handling complaints under the *Disability Discrimination Act* should be required to maintain current knowledge of the various forms and impacts of disability prejudice. Additionally, expert evidence on these matters should be available to inform and guide the decision-making process.

Should the Act be amended to provide specific protections against public and private disability prejudice, including offensive conduct and incitement based on disability, a defence should be incorporated. This defence should be modelled on section 18D of the *Racial Discrimination Act 1975* (Cth) and section 55 of the *Anti-Discrimination Act 1998* (Tas), ensuring that appropriate safeguards exist within the legal framework.

## Extending Coverage to Policing and Justice

It is further recommended by PDA that the coverage of the *Disability Discrimination Act* be expanded to include all aspects of public life, explicitly encompassing policing and the justice system. This amendment would ensure comprehensive protection against discrimination for people with disabilities in these critical areas.

## Defences in Policing and Justice Administration

No specific defences should be introduced within the *Disability Discrimination Act* in respect of the prohibition of discrimination in the administration of policing and justice. This approach aims to uphold strong and consistent protections against discrimination within these domains.

## Part 5: Exemptions

The following recommendations are made to improve clarity and accessibility within the *Disability Discrimination Act*, particularly regarding the distinction between defences and exemptions to allegations of discrimination.

### Amendments to Section 21A and 21B: Clarifying Defences

It is recommended that the headings of section 21A and 21B of the *Disability Discrimination Act* be amended by replacing the term 'Exception' with 'Defence'. Furthermore, the text of these provisions should be revised to make it explicit that their purpose is to provide a defence against allegations of discrimination. This change will ensure that the legal intent and practical application of these sections are clear to both duty-holders and complainants.

The heading of section 29A should be amended to read 'Defence – Unjustifiable hardship'. Additionally, the provision should be reworded to clarify that it operates as a defence to an allegation of discrimination. This adjustment will better reflect the function of the provision and assist in its consistent interpretation and application.

It is also recommended that Part 2 Division 5 of the *Disability Discrimination Act* be amended to create two separate divisions. The first division should include sections 45 to 54A (inclusive), be renamed 'Defences', and each provision within this division should be amended to clearly state that it serves as a defence to an allegation of discrimination. The second division should comprise sections 55 to 58 (inclusive) and be titled 'Temporary Exemptions'. This restructuring will provide greater transparency regarding the nature and effect of these provisions, distinguishing between ongoing defences and time-limited exemptions.

## Consultation Requirement Prior to Determining Exemption Applications

We recommend that section 55 of the *Disability Discrimination Act* be amended to introduce a mandatory consultation process. Specifically, before the Australian Human Rights Commission determines any application for exemption under this section, it must consult with disability representative organisations as well as state and territory statutory office holders responsible for discrimination matters. This requirement aims to ensure that the perspectives and expertise of relevant stakeholders are considered during the exemption application process.

Additionally, we also recommend that section 55 be further amended to require the Australian Human Rights Commission to obtain enforceable commitments from successful exemption applicants. These commitments should outline the specific actions the applicant will undertake, along with a detailed timetable for completion, to achieve compliance with the *Disability Discrimination Act*. The intention is to ensure that the exemption is only granted where active steps will be taken to address the need for exemption, thereby reducing the likelihood of further exemptions being required in the future.

## Part 6: Modernising the *Disability Discrimination Act*

PDA recommends that urgent action be taken to identify all organisations currently accredited under international standards for assistance animals. These organisations should then be formally listed in the regulations established under the *Disability Discrimination Act*. This measure aims to provide clarity and ensure consistency regarding which bodies are recognised for assistance animal accreditation.

### Establishment of a National Assistance Animal Accreditation Framework

To ensure the provisions relating to assistance animals within the *Disability Discrimination Act* are effective at a national level for both duty holders and people with disability, it is recommended that a national framework for the accreditation of assistance animals be established as a matter of urgency. The framework should set out the following key components:

#### Standards for Hygiene and Public Behaviour

The framework should define the hygiene standards that assistance animals must meet, clarifying what constitutes unacceptable habits, such as poor toileting or eating behaviours, as distinct from grooming issues. Public behaviour standards should be specified, including assessment areas such as distractibility, sensitivities, social behaviour, anxiety, reactivity, aggression, consistency, concentration, and adaptability, as outlined by the International Guide Dog Federation.

#### Frequency and Process of Review:

The framework should establish how often assistance animals must be reviewed to ensure ongoing compliance with the standards. Documentation of such reviews and follow-up actions should be required. For example, guide dogs are typically reviewed annually by their training organisation, and similar periodic assessments should be considered.

### Proof of Accreditation or Licensing:

The framework should require proof of a time-limited licence or accreditation for assistance animals to be produced upon reasonable request. This may include photo identification, which would be especially beneficial for people with disability who are unable to hold a driver's licence.

### Accessible Assessment Mechanisms:

Mechanisms should be implemented to provide assessments at a reasonable cost for individuals who rely on assistance animals that have not been, and cannot be, trained and assessed by a specialist training body. These assessments must evaluate the animal against hygiene standards and both the animal and its handler against public access and behaviour standards.

### Delegation of Accreditation Authority:

If an entity is delegated authority under the National Framework to accredit assistance animals, the framework should specify how frequently the entity's suitability is reviewed. It should also detail the requirements for such delegation, including the involvement of people with relevant disabilities in training, quality control, and the accreditation process for assistance animals.

Once the proposed framework is in place, the *Disability Discrimination Act* should be amended to reference this framework in relation to the protection against discrimination for people accompanied by an assistance animal. It is further recommended that the National Framework described above be legislated, potentially through a combination of primary and delegated legislation. Where appropriate, this legislation should be supported by guidance materials to aid implementation and compliance.

Until the National Framework is fully established, we recommend that organisations involved in training and accrediting assistance animals continue to be listed in the regulations made under the *Disability Discrimination Act*. Once the framework is operational, the Act should be amended to remove references to these regulations in section 9(2)(b), and updated to require that assistance animals be accredited under the National Framework. Consideration should also be given to whether the Act should expressly require individuals with assistance animals to carry their accreditation documents and present them upon request.

## Mandatory Disability Action Plans for Large Organisations and Government Agencies

It is recommended that the *Disability Discrimination Act* be amended to require all organisations with 100 or more employees, as defined by the *Workplace Gender Equality Act 2012* (Cth), as well as other organisations considered ‘relevant employers’ under that Act, along with government departments and agencies at all levels (to the extent permitted by federal powers), to develop disability action plans. These plans must be lodged with the Australian Human Rights Commission and organisations must report annually on progress against their action plans and on key disability equality indicators.

## Co-Design of Disability Equality Indicators

The Australian Human Rights Commission should collaborate with disability representative organisations and individuals with relevant expertise to co-design disability equality indicators. These indicators should be tailored to the different areas of activity governed by the *Disability Discrimination Act* and will be used in reporting against the action plans.

## Content and Development of Action Plans

Action Plans required under the mandatory provisions should incorporate key disability equality indicators, establish a schedule for audits, reviews, and amendments, and demonstrate evidence of co-design and ongoing involvement of people with disability. Additionally, these plans should include accessible mechanisms to ensure consultation with, and feedback from, people with disability.

## Duration of Voluntary and Mandatory Action Plans

Voluntary Action Plans should generally be valid for five years, unless a state or territory imposes a different legislated timeframe that applies to the organisation. Mandatory Action Plans, however, must be updated annually and will only remain valid as long as the mandatory action planner fulfils all reporting obligations.

## Amendments to Section 11(1)(e) of the *Disability Discrimination Act*

Section 11(1)(e) of the *Disability Discrimination Act* should be amended to clarify that relevant current action plans provided to the Australian Human Rights Commission under section 64, as well as evidence from the respondent showing fulfilment of commitments under the action plan relevant to a complaint, must be taken into account.

## Expanded Functions of the Australian Human Rights Commission

It is recommended that section 67 of the *Disability Discrimination Act* be amended to provide the Australian Human Rights Commission with additional functions. These should include reviewing Action Plans for compliance with section 61, auditing the compliance of mandatory action planners, reviewing reports submitted in respect of mandatory Action Plans, and publicly reporting on data and other outcomes related to mandatory action planners.

## Independent Prosecutorial Powers for Non-Compliance

It is recommended by PDA that an independent prosecutorial power be established to enable the pursuit of non-compliance with disability standards and related legislation. This authority should be granted either to the Australian Human Rights Commission or to another suitable independent or government body, such as the Attorney-General's Department. Additional and dedicated funding must be provided to support the relevant body, ensuring it is equipped to effectively discharge this responsibility.

## Empowering Disability Organisations to Make Complaints

Amendments to the *Disability Discrimination Act* and the *Australian Human Rights Commission Act 1986* (Cth) should clarify that disability organisations are authorised to lodge complaints regarding non-compliance with the law. This change will strengthen the ability of representative bodies to advocate for people with disability.

## Public Accessibility of Relevant Australian Standards

All relevant Australian Standards should be made publicly available to promote transparency and accessibility. This can be achieved either by appending the standards, in accessible formats, as schedules to the relevant disability standards, or by publishing them on a public-facing website managed by *Standards Australia* or another appropriate body.

## Regular Review of Disability Standards

The *Disability Discrimination Act* should be amended to include a clear provision requiring that Disability Standards are reviewed within five years of their adoption. Subsequent reviews must be completed within five years of the legislative completion requirement for the previous review. This ensures that the standards remain current and continue to meet the needs of people with disability.

## Establishment of Expert Advisory Groups

Expert advisory groups should be established for each of the Disability Standards. These groups will serve as ongoing governance mechanisms, ensuring that the standards are regularly updated and remain fit for purpose.

## Removal of the Unjustifiable Hardship Defence for 2022 Compliance Obligations

PDA recommends that, for all aspects of the *Disability Standards for Accessible Public Transport 2002* (Cth) which were required to reach full compliance by 2022, the defence of unjustifiable hardship should no longer be available. This measure aims to strengthen the enforcement of compliance for these particular obligations, ensuring that operators cannot rely on this defence to avoid meeting their responsibilities.

Further, PDA asserts that the *Disability Standards for Accessible Public Transport 2002* (Cth) should be amended to introduce a requirement for any operator that remains non-compliant with obligations that were scheduled for fulfilment by 2022. Such operators must apply for a time-limited exemption under section 55 of the *Disability Discrimination Act*. Additionally, they must provide an Action Plan outlining the timetable and steps for

achieving full compliance, and report progress to the Australian Human Rights Commission in accordance with this plan.

Any operator failing to comply with the 2022 obligations under the *Disability Standards for Accessible Public Transport 2002* (Cth), and who does not hold an exemption, should be regarded as engaging in unlawful discrimination. In such cases, the defence of unjustifiable hardship is clearly excluded, further reinforcing the expectation of compliance. Compliance with the *Disability Standards for Accessible Public Transport 2002* (Cth) must be clearly and expressly required, leaving no ambiguity regarding the obligations of operators.

### Clarifying the Definition of Adjustments in Education

We recommend that the *Disability Standards for Education 2005* (Cth) be amended to remove the term ‘reasonable’ from the definition of adjustments. Instead, adjustments should be defined in accordance with articles 2 and 24 of the Convention on the Rights of Persons with Disabilities. This would mean recognising adjustments as ‘those necessary and appropriate modifications and adjustments ... needed ... to ensure to [people with disability] the enjoyment or exercise on an equal basis with others’ the right to non-discrimination in education.

All education regulators, whether at the state, territory or federal level, should be required to assess the education providers under their jurisdiction for compliance with the *Disability Standards for Education 2005* (Cth). Non-compliance with these Standards should be explicitly listed in relevant legislation as grounds for suspension or cancellation of registration. Alternatively, registration may be made conditional upon the implementation of actions that will achieve compliance, with education providers required to report on these actions.

Legislation should establish mechanisms that require both private and public education providers to report regularly on their compliance with the *Disability Discrimination Act* and the *Disability Standards for Education 2005* (Cth). Providers should also supply relevant disability data, so that this information can be compiled and made publicly available at a national level.

## Universal Design for Learning

The *Disability Standards for Education 2005* (Cth) should be amended to expressly incorporate universal design for learning. Particular attention should be given to Part 6, which covers the standards for curriculum development, accreditation and delivery, ensuring these processes are inclusive and accessible.

## Principle of Disability Ready and Responsive

Consideration should be given to the incorporation of the principle of 'disability ready and responsive' within the *Disability Standards for Education 2005* (Cth). This would help ensure that education providers are prepared and equipped to meet the diverse needs of students with disability.

## Model Process for Building Access Administration

It is recommended that all states and territories adopt a consistent model process to administer building access for people with disability. This approach should be implemented through amendments to relevant building laws. Furthermore, the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) should be revised to explicitly reference the Protocol when considering the factors listed in the defence of unjustifiable hardship, as outlined in section 4.1 of the Standards.

## Alignment of Standards Review with National Construction Code

The *Disability (Access to Premises – Buildings) Standards 2010* (Cth) should be amended to ensure that future scheduled reviews are aligned with the three-yearly reviews of the National Construction Code. This process must include clear requirements for consultation with people with disability. Alternatively, there should be provisions allowing the National Construction Code to be updated in line with changes to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth), even if these changes occur outside the standard National Construction Code review cycle.

Organisations should be required to report on their compliance with applicable disability standards as part of their disability action plans. This reporting should form an integral part of the mandatory action planning and reporting obligations proposed in this submission.

## Inclusion of Non-Compliance and Timetables in Action Plans

Matters listed in section 61 of the *Disability Discrimination Act* that must be addressed in all Disability Action Plans should specifically include: the identification of areas where current non-compliance with relevant disability standards exists; the actions that will be taken under the action plan to achieve compliance; and the timetable for implementing those actions.

## Mandatory Data Reporting on Disability Standards

It is recommended that the *Disability Discrimination Act* be amended to require duty bearers to report data on key elements. These elements should be relevant both to measuring improvements for people with disability and to assessing compliance with disability standards.

## Establishment of a Dedicated Accessibility Standards Body

A dedicated body should be established to develop, support, and monitor accessibility standards, taking inspiration from similar bodies in the USA and Canada. One of the primary responsibilities of this body would be to review accessibility standards established in other countries and, where appropriate, implement them in Australia with necessary modifications to suit the local context.

## Part 7: Further options for reform

### Empowering the Australian Human Rights Commission

To strengthen the protection and enforcement of the rights of people with disability, PDA recommends that the *Disability Discrimination Act* be amended to empower the Australian Human Rights Commissioner and/or the Disability Discrimination Commissioner to investigate potential breaches of the Act. These investigations should proceed as though a formal complaint had been received. Where the Commissioner finds a prima facie case of breach, they should have the authority to initiate proceedings in the Federal Court of Australia as if they were an aggrieved party.

The Australian Human Rights Commission must be adequately resourced to respond to these ‘super’ complaints within a set timeframe and should be empowered to take a range of actions similar to those available to the ACCC.

### Addressing Systemic Issues and Enhancing Collaboration

Any proposed amendments should empower the Australian Human Rights Commission to identify systemic issues arising from individual or positive duty complaints, akin to the powers of the Administrative Review Tribunal. This would enable collaboration with other equality agencies to prevent the recurrence of issues affecting people with disability.

It is proposed that the Australian Human Rights Commission receive funding to develop guidance materials, co-designed with people with disability and subject matter experts. These materials would assist both the community and duty-holders in understanding the application of the *Disability Discrimination Act* to artificial intelligence and automated decision-making systems.

### Ongoing Advisory and Monitoring Mechanisms

PDA recommends that an advisory body composed of representatives from the disability community and discrimination law experts should be established. This body would contribute to reviews of the *Disability Discrimination Act* and related standards, co-design guidance materials, and help identify systemic discrimination issues, especially for individuals facing greater barriers to accessing the justice system.

## Ensuring Representation in Key Roles

Sections 113 and 120 of the *Disability Discrimination Act* should be amended to ensure that the Disability Discrimination Commissioner, whether acting or permanent, is a person who publicly identifies as having a disability and who has actively promoted equality and freedom from discrimination for people with disability.

## Promoting Supported Decision-Making

The *Disability Discrimination Act* should be amended to require that all officers of the Australian Human Rights Commission exercising powers or duties under the Act adopt the principles of supported decision-making, thereby upholding autonomy and participation for people with disability.

## Broadening Employer and Principal Liability

Consideration should be given to amending section 123 of the *Disability Discrimination Act* to broaden employer and principal liability, drawing on the approach in section 106 of the *Sex Discrimination Act 1984* (Cth), to ensure comprehensive protections against discrimination in the workplace.

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