



PEOPLE WITH DISABILITY
AUSTRALIA

A voice
of our
own

Making NSW discrimination laws work for people with disability

Submission to the NSW Law Reform Commission's review
of the *Anti-Discrimination Act 1977* (NSW)

SEPT
2023

Copyright information

Making NSW discrimination laws work for people with disability – Submission to the NSW Law Reform Commission review of the Anti-Discrimination Act 1977 (NSW).

First published in 2023 by People with Disability Australia Ltd.
Level 8, 418a Elizabeth Street, Surry Hills, New South Wales, Australia 2010
Head office also in Sydney
Email: pwd@pwd.org.au
Phone: +61 2 9370 3100 Fax: +61 2 9318 1372
URL: www.pwd.org.au

Typeset in Arial 12 and 14 pt and VAG Rounded 16 and 26 pt

© People with Disability Australia Ltd. 2023

The moral rights of the authors have been asserted

National Library of Australia Cataloguing-in-Publication data:

Creator(s): Julian Laurens
Title: Making NSW discrimination laws work for people with disability –
Submission to the NSW Law Reform Commission review of the *Anti-Discrimination Act 1977 (NSW)*.

All rights reserved. Except as permitted with the *Australian Copyright Act 1968* (for example, a fair dealing for the purposes of study, research, criticism or review), no part of this book may be reproduced, stored in a retrieval system, communication or transmitted in any form or by any means without prior written permission. All inquiries should be made to the publisher at the address above.

Suggested citation:

Laurens, J., *Making NSW discrimination laws work for people with disability – Submission to the NSW Law Reform Commission review of the Anti-Discrimination Act 1977 (NSW)*, 29 September 2023, People with Disability Australia, Sydney.

ISBN 978-0-6459325-1-5



Table of Contents

Introduction	5
The experience of PWDA individual advocates	6
Submission structure	8
Summary of Recommendations	10
Eliminating systemic discrimination	10
Positive duties: reasonable adjustments and preventing discrimination	10
Improving access to justice	11
Part 1 - Context	12
Human rights	12
Intersectionality	13
Other legal and policy considerations	14
Recommendations	16
Part 2 - Towards substantive equality and eliminating systemic discrimination	17
The example of Victoria, the ACT, and the United Kingdom	18
Recommendation	19
Part 3 - Reasonable adjustments and preventing discrimination as positive duties	20
The example of the United Kingdom and Victoria	21
Recommendations	24
Part 4 - Access to justice: decision support services and strengthening Anti-Discrimination NSW	25
Capacity and decision support services	25
Strengthening Anti-Discrimination NSW	26
Recommendations	27
Conclusion	29

About PWDA

People with Disability Australia (PWDA) is a national disability rights and advocacy organisation made up of, and led by, people with disability.

We have a vision of a socially just, accessible and inclusive community in which the contribution, potential and diversity of people with disability are not only recognised and respected but also celebrated.

PWDA was established in 1981, during the International Year of Disabled Persons.

We are a peak, non-profit, non-government organisation that represents the interests of people with all kinds of disability.

We also represent people with disability at the United Nations, particularly in relation to the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Our work is grounded in a human rights framework that recognises the CRPD and related mechanisms as fundamental tools for advancing the rights of people with disability.

PWDA is a member of Disabled People's Organisations Australia (DPO Australia), along with the First People's Disability Network, National Ethnic Disability Alliance, and Women with Disabilities Australia.

DPOs collectively form a disability rights movement that places people with disability at the centre of decision-making in all aspects of our lives.

The work of PWDA embraces the 'Nothing About Us, Without Us' motto of the international disability community and Disabled Peoples' International, the international organisation representing national organisations of people with disability in over 130 countries.

Introduction

PWDA welcomes the opportunity to provide preliminary comments on the New South Wales Law Reform Commission's (NSWLRC) review of the *Anti-Discrimination Act 1977* (NSW) (ADA).²

PWDA is Australia's peak cross-disability Disability Representative Organisation and is also funded to provide cross-disability systemic advocacy on behalf of people with disability in New South Wales under the Department of Communities and Justice's *Disability Advocacy Futures Program*. Nationally 4.4 million Australians have a disability, around 17.7% of the population.¹ The most recent data shows that 16.9% of the NSW population have a disability, equivalent to 1,346,200 residents.²

When compared with people without disability, people with disability continue to experience discrimination and poorer life outcomes across all life domains.³ It is estimated that 22% of people aged over 15 with disability in Australia have experienced some form of discrimination compared with 15% of those without disability.⁴ Disability discrimination is the largest ground of complaint to Anti-Discrimination NSW (ADNSW)⁵ and the Australian Human Rights Commission (AHRC).⁶ Discrimination against people with disability appears deeply entrenched across systems.

Governments have an obligation to respect, protect and fulfil human rights.⁷ Disability Rights are Human Rights. However, the ADA is now regarded as 'out of step with community standards and expectations'⁸ and no longer an example of best practice anti-discrimination legislation.⁹

¹ Australian Institute of Health and Welfare, *People with Disability in Australia 2022* (2022) <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/about>; Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (2019) <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>.

² Australian Bureau of Statistics (n 1).

³ Rosemary Kayess and Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation* (UNSW Social Policy Research Centre, 2020); Australian Bureau of Statistics (n1); Australian Institute of Health and Welfare (n 1); Jeromey B Temple, Margaret Kelaher and Ruth Williams, 'Discrimination and avoidance due to disability in Australia: evidence from a National Cross-Sectional Survey' (2018) 18 *BMC Public Health* 1347.

⁴ Australian Institute of Health and Welfare (n 1) 163.

⁵ Anti-Discrimination NSW, *Annual Report 2021-22* (2022) 15 <https://antidiscrimination.nsw.gov.au/documents/annual-reports/anti-discrimination-annual-report-2021-22.pdf>

⁶ Australian Institute of Health and Welfare (n 1) 163.

⁷ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) Equality and non-discrimination* CRPD/C/GC/6 (26 April 2018) [30]; Australian Human Rights Commission, *Free and Equal. A reform agenda for federal discrimination laws* (December 2021) 16; United Nations, *Convention on the Rights of Persons with Disabilities* (12 December 2006), article 5.

⁸ Public Interest Advocacy Centre, *Leader to Laggard: The case for modernizing the NSW Anti-Discrimination Act* (2021) 3.

⁹ *Ibid.*, 3.

The overarching theme of this preliminary submission is that the ADA must support the achievement of substantive equality, and this can be assisted with the introduction of positive duties to provide reasonable adjustment and prevent discrimination.¹⁰

PWDA believes the goal of substantive equality is to ensure the full equal inclusion and participation of all people across all social, community, political and economic domains. The concept of substantive equality ‘resists capture by a single principle’.¹¹ Central to our conception of substantive equality is:

- a celebration and respect for human diversity and human dignity reflected in all decision-making
- a consideration of a person’s existing individual circumstances and experiences when they interact with systems so that where necessary measures can be put in place to provide equality of opportunity *and* equality of outcomes; and
- the building of inclusive frameworks across systems in which accessibility is factored in from the beginning and discrimination is challenged at its roots.

This is contrasted with the dominant *formal equality* perspective based on the principle of ‘likes treated as likes.’¹² A formal approach to equality is not concerned with equality of outcomes, does not consider an individual’s characteristics or ‘differences’ for this purpose, and is not concerned with combatting entrenched systemic discrimination.¹³

The experience of PWDA individual advocates

PWDA is funded by the NSW Department of Communities and Justice’s *Disability Advocacy Futures Program* to provide individual advocacy. Our individual advocates’ experience with the ADA provides insights into what may be improved. A consistent observation was that rights, obligations, and tests for discrimination in the ADA are unclear. Our individual advocates felt the current ADA is:

¹⁰ PWDA notes there are a range of interventions that can promote the inclusion of people with disability in the community. Strong anti-discrimination legislation is one of these, and can be seen as foundational and complementary to others. For discussion see eg, Jan Idle et al, *Research Report – Changing community attitudes to improve inclusion of people with disability* (Royal Commission into Violence, Abuse, Neglect and Exploitation of people with Disability, 2022).

¹¹ Sandra Fredman, ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

¹² *Lowe v The Queen* (1984) 154 CLR 606, 609. See also *Leeth v The Commonwealth* (1992) 172 CLR 455 per Mason CJ, Dawson and McHugh JJ at [32]; Brennan J at [7] and [13]; Deane and Toohey JJ at [13]; Gaudron J at [21]. For discussion see eg, Fredman (n 11); Alice Taylor, ‘The Conflicting Purposes of Australian Anti-Discrimination Law’ (2019) 42(1) *University of New South Wales Law Journal* 188.

¹³ See eg, Taylor (n 12).

- poorly structured and not consistent with human rights language and principles
- not empowering of people with disability, not able to promote substantive equality, and not able to adequately prevent discrimination from occurring
- not helpful in determining what action to take, with no clear pathways for action, and no clarity about outcomes
- enforcing or appealing a decision made by the Anti-Discrimination Board of NSW was considered difficult and time consuming; and
- of limited use as an educational tool to assist PWDA clients, advocates, the wider community, and organisations to better understand human rights, and how these may be promoted and protected.

Case study 1 – Jessie

Jessie (name changed) is an adult with hearing and psychosocial disability. They were serving a custodial sentence in a NSW prison. PWDA advocates were supporting Jessie and their family to ensure they exited prison with support in place. The family solicitor would also speak with Jessie.

Advocates met with Jessie over video at least once per fortnight. They noticed it was difficult to hear Jessie because of a loud humming noise. While a staff member said “it wasn’t too bad at his end and would go away” Jessie could not hear and understand the advocate properly over the headphones, or the speaker in the room.

Jessie’s family told the advocates that Jessie was distressed about not being able to hear and communicate when using the video link. The advocate suspected the audio equipment was broken or not suitable for use for a person with a disability.

The advocate spoke to a Centre supervisor over the phone about the difficulty hearing. The advocate suggested a new suitable headset or speaker be used to allow Jessie to fully participate in meetings. They were told “that’s the way it is, others have used it and not complained”, “it’s like that for others so it’s not discrimination” and “we can’t be giving people all this special treatment”.

The advocate spoke to the family solicitor who acknowledged there might be disability discrimination, but it may be difficult to show, and might be expensive if a complaint was pursued. They indicated they would write a letter to the Correctional Centre about the disability discrimination and human rights concerns the advocate identified.

Four weeks later advocates noticed Jessie was wearing new headphones, and they acknowledged Jessie could hear reasonably clearly when compared with before.

Relevance of this case study:

- The ADA provided little to no assistance to Jessie in preventing potential discriminatory conduct.
- There is a continuing lack of awareness and understanding of human rights and what constitutes discrimination throughout the community. Positive duties may assist in understanding obligations.

Case study 1: Jessie

The experience of PWDA advocates and clients aligns with the view of the Public Interest Advocacy Centre (PIAC) that:

Serious limitations [of the ADA] include a narrow range of groups offered protection, outdated tests for what constitutes discrimination, and excessively broad exceptions allowing discrimination by organizations like private educational authorities.

The Act is long, complex and idiosyncratic, with structural issues compounded by each new attribute. This has made it very difficult for people affected by discrimination to understand and use the ADA to protect their rights.¹⁴

Submission structure

The New South Wales Law Reform Commission (NSWLRC) has asked for preliminary submissions to the review of the ADA to identify key areas to focus attention. This preliminary submission is organised into four parts and a conclusion:

- Part 1 looks at key contexts such as a human rights model of analysis and intersectionality which must inform the review of the ADA overall

¹⁴ Public Interest Advocacy Centre (n 8) 3.

- Part 2 identifies that substantive equality and the elimination of systemic discrimination must be key objects of the new ADA
- Part 3 looks at positive duties as a key tool to promote substantive equality, eliminate systemic discrimination, and change community attitudes towards disability; and
- Part 4 looks briefly at access to justice and argues that decision-making supports including supported decision-making must be made available and ADNSW must receive proper funding to fulfil statutory obligations.

The following Terms of Reference (ToR) provided to the NSWLRC provide the general basis for this submission and recommendations:

ToR 1: whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards.

ToR 7: whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life.

Further recommendations are based on the following themes derived from the ToR:

1. The need to address and eliminate systemic discrimination and promote substantive equality (e.g., ToR 4, 9,10, 11).
2. The ADA as a tool to educate and promote change in community attitudes about disability and discrimination (e.g., ToR 1,4, 7, 11).

The Terms of Reference, themes, and recommendations identified are interrelated.

Summary of Recommendations

Recommendation 1 – The new Anti-Discrimination Act (ADA) must be informed by, and grounded in, a human rights model of disability, which recognises human dignity as the foundation for all rights and recognises the critical importance of intersectionality.

Recommendation 2 – The ADA must recognise the primacy of international human rights instruments (such as the CRPD) as being the basis from which rights flow and reflect and support the purposes and principles of those instruments without qualification.

Recommendation 3 – Anti-Discrimination NSW must expand delivery of community education to all NSW residents about the ADA, so all are aware of their obligations to prevent discrimination from occurring. The ADA and its objects need to be promoted as part of this community education with the aim to combat attitudinal barriers to inclusion, advance and protect human rights broadly in NSW, and achieve substantive equality.

Eliminating systemic discrimination

Recommendation 4 – The ADA must contain key objects and purposes recognising that systemic discrimination operates as a significant barrier to social inclusion for people with disability, that formal equality has limitations in tackling systemic discrimination, that promoting equality of opportunity and equality of outcomes challenges systemic discrimination, and that targeted measures are a key method to advance the achievement of substantive equality.

Positive duties: reasonable adjustments and preventing discrimination

Recommendation 5 – The ADA must contain positive duties on relevant duty holders as identified in the ADA, to provide reasonable adjustments and to prevent and eliminate discrimination up to the point of ‘unjustifiable hardship’.

Recommendation 6 – The ADA must state that an aim or purpose of the Act is to encourage a ‘preventative culture’ towards discrimination amongst all members of the community not just those in the public sphere or who are otherwise identified as having a

specific duty to prevent discrimination, in line with the Australian Human Rights Commission's *Free & Equal* model.

Improving access to justice

Recommendation 7 – The ADA must include provisions guaranteeing:

- independent fully funded decision-making support services including supported decision-making for complainants where needed
- that decisions made through supported decision-making by the person requiring support are regarded at law as being those of the person requiring support; and
- that explanatory materials on the complaint process are made available in a variety of accessible formats, modalities and languages considering the diversity of disability.

Recommendation 8 – Legal Aid NSW and Community Legal Centres in NSW must be funded so that all persons experiencing discrimination can access assistance with legal tasks, advice, and critical representation when seeking to make a complaint under the ADA.

Recommendation 9 – The powers of Anti-Discrimination NSW (or new body to administer the ADA) must be reviewed with an emphasis on strengthening its ability to identify, investigate, and challenge systemic discrimination independently of receiving a complaint. The body that administers the ADA must be provided with adequate funding to fully undertake its functions and meet the aims and objects of the new legislation including:

- an expanded rights awareness campaign
- the provision of a range decision-making supports; and
- expanding direct information and assistance services aimed at improving access to justice for people who wish to make a discrimination complaint.

Recommendation 10 – The nature of the powers, functions, and budgetary requirements of Anti-Discrimination NSW (or the new body to administer the ADA) must be the basis for a future consultative process.

Part 1 - Context

There are three interrelated contexts providing the conceptual foundation for this submission and which should be considered when reviewing the ADA. These are:

1. human rights
2. intersectionality; and
3. other legal and policy considerations such as Australia's Disability Strategy 2021-2031.

Human rights

Human Rights Framework

This submission is undertaken in the context of Australia's current review of its National Human Rights Framework (NHRF).¹⁵ PWDA agrees with the Australian Human Rights Commission's (AHRC) vision on how this framework should look.¹⁶ A key foundation of the AHRC framework is enhanced human rights education throughout the community, and positive duties including on public authorities to act and make decisions that are compatible with human rights.

The President of the AHRC recently stated that:

The primary benefit of the National Human Rights Framework is that it will foster a culture of respect for human rights throughout the whole of government and across the country. It would likely contribute to a better understanding and awareness of Australia's human rights obligations, increasing acceptance of them, and provide greater prominence to human rights through the demonstration of political will by

¹⁵ See <https://www.aph.gov.au/parliamentary_business/committees/joint/human_rights>.

¹⁶ See eg, Australian Human Rights Commission, *Inquiry into Australia's Human Rights Framework*. Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights (May 2023) <<https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-australias-human-rights-framework>>; Australian Human Rights Commission, *Free and Equal. Position paper: A Human Rights Act for Australia* (December 2022) <<https://humanrights.gov.au/human-rights-act-for-australia>>.

*the Government and Parliament. It would provide the foundation for, and enhance, 'rights-mindedness' in policy, law and decision making.*¹⁷

PWDA believes that fostering such 'a culture of respect for human rights throughout the whole of Government and across the country' must be an important purpose and benefit delivered by the ADA.

Noting that NSW is a jurisdiction that has no human rights legislation, a step to achieve a culture of respect for human rights is to reflect and support the structure and goals of a NHRF as outlined by the AHRC, in the ADA. Aligning the ADA with a national human rights approach is critical as the ADA will be the primary document for the protection of rights and prevention of discrimination in NSW.

Human rights model of disability

A review of the ADA must also be informed by a human rights model of disability.

A human rights model of disability recognises all people have inherent dignity and worth and encompasses an understanding of intersectionality and diversity.¹⁸ The Committee on the Rights of Persons with Disabilities (the Committee) links a human rights model with intersectionality stating:

*The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.*¹⁹

Intersectionality

The concept of 'intersectional discrimination' (also referred to as 'intersectional disadvantage'²⁰) refers to a situation where a person can experience multiple overlapping

¹⁷ Rosalind Croucher, 'A new national human rights framework for Australia' (Speech, Annual Castan Centre for Human Rights Law Conference, 21 July 2023) <<https://humanrights.gov.au/about/news/speeches/new-national-human-rights-framework-australia>>.

¹⁸ Kayess and Sands (n 3); Australian Bureau of Statistics (n 1) 9.

¹⁹ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) Equality and non-discrimination* CRPD/C/GC/6 (26 April 2018) [9].

²⁰ See eg, Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 84.

forms of discrimination based upon them having a variety of attributes linked to disadvantage such as being female, being from a culturally and linguistically diverse background, and having a disability.²¹

The AHRC has indicated that intersectionality is an area that needs to be managed effectively and reflected clearly in discrimination legislation.²² Applying an ‘intersectional lens’ that acknowledges intersectionality between attributes and across systems helps us consider the impact of laws and whether a particular legislative or policy response is appropriate given the likelihood of intersectionality.²³

The intersectional lens is a key method policymakers can use to ensure those who experience significant disadvantage can be included in actions designed to reduce inequality.²⁴

Other legal and policy considerations

Commonwealth

Australia’s Disability Strategy 2021-2031

The ADA must support the achievement of the seven outcome areas contained in Australia’s Disability Strategy 2021-2031.²⁵

Review of federal discrimination laws

The review of the ADA should consider reforms to federal discrimination laws proposed by the AHRC in its 2021 report, *Free & Equal. A reform agenda for federal discrimination laws*.²⁶ PWDA believes the following recommendations in the *Free & Equal* reports are relevant to the current review of the ADA:

- inserting positive duties to provide reasonable adjustment and prevent discrimination

²¹ Australian Human Rights Commission (n 7) 222.

²² See eg, *ibid*, Ch. 4.7

²³ *Ibid*, 222

²⁴ Beth Goldblatt, ‘Intersectionality in international anti-discrimination law: addressing poverty in its complexity (2015) 21(1) *Australian Journal of Human Rights* 47.

²⁵ Australia’s Disability Strategy Hub, <https://www.disabilitygateway.gov.au/ads>

²⁶ See eg, full report at <<https://apo.org.au/node/315602>>. For broad overview including summary reports see

<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>. Note subsequent reports as well.

- removing the comparator test for direct discrimination and simplifying tests for indirect discrimination
- ensuring laws are clear and simplified so it can be used for education about human rights generally; and
- identifying how discrimination law reforms will support the aims of the national disability strategy.

New South Wales

NSW has the *Disability Inclusion Act 2014* (NSW) (DIA).²⁷ The objects of the DIA include the acknowledgement ‘that people with disability have the same human rights as other members of the community and that the *State and community have a responsibility to facilitate the exercise of those rights*.’²⁸ Section 3(e) notes an object of the DIA is to ‘support, to the extent reasonably practicable, the purposes and principles of the *United Nations Convention on the Rights of Persons with Disabilities*.’²⁹

Section 4 of the DIA identifies twelve general principles which have some grounding in a human rights model. These are referred to in Section 4(1) as being the ‘disability principles.’ The principles acknowledge that people with disability ‘have an inherent right to respect for their worth and dignity as individuals,’³⁰ and a ‘right to access information in a way that is appropriate for their disability and cultural background and enables them to make informed choices.’³¹

PWDA suggests the objects in Section 3 and the disability principles in Section 4 of the DIA provide some guidance to a review of the ADA. PWDA believes that as a minimum, all legislation, regulation, government action, and other public sphere activity in NSW must consider how it is consistent with the objects and disability principles contained in the DIA.

²⁷ *Disability Inclusion Act 2014* (NSW) <<https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2014-041>>.

²⁸ *Ibid*, s 3(a) *emphasis added*.

²⁹ PWDA notes that while we think that referencing the CRPD in legislation is a positive step, we do not think should be any qualifier such as ‘to the extent reasonably practicable’.

³⁰ *Disability Inclusion Act 2014* (NSW) s 4(2).

³¹ *Ibid*, s 4(9).

Recommendations

Recommendation 1 – The new Anti-Discrimination Act (ADA) must be informed by, and grounded in, a human rights model of disability, which recognises human dignity as the foundation for all rights and recognises the critical importance of intersectionality.

Recommendation 2 – The ADA must recognise the primacy of international human rights instruments (such as the CRPD) as being the basis from which rights flow and reflect and support the purposes and principles of those instruments without qualification.

Recommendation 3 – Anti-Discrimination NSW must expand delivery of community education to all NSW residents about the ADA, so all are aware of their obligations to prevent discrimination from occurring. The ADA and its objects need to be promoted as part of this community education with the aim to combat attitudinal barriers to inclusion, advance and protect human rights broadly in NSW, and achieve substantive equality.

Part 2 - Towards substantive equality and eliminating systemic discrimination

Anti-discrimination laws are a primary method by which human rights are protected in Australia, particularly where the jurisdiction does not have human rights legislation, as is the case in NSW. Promoting substantive equality and eliminating systemic discrimination must be key aims and objectives of the ADA.³²

‘Equality’ is a concept and value central to Australia’s vision of justice. However, conceptions of equality in Australia’s systems and the general community are heavily influenced by a ‘formal equality’ view, and the formal equality view dominates understandings of the purpose of anti-discrimination laws.³³ The formal view of equality is classically conceived of as ‘likes must be treated alike’.

Formal equality has an advantage in appearing neutral. However, it is not concerned about equality of outcome.³⁴ This is contrasted with a substantive vision of equality which is focused on equality of outcomes and opportunity. Substantive equality is based on a human rights model of social relations that acknowledges difference and diversity as key to human identity and dignity. It recognises people start from different positions with different characteristics, and therefore may require reasonable adjustments to assist them to fully participate in the community.

The Committee on the Rights of Persons with Disabilities notes formal equality may:

*Combat negative stereotyping and prejudices, but it cannot offer solutions for the ‘dilemma of difference,’ as it does not consider and embrace differences among human beings. Substantive equality, by contrast, also seeks to address structural and indirect discrimination and takes into account power relations. It acknowledges that the ‘dilemma of difference’ entails both ignoring and acknowledging differences among human beings in order to achieve equality.*³⁵

³² Australian Human Rights Commission (n 7) 25.

³³ Taylor (n 13) 202.

³⁴ See eg, *Kruger v the Commonwealth* (1997) 146 ALR 126 per Dawson J at 157-8.

³⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) Equality and non-discrimination* CRPD/C/GC/6 (26 April 2018) [10].

Alice Taylor similarly argues that while formal approaches to anti-discrimination law do have a place by protecting people from obvious forms of discriminatory treatment, they do 'not require any broader change to practices or policy which continue to exclude those who are different' and are therefore 'an ineffective framework to utilise when considering provisions designed to provide a more positive and substantive form of equality.'³⁶

The practical result of the ignoring of individual characteristics and differences (such as disability) by formal equality (in terms of actual outcome) is the perpetuation of a particular norm which denies the identity and full inclusion in the community of people with disability. As Justice Brennan observed in *Gerhardy v Brown*:

Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social cultural or any other field of public life'.³⁷

PWDA submits that an over reliance on formal equality has entrenched inequalities across multiple systems in NSW, including health, education, and justice and that the only way to tackle these are through methods aimed at achieving substantive equality.

The example of Victoria, the ACT, and the United Kingdom

The *Equal Opportunity Act 2010 (Vic)* (EOA) and the *Discrimination Act 1991 (ACT)* (DA) recognise in an almost identical way the need to eliminate systemic discrimination and move towards substantive equality.³⁸ It is recognised in both the Victorian and ACT Acts that a strict or simple equal application of the law (formal equality) has limitations and is associated with negative outcomes such as an increase in disadvantage and the entrenchment of inequality.³⁹

The *Equality Act 2010 (UK)* (EA) also recognises in its introduction that a key function of the Act is to require decision makers to make decisions after regarding 'the desirability of reducing-socioeconomic inequalities,' the 'need to eliminate discrimination' and the need to 'increase equality of opportunity.'⁴⁰ The Act further provides the following:

³⁶ Alice Taylor (n 13).

³⁷ *Gerhardy v Brown* (1985) 159 CLR 70, 129.

³⁸ *Equal Opportunity Act 2010 (Vic)* ss 3(a), (c), (d); *Discrimination Act 1991 (ACT)* ss 4(a), (c), (d).

³⁹ *Equal Opportunity Act 2010 (Vic)* ss 3(d)(i-iii); *Discrimination Act 1991 (ACT)* ss 4(d)(i-iii).

⁴⁰ *Equality Act 2010 (UK)* <<https://www.legislation.gov.uk/ukpga/2010/15/introduction>>.

- Section 1(1) of the EA states again that functions of an authority must be exercised ‘in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.’
- Sections 149(1)(a)-(b) of the EA note that a public authority must exercise its functions in a manner that eliminates discrimination and advances ‘equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.’

A key method by which substantive justice can be promoted and systemic discrimination challenged is through the introduction of a **positive duty to provide reasonable adjustments**, and a **positive duty to prevent discrimination**. This is discussed in Part three.

Recommendation

Recommendation 4 – The ADA must contain key objects and purposes recognising that systemic discrimination operates as a significant barrier to social inclusion for people with disability, that formal equality has limitations in tackling systemic discrimination, that promoting equality of opportunity and equality of outcomes challenges systemic discrimination, and that targeted measures are a key method to advance the achievement of substantive equality.

Part 3 - Reasonable adjustments and preventing discrimination as positive duties

PWDA believes that including a positive duty to provide reasonable adjustments and a positive duty to prevent discrimination in the ADA will provide increased protections to *all* NSW residents.

By providing clear expectations on how community members must behave, positive duties in legislation provide a significant education benefit and help change community attitudes towards disability. Positive duties can directly address systemic discrimination.⁴¹ The AHRC notes for example:

*The benefit of positive duties is that they are focused on instituting change – rather than on fault. A positive duty would support businesses to take steps to embed non-discrimination measures into their operations. It would also benefit businesses by helping to prevent individual claims of discrimination from being brought against them.*⁴²

The prevention of discrimination through the building of what the AHRC calls a ‘preventative culture’ and the promotion of ‘equality of treatment and equal opportunity’ (substantive equality) must be the ‘ultimate goals’ of discrimination legislation.⁴³

PWDA believes that changing community attitudes towards disability must extend beyond duty holders, and beyond a person’s current ‘lived experience’ or understanding of disability. In other words, changing community attitudes towards disability must be about more than a community adhering to a *legal obligation* influencing what they do in the public sphere.

⁴¹ Australian Human Rights Commission (n 7) 60.

⁴² Australian Human Rights Commission, *Free and Equal. A reform agenda for federal discrimination laws. Summary Report* (2021) 11.

⁴³ See eg, Australian Human Rights Commission (n 7) Chapter 2 and pp 4, 25. Note that while the AHRC is referring largely to a need to reform Commonwealth anti-discrimination laws their insights, principles, and recommendations are relevant to discrimination law reform broadly, including the review of the ADA.

Instead, the ideal should be that attitudes in the public sphere and private spheres are changed because we recognise that we are all *human* with intrinsic worth and *rights and exist in a shared space as one community*. The ADA should consider how it can promote the dignity of all beyond just adherence to legal obligations.

Building a 'preventative culture' is critical as NSW discrimination law is almost entirely reliant on a person coming forward to make a complaint, and many people who do experience discrimination do not take any action for a variety of reasons, including lack of knowledge about their rights, lack of knowledge of where to get assistance, and concerns about impact of proceedings on their health and wellbeing or future career.⁴⁴

Along with a positive duty to prevent discrimination, a **positive duty to provide reasonable adjustments** (up to the point of 'unjustifiable hardship') is a key mechanism PWDA believes will support efforts to promote substantive equality.⁴⁵

While subject to reasonable exceptions, these positive duties are to apply broadly across the public sphere including but not limited to, employment, education, the provision of goods and services, accommodation, clubs, and sport.

The example of the United Kingdom and Victoria

The *Equality Act 2010* (UK) contains a '[p]ublic sector duty regarding socio-economic inequalities',⁴⁶ and a '[p]ublic sector equality duty'.⁴⁷ These duties apply to all exercising public functions. These duties can be broken down as:

- A duty to exercise functions in a way that will reduce inequalities of outcome which result from socio-economic disadvantage⁴⁸
- A duty to eliminate discrimination⁴⁹
- A duty to advance equality of opportunity⁵⁰

⁴⁴ Australian Human Rights Commission (n 7) 56.

⁴⁵ Ibid, 286. See also Dominique Allen, 'Mechanisms Promoting Equality in the Equal Opportunity Act 2010 (VIC)' (2020) 44(2) *Melbourne University Law Review* 459, 469.

⁴⁶ *Equality Act 2010* (UK) s 1.

⁴⁷ Ibid, s 149.

⁴⁸ Ibid, s 1(1)

⁴⁹ Ibid, s 149(1)(a).

⁵⁰ Ibid, s 149(1)(b).

- A duty to encourage participation in public life;⁵¹ and
- A duty to provide reasonable adjustments to minimize or remove disadvantage.⁵²

Section 15 of the *Equal Opportunity Act 2010* (Vic) (EOA) is an example of a **positive duty to not engage in discrimination and to eliminate discrimination, sexual harassment, or victimisation**. It applies to a person who has a duty under EOA Parts 4, 6 or 7 – they are not to engage in discrimination, sexual harassment, or victimization,⁵³ and must take ‘reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimization as far as possible.’⁵⁴

Section 20 of the EOA is an example of the **positive duty to make reasonable adjustments**, in this instance in employment (it applies in other domains). Section 20(2) states:

The employer **must** make **reasonable adjustments** unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.

The Victorian Civil and Administrative Tribunal (VCAT) has described reasonable adjustment provisions in the EOA as an ‘explicit requirement.’⁵⁵

Feedback from the operation of the EOA suggests the duty to make reasonable adjustments is one of the Acts ‘greatest strengths’, leading to an increased use of the EOA versus bringing a complaint under the *Disability Discrimination Act 1992* (Cth).

The positive duty has improved access to justice as it is now easier to point to a failure to make a reasonable adjustment (breach of a duty), and that can be the basis for a claim.⁵⁶

⁵¹ Ibid, s 149(3)(c).

⁵² Ibid, 149(3).

⁵³ *Equal Opportunity Act 2010* (Vic) s 15(1).

⁵⁴ Ibid, s 15(2).

⁵⁵ Allen (n 45) 499.

⁵⁶ Ibid, 488-489.

Case study 2 – Kacie

Kacie (name changed) is a 23-year-old student. They work as a sales assistant in a small metropolitan clothing boutique where they have worked for 8 months.

In between serving customers and looking after stock Kacie stands behind the counter. In addition to a mild psychosocial disability, Kacie has a physical disability which can cause pain and discomfort if they spend long hours standing.

Kacie asked the manager for some kind of shock absorbing mat placed behind the counter to stand on and a high stool or chair so they could briefly rest off their feet in between serving customers. The manager refused saying staff shouldn't sit around outside of their break, and that a chair and floor mats would be a safety risk.

Kacie called a PWDA advocate very upset. They felt there was no safety risk as it was a closed counter area. They felt having an option to get off their feet would not hinder work performance. Kacie said they were not sure of their rights, 'the law was confusing,' and they were not confident in speaking with the manager about disability and rights because of this.

The advocate looked at Kacie's employment contract and noted it was not clear at all about reasonable accommodation, inclusion, and accessibility. With permission from Kacie, the advocate contacted the employer to talk about the need for inclusion and reasonable adjustment. The manager said that they didn't have to do anything and there was no discrimination.

The advocate referred the matter to a Community Legal Centre but continued to act as an additional advocate and support.

Unfortunately, two weeks after this Kacie decided not to proceed with a discrimination complaint. When speaking with the advocate they stated the process to go to mediation or conciliation was going to take too long, they needed some kind of support at work now, they were unclear of what the outcome would be anyway, they were concerned about impact on future employment, and were concerned about potential costs. Kacie

said it was not yet clear what the final basis of the complaint was going to be. Kacie said they were feeling very stressed and had resumed anti-anxiety medication. Kacie said they were considering resigning from the job.

Relevance of this case study:

- A clear duty to provide reasonable adjustment and to prevent direct and indirect discrimination would have assisted Kacie and their employer in understanding their rights and obligations, potentially leading to the matter being resolved quickly.

Case study 2: Kacie

Recommendations

Recommendation 5 – The ADA must contain positive duties on relevant duty holders as identified in the ADA, to provide reasonable adjustments and to prevent and eliminate discrimination up to the point of ‘unjustifiable hardship’.

Recommendation 6 – The ADA must state that an aim or purpose of the Act is to encourage a ‘preventative culture’ towards discrimination amongst all members of the community not just those in the public sphere or who are otherwise identified as having a specific duty to prevent discrimination, in line with the Australian Human Rights Commission’s *Free & Equal* model.

Part 4 - Access to justice: decision support services and strengthening Anti-Discrimination NSW

Access to justice is a critical consideration for the ADA. If a person is unable to gain the benefit of a legal right, it has no practical value. Two access to justice considerations for this review of the ADA are to:

1. embed recognition of a right to independent decision support services, including supported decision-making, in the ADA, including that fully funded services will be provided if required; and
2. strengthen the ability of ADNSW to independently investigate suspected systemic discrimination and breaches of duties by ensuring it is properly funded.

Capacity and decision support services

The ADA must recognise:

- a presumption of decision-making capacity
- the inherent legal capacity of all people with disability
- legal capacity is not the same as mental capacity
- that disability is diverse
- that mental capacity and decision-making capacity is not fixed and can fluctuate depending on context; and
- that some people with disability or other protected characteristics may require support in exercising their legal capacity across a process. Decision support may be needed at various times including when reviewing options, making an initial complaint to ADNSW, and reviewing any response.

A right to fully funded decision support services for a complainant and their supporters needs to be embedded in the ADA.⁵⁷ The inherent legal capacity of a person with disability and the right to receive supports is affirmed in CRPD Article 12 (equal recognition before the law). Article 12 is regarded as ‘critical to the exercise of all other human rights.’⁵⁸ It is essential to upholding the autonomy of people with disability which is a foundational principle of the CRPD.⁵⁹ Such supports that must be provided include, but are not limited to:

- supported decision-making
- accessible information
- administrative support such as completing forms
- representation; and
- other support that may be identified by the person seeking support to enable them to exercise their legal capacity.

Strengthening Anti-Discrimination NSW

Anti-Discrimination NSW (ADNSW) has some wide-ranging functions it can exercise ‘[f]or the purpose of eliminating discrimination and promoting equality and equal treatment of all human beings.’⁶⁰ For example it can:

- carry out investigations, research and inquiries relating to discrimination;⁶¹ and
- refer complaints directly to the NSW Civil and Administrative Tribunal.⁶²

However, it would be important to review the functions and powers of ADNSW considering recommendations made in this submission to orientate the ADA explicitly towards ending systemic discrimination, preventing discrimination, and changing community attitudes.

⁵⁷ A recognition of supported decision-making has begun to be incorporated most notably in guardianship legislation thus far. See for example *Guardianship and Administration Act 2019* (Vic) ss 7(1)(a), 8(1)(a); *Guardianship and Administration Act 2000* (Qld) ss 8(2)-(3). Both these Acts for example have sought to embed key human rights principles, including from the CRPD to guide decision-makers. Note the presumption of decision-making capacity in both Acts.

⁵⁸ Kayess and Sands (n 3); Australian Bureau of Statistics (n 1) 19.

⁵⁹ *Convention on the Rights of Persons with Disability*, article 3(a).

⁶⁰ *Anti-Discrimination Act 1977* (NSW) s 119(1).

⁶¹ *Anti-Discrimination Act 1977* (NSW) s 119(1)(a).

⁶² *Anti-Discrimination Act 1977* (NSW) s 95.

Such changes or adjustments in powers or functions may include:

- an enhanced investigative ability to include suspected breaches of duties and suspected systemic discrimination (independent of receiving a complaint)
- an enhanced and simplified ability to refer cases directly to a Tribunal where breaches of duties are considered; and
- a renewed focus on promoting inclusive communities through expanded education and awareness campaigns on human rights, inclusion, and what positive duties mean.

PWDA believes the exact form of the powers of ADNSW must form the basis of a future consultative process as part of this review.

One of the biggest challenges facing the ability of ADNSW to promote equality and justice is that it does not receive adequate funding to fully undertake its *existing* functions. It has been estimated that ADNSW has experienced a 24% budgetary cut in real terms in the 10 years to 2021 and has a history of being understaffed to keep the budget in check.⁶³

ADNSW must receive an appropriate level of funding that enables it to exercise all its functions and effectively promote the aims and objectives of the ADA, including those aims identified in this submission.

The extent of the necessary funding required by the ADA to achieve recommendations made in this submission for example must be the basis for a future consultative process as part of this review.

Recommendations

Recommendation 7 – The ADA must include provisions guaranteeing:

- independent fully funded decision-making support services including supported decision-making for complainants where needed

⁶³ See eg, Simon Rice, 'NSW's anti-discrimination law is confusing and outdated. Why is it lagging behind the country on reform?', *The Conversation* (online, 3 September 2021) <<https://theconversation.com/nsws-anti-discrimination-law-is-confusing-and-outdated-why-is-it-lagging-behind-the-country-on-reform-166753>>.

- that decisions made through supported decision-making by the person requiring support are regarded at law as being those of the person requiring support; and
- that explanatory materials on the complaint process are made available in a variety of accessible formats, modalities and languages considering the diversity of disability.

Recommendation 8 – Legal Aid NSW and Community Legal Centres in NSW must be funded so that all persons experiencing discrimination can access assistance with legal tasks, advice, and critical representation when seeking to make a complaint under the ADA.

Recommendation 9 – The powers of Anti-Discrimination NSW (or new body to administer the ADA) must be reviewed with an emphasis on strengthening its ability to identify, investigate, and challenge systemic discrimination independently of receiving a complaint. The body that administers the ADA must be provided with adequate funding to fully undertake its functions and meet the aims and objects of the new legislation including:

- an expanded rights awareness campaign
- the provision of a range decision-making supports; and
- expanding direct information and assistance services aimed at improving access to justice for people who wish to make a discrimination complaint.

Recommendation 10 – The nature of the powers, functions, and budgetary requirements of Anti-Discrimination NSW (or the new body to administer the ADA) must be the basis for a future consultative process.

Conclusion

PWDA submits that the purpose of anti-discrimination laws (regardless of type of discrimination) should be:

- the achievement of substantive equality
- the elimination of discrimination, including systemic discrimination⁶⁴
- the development of a 'culture of prevention'; and
- to empower a person experiencing discrimination to take action and advocate for themselves wherever possible.

Adopting a human rights lens to a review of the ADA provides an appropriate conceptual basis for ensuring the new Act can achieve these purposes. Introducing positive duties into the ADA to provide reasonable adjustments and to prevent discrimination for example are two key strategies for achieving the purpose of anti-discrimination laws identified above for people with disability.

In conjunction with positive duties, the ADA must contain a clear reference to rights as identified in international instruments such as the CRPD. It must provide clear pathways for action by a complainant, with easily accessible tools and resources to assist them in making a complaint. Anti-Discrimination NSW needs to be funded so that it can properly exercise its functions (particularly independent investigative functions) and promote the objectives of the Act.

A new ADA informed by a recognition of human diversity and dignity will send a powerful signal to the community as to expected behaviour and influence a cultural shift towards a society where everyone, in public *and* private life, contributes to challenging and preventing discrimination against people with disability.

⁶⁴ Australian Human Rights Commission (n 7) 34.



PEOPLE WITH DISABILITY AUSTRALIA

People with Disability Australia (PWDA) is a national disability rights and advocacy organisation made up of, and led by, people with disability.

For individual advocacy support contact PWDA between 9 am and 5 pm (AEST/AEDT) Monday to Friday via phone (toll free) on **1800 843 929** or via email at pwd@pwd.org.au

Submission contact

Giancarlo de Vera

Senior Manager of Policy

E: giancarlod@pwd.org.au

**A voice
of our
own**