

Submission

Review of Disability Discrimination Act 1993

Human Rights Commitment

Australian Women's Health Alliance promotes equity and commits to respect, protect and promote human rights in our work. Through this submission we seek the rights to recognition and equality before the law, and freedom from discrimination for women and people with disability.

Discrimination is a determinant of health and is intertwined in the social, cultural, legal and political determinants of health for women and people with disabilities. There is a need to prevent discrimination occurring for women with disabilities and to compensation as an outcome of complaints.

Introduction

Australian Women's Health Alliance welcomes the Attorney-General's call for public input to develop a new understanding for the rights of women and peoples with disabilities, to build a more inclusive and effective *Disability Discrimination Act 1992*.

It is essential to create spaces that recognise women with disabilities and to provide a framework that protects and promotes the rights of women and people with disabilities. The number of people acquiring different types of disabilities has significantly increased, as a result, disability has become a central agenda item for all of us.

In Australia, women and peoples with disabilities who have the greatest need to use the *Disability Discrimination Act 1992* face the greatest barriers accessing it.

In 2022 it was estimated 5.5 million (21.4 per cent) Australians had a disability, and 21.8 per cent of females had a disability.¹

Australian Disability Strategy

Improving the *Disability Discrimination Act 1992* will also further the outcome areas for diverse and priority groups under Australia's National Disability Strategy, including:

- **Employment and financial security:** People with disability have economic security, enabling them to plan for the future and exercise choice and control over their lives.²
- **Safety, rights and justice:** The rights of people with disability are promoted, upheld and protected, and people with disability feel safe and enjoy equality before the law.³
- **Education and learning:** People with disability achieve their full potential through education and learning.⁴
- **Inclusive homes and communities:** People with disability live in inclusive, accessible and well-designed homes and communities.⁵
- **Health and wellbeing:** People with disability attain the highest possible health and wellbeing outcomes throughout their lives.⁶



The National Disability Strategy is the main way Australia can implement the United Nations Convention on the Rights of Persons with Disabilities.⁷

International Rights

In 2006, the United Nations established the Convention on the Rights of Persons with Disabilities (CRPD), which is the first legally binding international accord that obligates signatory states to provide equal access to healthcare and related services for people with disabilities. The United Nations CRPD provides a clear framework to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedom by peoples with disabilities, and to promote respect for their inherent dignity.⁸

Australia ratified the CRPD in 2008, the foundation of the convention included respect for human dignity and non-discrimination, full participation, social inclusion, equality of opportunity and accessibility.

Despite the United Nations Convention on the Rights of Persons with Disability and the Disability Discrimination Act 1992 there is evidence that women with disability still face high rates of discrimination.

One of the recommendations from the outcome from the Disability Rights Now 2019 shadow report to the United Nations Convention on the Rights of Persons with Disability, to Australia was:

'Strengthen anti-discrimination laws to address intersectional discrimination; enable representative complaints; enable complaints regarding disability hate crimes; and ensure people with disability can effectively make complaints about denial of reasonable accommodation.'

to ensure that it is easy to understand and implement for people with disability and duty holders.

The Legal Process

The Australian Constitution established the Commonwealth of Australia on 1 January 1901, however, when the Constitution was introduced, there was only 5 provisions that referred to human rights.

The Australian Government entered treaties and became a signatory to international conventions under the general executive powers, these external powers enable the Australian Parliament to make laws in respect to matters physically external to Australia and matters relating to Australia's obligation under bona fide international treaties or agreements, or customary international laws.⁹

For example, the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS) was enacted with the express objective of giving effect to a number of international conventions.¹⁰

The Australian Constitution does not include a comprehensive list of rights and offers limited protection against discrimination. In Australia, anti-discrimination protections are primarily found in federal and state and territory legislations such as the *Disability Discrimination Act*. Rights are a key principle of Australia's democratic system of government.¹¹



Rights in Australia come from a range of sources, including international law, common law (law made by courts) and statute (laws made by parliaments), how we define our rights in Australia has changed over time and may continue to change in the future.¹²

This is why the findings from the Disability Royal Commission demonstrate the need to reform the *Disability Discrimination Act* to strengthen protections for peoples with disability, and ensure it is fit-for-purpose, now and in the future.¹³

1. How should disability be defined in the *Disability Discrimination Act*?

Disability legislation that protects has a broad range of definitions including:

- **Physical disability:** Impacts mobility or dexterity
- **Intellectual disability:** Impacts ability to learn or process information
- **Mental illness:** Impacts thinking processes
- **Sensory disability:** Impacts the brain and central nervous system
- **Learning disability:** Impacts acquisition, organisation, retention, and understanding of information
- **Physical disfigurement:** Impacts physical appearance
- **Immunological disability:** Impact due to the presence of organisms causing disease in the body¹⁴

The objective of the *Disability Discrimination Act 1992*, is the elimination of discrimination, ensuring women and people with disability have the same rights to equality before the law as the rest of the community, and to promote recognition and acceptance within the community of the principles that people with disability have the same fundamental rights as the rest of the community.¹⁵

For example: women with fibromyalgia and/or hypermobility syndrome may experience disability discrimination in areas of employment and healthcare, leading to complaints to the Australian Human Rights Commission and other bodies. These conditions can affect their ability to work or access services, some women may receive NDIS or Centrelink support, though obtaining it can be challenging due to high claim rejections. Discrimination for women with fibromyalgia and hypermobility can occur directly or indirectly, through workplace policies that disproportionately disadvantage women and people with these chronic conditions.

As stated above, the current definition uses terminology that does not align with the social or human rights of disability. The United Nation Convention on the Rights of Persons with Disability uses the terms, 'disabled people' or 'people with disability', there should be more focus on the person, rather than the disability. By focusing on the person, we recognise their inherent right and potential as a human being.

2. Factors to be considered in developing a new definition of disability

In developing a new definition of disability, it is critical to recognise long-term disability, whether it be mental, physical, intellectual, impairment and health or genomic conditions

The definition should also acknowledge that some disabilities link to genetic or genomic variations that influence a person's development, structure, or function. These variations may be inherited or occur spontaneously. People who experience discrimination because of genetic conditions or



predispositions, for example by insurance companies or workplaces, must be clearly protected within the scope of disability.

A contemporary definition must recognise the intersecting inequalities that shape people's experiences of disability. Gender, culture, race, class, sexuality, age, and geography can compound disadvantage and limit access to care, opportunity, and representation. Recognising this ensures that policy and practice reflect real experiences and promote genuine equality and inclusion.

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

Yes, if *Disability Discrimination Act* claims are brought for multiple or combined protected attributes it would strengthen them. Currently there are a number of protected attributes for unlawful discrimination in Australia. These equal opportunity laws are contained in the following federal legislation:

- *Australian Human Rights Commission Act 1986*
- *Racial Discrimination Act 1975*
- *Age Discrimination Act 2004*
- *Sex Discrimination Act 1984*

In state and territory legislation:

- *New South Wales Anti-Discrimination Act 1977*
- *Queensland Anti-Discrimination Act 1991*
- *Northern Territory Anti-Discrimination Act 1992*
- *Tasmanian Anti-Discrimination Act 1998*

The *Fair Work Act 2009* also provides protection from discrimination in the workplace. This is also reflected in various jurisdictional workplace health and safety Acts. Acknowledging intersectionality for women and peoples with disability who face discrimination based on other factors, such as sexual orientation, race and gender can be strengthened under the *Disability Discrimination Act* by integrating disability protection into a broader human rights framework.

The *Privacy Act 1988* provisions are relevant to healthcare, research, and employment settings, where genetic information could otherwise be used to predict or assume future health conditions. By treating genetic data confidentiality, the Act reinforces the right to privacy and helps to prevent discrimination in the context of genomic health.

For women with disabilities the legislation needs to be stronger, they suffer a higher rate of exclusion, violence and harassment. At present the existing laws are not equipped for these overlaps and providing evidence in any discrimination matter, can be difficult for women with disability.

4. Could any other changes be made to the Disability Discrimination Act to recognise and provide protection for people with disability who have intersecting identities, or addressing compounding discrimination?



The nature of the courts being less flexible, for women and peoples with disability who are addressing compounding discrimination and intersecting identities, means they will find it challenging.

To provide equal protection for women and peoples with disability under the Act, and to simplify the process and ensure more protection within the tribunals, the *Disability Discrimination Act* should include reflections on real-world experiences of intersectional discrimination. The experiences of women with disability and people facing intersectional disadvantage differ vastly and it is important to understand their human rights and the ways they can be excluded.

For example, Aboriginal and Torres Strait Islander women face the intersections of colonisation, gender violence and racism, the *Disability Discrimination Act* must be changed to acknowledge the different forms of oppression that exist for women facing intersectional discrimination.

The court's ignorance of intersectional discrimination will continue to be problematic for all women with disabilities.

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 peoples with disability, and why?

The current 2-step test for direct discrimination under the *Disability Discrimination Act* requires the applicant to prove that:

1. They have been treated less favourably than a person without disability in similar circumstances (comparator test).¹⁶
2. The treatment they experienced was because of the disability (causation).¹⁷

The proposal under the review recommends that the focus should be on the unfavourable treatment or detriment that the person with disability has faced, this means the respondent must show that the detriment the applicant suffered was not because of their disability instead the applicant must show that the detriment they suffered was because of their disability.

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

The burden of proof in the *Disability Discrimination Act*, should be addressed in line with the exception for a witness's ability under the *Evidence Act 1995* (Cth) if a witness has reduced capacity.¹⁸ The statutory demands of the *Evidence Act* on the judicial officer to directly consider the witness's disability when determining their competence and compellability to give evidence could result in the judicial officer exercising their discretion in a discriminatory fashion.¹⁹

Section 13 of the *Evidence Act 1995* permits a witness with a lack of capacity to be found competent if their capacity can be overcome, Section 14 excuses the witness from being compelled to give evidence if there would be substantial cost of delays incurred by the court in overcoming the incapacity.²⁰

Importantly, Section 31 explicitly provides for 'deaf and mute' witnesses, requiring that the judge adopt appropriate ways of hearing the witness.²¹ This provision ensures that a flexible approach to overcoming incapacity is adopted by the judicial officer when determining whether a witness with a communication disability is competent and compellable.²²



The *Evidence Act* is important for women and peoples with disabilities and the burden of proof, as it establishes rules with fairness and protection within the legal system. Women with disabilities who are going through this process can at times be exploited and misunderstood. Special measures, arrangements and witness support are important when women with disabilities are providing evidence effectively. They need to be protected, the integrity of the justice system needs to be upheld, when women with disability suffer from discrimination.

Under the *Fair Work Act* the burden of proof is on the employer in cases for disabilities. The general protection provides that it is unlawful for an employer to take adverse action against a person because of their mental or physical disability. In determining if a woman with disability is discriminated against, she must provide evidence on her own behalf, the *Fair Work Act* has incorporated the *Evidence Act* as it clearly states that a person is not competent if their disability prevents them from understanding questions or giving an understandable answer.

7. How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?

Indirect discrimination under the *Disability Discrimination Act* occurs when there is an unreasonable 'requirement or condition' imposed that is the same for everyone but has an unfair effect on people with disability.²³

8. Should the reasonable 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

The reasonable element should be removed. It is difficult to prove in court. Section 6(1) of the *Disability Discrimination Act* provides that indirect discrimination occurs when a person with disability is required to comply with a condition or requirement, which they cannot comply with because of their disability, and this requirement disadvantages a women or person with disabilities.

It adds a layer of inequity, which targets those it claims to assist. For example, a woman with intersectional disability would also have difficulties with this process, because the respondent must prove their actions to the women was reasonable in all circumstances. If the respondent can demonstrate they did not indirectly discriminate, this would impose an unjustifiable hardship on the woman. Therefore, the reasonable exemption should be removed.

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?

The language of "does not or would not comply or is not able or would not be able to comply" should be removed as it would remove the burden on women and peoples with disabilities to prove they 'cannot' comply.

The process to prove discrimination has taken place can be complex and creates barriers to accessing justice. This must shift to focus on the respondent to prove they did not discriminate rather than on a women or person with disability who is unable to meet a requirement.



10. Should the Disability Convention be included in the objects provision of the Disability Discrimination Act?

Yes, the Disability Convention should be included in the object provision of the *Disability Discrimination Act* as the Act needs to be consistent with the international human rights treaties which Australia is signatory to. This would strengthen the human rights standards to an international level and ensure those standards are being monitored through the Universal Period Review process and through the mandate of the Special Rapporteur on Disability.

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?

Yes, this aligns with the human rights treaties and takes the approach that all women and peoples with disability have human rights, to eliminate discrimination and better protect the rights of women and peoples with disability.

Conclusion

Through the *Disability Discrimination Act 1992* review there must be additional legislative change, otherwise women and peoples with disability will continue to face discrimination. International regulations and Australia specific laws and policies are to protect the rights of women and peoples with disabilities and outlaw discrimination.

About us

Australian Women's Health Alliance provides a national voice on women's health. We highlight how gender shapes experiences of health and health care, recognising that women's health is determined by social, cultural, environmental, and political factors.

Contact us

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²⁰ Dominique Allen, '[Reducing the Burden of Proving Discrimination in Australia](#)'.

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