



PEOPLE WITH DISABILITY
AUSTRALIA

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of our
own

**Submission to the NSW Law
Reform Commission review
of the *Anti-Discrimination
Act 1977* (NSW): Unlawful
conduct**

15 AUGUST 2025

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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 is 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. PWDA is now recognised as the national representative body for the LGBTQIA+ community with disability.

Our work is grounded in a human rights framework that recognises the United Nations [*Convention on the Rights of Persons with Disabilities*](#) (*CRPD*) and related mechanisms as fundamental tools for advancing the rights of people with disability. PWDA embraces the ‘Nothing About Us, Without Us’ motto of the international disability community and Disabled Peoples’ International.

PWDA receives funding under the Department of Social Services Disability Representative Organisation (DRO) program to communicate the views of its members to the Australian Government. We also represent people with disability at the United Nations, particularly in relation to the *CRPD*.

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.

Part 1: Core recommendations for improving the *Anti-Discrimination Act* for people with disability in NSW

Note that while some of these recommendations in Part 1 align closely with our responses to specific consultation paper questions in Part 3, not all our responses to questions are captured here. Our responses to questions in Part 3 provide further specific perspectives. These core recommendations in Part 1 can be considered as overarching systemic recommendations.

Recognising human rights instruments

Recommendation 1 – The NSW *Anti-Discrimination Act* must recognise the primacy of all international human rights instruments as being the basis from which rights, while inherent to all, flow. The ADA must reflect and support the purposes and principles of those instruments without qualification.

Recommendation 2 – The NSW *Anti-Discrimination Act* must be informed by and reflect in its objects and principles, a human rights model of disability as articulated by the United Nations *Convention on the Rights of Persons with Disabilities* and interpreted by the Committee on the Rights of Persons with Disabilities. The human rights model of disability recognises human dignity as the foundation for all rights and recognises the critical importance of intersectionality.¹

¹ Theresia Degener, 'The Human Rights Model of Disability in Times of Triage' (2024) 26(1) *Scandinavian Journal of Disability Research* 437. DOI: <https://doi.org/10.16993/sjdr.1088>

Eliminating systemic discrimination

Recommendation 3 – The NSW Anti-Discrimination Act must identify in its objects and purposes that systemic discrimination operates as a significant barrier to economic and social inclusion for people with disability, that formal equality has limitations in tackling systemic discrimination, that promoting equality of opportunity and equality of outcomes is necessary to end systemic discrimination, and that targeted measures are a key method to advance the achievement of substantive (and ultimately inclusive) equality.

Positive duties: adjustments and preventing discrimination

Recommendation 4 – The NSW *Anti-Discrimination Act* must contain a standalone positive duty on relevant duty holders, to provide all **adjustments** (such as in a workplace) up to the point of “unjustifiable hardship.” The duty should ensure that the evidentiary burden for proving “unjustifiable hardships” falls on the duty holder. In line with recommendations from the Disability Royal Commission (DRC), and examples from other jurisdictions with positive duties, this evidentiary threshold must demonstrate exhaustive attempts to identify and provide adjustments by the respondent in consultation with the complainant. **The term ‘reasonable’ should be decoupled from adjustments in line with the DRC recommendation.**

Recommendation 5 – The NSW *Anti-Discrimination Act* must contain a standalone positive duty on relevant duty holders **to prevent and eliminate discrimination** against people with disability, including where the person with disability may have one or more other protected attributes under the Act, leaving them exposed to the risk of intersectional discrimination.

Recommendation 6 – The NSW *Anti-Discrimination Act* 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 and Equal* model.

Improving access to justice

Recommendation 7 – Legal Aid NSW, NSW Community Legal Centres, and community advocacy services must be funded so that *all* persons experiencing discrimination can access assistance with information, tasks, advice, and critical representation when seeking to make a complaint.

Recommendation 8 – The NSW ADA must recognise a right to supported decision making assistance and include provisions guaranteeing independent fully funded decision-making support services for complainants when requested by them. Supported decision-making assistance includes:

- providing a ‘supporter’ to assist a person in identifying their will and preferences, making decisions, and participating in proceedings (the person seeking decision-making assistance must consent to the appointment of a supporter), and
- the provision of information materials in an accessible format suitable for that person to assist them to understand processes and make decisions.

Complaints made by a person with disability under the NSW ADA with the assistance of a person acting as a supporter in a consensual supported decision-making context, must be recognised as being a complaint made by the person receiving supported decision-making assistance.

Recommendation 9 – Anti-Discrimination NSW must be empowered to undertake “own motion” investigations into all areas of unlawful discrimination in NSW, particularly those which indicate a systemic problem. As part of this power, it must be given effective enforcement mechanisms, and adequate funding.

Part 2: Introduction and Context

People with Disability Australia (PWDA) welcomes the opportunity to comment on the Consultation Paper (Unlawful Conduct) provided by the NSW Law Reform Commission to inform its review of the *Anti-Discrimination Act 1977* (NSW) (the ADA).

In 2022, 5.5 million (21.4%) Australians had a disability.² These are individual people with diverse voices. They are members of families and communities. They are citizens.

PWDA believes that the **lived experience** evidence of people with disability alongside genuine co-design/co-production (a central principle of the ‘Nothing About Us Without Us’ motto) are critical elements in effective disability policy making.³

A Human Rights Model of Disability and the Convention on the Rights of Persons with Disabilities

PWDA believes that a human rights model of disability must provide the conceptual framework for all disability policy and legislative reform in Australia. All disability policy and legislation must recognise people with disability as active **citizens**.

The pervasive medical model of disability defines people with disabilities by their “impairments” and as objects to be “cured”.⁴ This legitimises restrictions on autonomy, and the denial of dignity. In contrast, a human rights model of disability, as expressed through the United Nations *Convention on the Rights of Persons with*

² Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Reference period 2022, release date 4/07/2024) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>>.

³ Sian Anderson and Christine Bigby, ‘Nothing about us without us.’ Including Lived Experiences of People with Intellectual Disabilities in Policy and Service Design’ in Christine Bigby and Alan Hough (eds), *Disability Practice. Safeguarding Quality Service Delivery* (Palgrave Macmillan 2024) 225; Kathryn Williams, *Lived Experience Evidence in Disability Policy Making* (Wales Centre for Public Policy, 2024) <<https://apo.org.au/node/327306>>; Patsie Frawley, *Lived Experience of People with Disabilities* (Australian Institute of Family Studies, 2020) <<https://aifs.gov.au/resources/short-articles/lived-experience-people-disabilities>>.

⁴ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Executive Summary, x.

Disabilities (CRPD), sees all people with disability as **holders of rights** with full legal capacity.⁵ Disability rights are human rights. The Committee describes the human rights model as:

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.⁶

Australia ratified the *CRPD* on July 17, 2008. It entered into force on 16 August 2009. Despite rights enshrined in this and other international human rights treaties, (Australia is party to the core seven of these including the *CRPD*),⁷ people with disability continue to experience poorer life outcomes across all life domains when compared with those without disability.⁸ This is exacerbated by ongoing systemic discrimination.⁹

⁵ Theresia Degener, 'The Human Rights Model of Disability in Times of Triage' (2024) 26(1) *Scandinavian Journal of Disability Research* 437. DOI: <https://doi.org/10.16993/sjdr.1088>; Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1.

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

⁷ The 7 main human rights treaties Australia is party to are: the *International Covenant on Civil and Political Rights* (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD); *Convention on the Elimination of Discrimination Against Women* (CEDAW); *Convention on the Rights of the Child* (CRC); *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and the *Convention on the Rights of Persons with Disabilities* (CRPD).

⁸ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Reference period 2022, release date 4/07/2024)

< <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>>.

⁹ Rosemary Kayess and Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation* (Research Report, UNSW Social Policy Research Centre, 2020); Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Reference period 2022, release date 4/07/2024)

<<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>>.

Article 2 of the *CRPD* defines “[d]iscrimination on the basis of disability” to mean

[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. ***It includes all forms of discrimination, including denial of reasonable accommodation.***¹⁰ (*emphasis added*)

While existing anti-discrimination laws in NSW have resulted in some improvements, they are failing to tackle deep systemic discrimination. A key reason is because anti-discrimination laws such as those in NSW contain limited or no “mechanisms” to both *proactively prevent discrimination* and confront and change processes that perpetuate in-equality.¹¹

A particular flaw with the system stems from NSW anti-discrimination legislation almost exclusively operating within an ‘individual complaints-based model’ (as also in the Federal scheme for example). It places the burden of seeking a remedy for unlawful discrimination upon the victim. They must first recognise that a particular treatment they were subject to was unlawful discrimination. They must then determine what to do. This ‘individual complaints-based model’ has been subject to considerable academic and legal criticism. Its “inability to bring about systemic or structural change” has been identified as a particularly egregious limitation of the model.¹²

This must change. NSW anti-discrimination laws at their core must be focused on promoting substantive and ultimately *inclusive* equality.

A right to equality and to live without discrimination

Under the *CRPD*, **equality** and **non-discrimination** are identified as both principles (as stated in article 3 – General principles) and rights (as articulated in article 5 –

¹⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Article 2.

¹¹ Dominique Allen, ‘An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459, 461.

¹² Peter Cashman, ‘Commonwealth Human Rights and Discrimination Legislation’ (2024) 23 *UNSWLRS* 2.

Equality and non-discrimination). The principles of, and right to equality and non-discrimination are further regarded as an “interpretive tool for all other principles and rights enshrined in the Convention.”¹³ The Committee on the Rights of Persons with Disabilities (the Committee) has made clear that States Parties “have an **obligation** to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality.”¹⁴ **This obligation has two key elements – immediate action and positive duties.**

Immediate action

Critically, the Committee states that the promotion of equality and addressing discrimination places an obligation on States parties to act *immediately*. These are NOT rights subject to progressive realisation.¹⁵ Article 5 of the *CRPD* outlines the right to equality and non-discrimination and the **obligation** on State parties in the following way:

Article 5 - Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that **reasonable accommodation** is provided.

¹³ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [12].

¹⁴ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [30].

¹⁵ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [12].

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Positive duties

Relevantly for this submission, the **obligation** to guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds as outlined in article 5(2) has been interpreted by the Committee as being one that “is far-reaching and imposes **positive duties** of protection on States Parties.”¹⁶ The Committee notes that the phrase “on an equal basis with others” in the definition of disability discrimination in *CRPD* article 2 requires that “States Parties take concrete specific measures to achieve de facto equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms.”¹⁷

PWDA submits that such ‘concrete measures’ to promote substantive and inclusive equality in anti-discrimination legislation includes positive duties to prevent discrimination against people with disability, positive duties to provide adjustments, and other measures to promote access to justice and give voice to rights.

Terminology regarding adjustments

We note that the *CRPD* uses the term “reasonable accommodation” when talking about what are commonly called “reasonable adjustments”. “Reasonable accommodation” is defined in *CRPD* article 2:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

¹⁶ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [17] (*emphasis added*).

¹⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [17], and see [30].

However, *reasonableness* is not an element that is relevant to a determination of whether an adjustment is needed.¹⁸ The focus should be whether there was a refusal to provide an adjustment and if there was, identify if the respondent would face unjustifiable hardship in making the adjustment. The Disability Royal Commission (DRC) recommended that the *Disability Discrimination Act 1992* (Cth) be amended by replacing all references to ‘reasonable adjustments’ with ‘adjustments’.¹⁹ **PWDA agrees with this approach, submits this recommendation should apply to the NSW ADA, and uses the term ‘adjustments’ throughout this submission.**

Overview of PWDA’s 2023 preliminary submission

In our [2023 preliminary submission to this Review](#)²⁰ we looked at the following themes, some of which are reflected in this submission:

1. The reliance on formal equality in legal frameworks does not promote substantive and inclusive equality. Promoting substantive equality and eliminating systemic discrimination must be key aims and objectives of the *Anti-Discrimination Act 1977* (NSW) (ADA).
2. The *Equal Opportunity Act 2010* (Vic) and the *Discrimination Act 1991* (ACT) recognise the limitations of formal equality and recognise a need to eliminate systemic discrimination and move towards substantive equality.
3. The ADA should contain a positive duty to provide adjustments and a positive duty to prevent discrimination. These positive duties will help change attitudes and build a “preventative culture.”
4. While subject to reasonable exceptions, these positive duties are to apply broadly across the public sphere.

¹⁸ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 309.

¹⁹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” rec 4.25 “Adjustments”.

²⁰ People with Disability Australia, *Making NSW Discrimination Laws Work for People with Disability*. Submission to the NSWLRC Review of the *Anti-Discrimination Act 1977* (NSW) (September 2023) (Preliminary Submission) <<https://pwd.org.au/preliminary-submission-nswlrc-review-of-the-anti-discrimination-act-1977/>>.

5. The ADA must recognise the inherent legal capacity of all people with disability and contain a presumption of decision-making capacity. Access to independent supported decision-making services must be provided to assist a person subject to unlawful discrimination pursue a remedy.
6. Anti-Discrimination NSW must be able to independently investigate suspected breaches of the Act.

Part 3: PWDA response to select 2025 Consultation Paper questions

Tests for discrimination: Question 3.8: Intersectional discrimination

- (1) Should the ADA protect against intersectional discrimination? Why or why not?
- (2) If so, how should this be achieved?

As defined by the Committee on the Rights of Persons with Disabilities (the Committee),

Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination.²¹

Intersectional discrimination can appear as any of the **four types of discrimination** recognised in international human rights practice:²²

- I. Direct discrimination
- II. Indirect discrimination
- III. Denial of reasonable accommodation (which we address in this submission further on), and

²¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) Article 6: Women and girls with disabilities* UN Doc CRPD/C/GC/3 (2 September 2016) [4](c), [19]; Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [19].

²² Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18], [19].

IV. Harassment (which can include behavior classed as vilification and hate-crimes and is discussed further on)

The compounding and aggravating nature of intersectional discrimination results in significant harm. *CRPD* article 6 recognises that women and girls with disabilities are particularly vulnerable to experiencing multiple and intersectional discrimination.²³

Other groups with disability are also at heightened risk. The Disability Royal Commission found that “[t]he issue of intersectional discrimination is particularly relevant to First Nations people with disability,”²⁴ and that they are also “especially at risk of violence, abuse, neglect and exploitation.”²⁵ They drew attention to articles 21 and 22 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which call for particular attention to be directed to the needs of First Nations persons with disabilities.²⁶

The Committee states that

Intersectional discrimination recognizes that individuals do not experience discrimination as members of a homogenous group but rather, as individuals with multidimensional layers of identities, statuses and life circumstances. It means acknowledging the lived realities and experiences of heightened disadvantage of individuals caused by multiple and intersecting forms of discrimination, which requires targeted measures with respect to disaggregated data collection, consultation, policymaking, enforceability of non-discrimination and provision of effective remedies.²⁷

²³ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [36].

²⁴ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 55.

²⁵ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Executive Summary, xiii. Note that Volume 9 of the DRC Final Report looks specifically at First Nations people with disability.

²⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 56. Along with persons with disabilities, UNDRIP article s21 and 22 also call for special attention to the rights of indigenous elders, women, youth, and children: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

²⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) Article 6: Women and girls with disabilities* UN Doc CRPD/C/GC/3 (2 September 2016) [16].

PWDA believes the ADA should protect against intersectional discrimination.

We believe that protecting against intersectional discrimination does more accurately represent individual lived experience and reflects how discrimination often occurs. It can potentially cover a broader range of occurrences of discrimination. We agree with the Committee that “[p]rotection against ‘discrimination on all grounds’ means that all possible grounds of discrimination and their intersections must be taken into account.”²⁸ Governments must address intersectional discrimination against people with disability.²⁹

We note that the Consultation Paper (p. 38) refers to several reviews of discrimination laws in Australia that have recommended introducing protections for intersectional discrimination, and that a number of Australian and overseas jurisdictions have introduced changes to address discrimination based on more than one attribute.

To reduce uncertainty, the approach preferred by PWDA for the NSW ADA is that put forward by the Australian Human Rights Commission in its *Free and Equal Final Report* on reforming federal discrimination laws. This is

Reform 35: A new provision should be added across all federal discrimination laws which identifies that discrimination may occur on the basis of a particular protected attribute ‘or a particular combination of 2 or more protected attributes’.³⁰

²⁸ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [21].

²⁹ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [19].

³⁰ Australian Human Rights Commission, *Revitalising Australia’s Commitment to Human Rights: Free & Equal*, Final Report (2023) Part 4. Discrimination law reform, Reform 35, 88.

Discrimination - Protected attributes: Question 4.3: Disability discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “disability”?
- (2) Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability?
- (3) What changes, if any, should be made to the public health exception?

PWDA is concerned that the language being used to define disability in the ADA³¹ is not consistent with a contemporary social or human rights model of disability that reflects people with disability as **rights holders** with inherent autonomy and legal capacity.

Definitions currently used are negative or deficit-based terms reflecting almost entirely a medical model of disability rejected by the disability community. We note that the ADA definition largely aligns with the *Disability Discrimination Act 1992* (Cth).³²

PWDA defines disability in line with the CRPD definition.³³ We believe that the ADA (and all Australian jurisdictions) should also do this. We believe that the ADA should provide a clear statement on key rights and principles central to the experience of people with disability as citizens and rights holders.

The *CRPD* definition of disability acknowledges impairments, but notes (consistent with a social model of disability) that *disability* occurs through barriers in the environment:

³¹ *Anti-Discrimination Act 1977* (NSW) s 4 ‘Definitions’.

³² *Disability Discrimination Act 1992* (Cth) s 4 ‘Definitions’.

³³ People with Disability Australia, *Social Model of Disability* <<https://pwd.org.au/resources/models-of-disability/>>.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.³⁴

The Disability Royal Commission adopted this *CRPD* ‘approach’ or definition of disability and people with disability.³⁵

Relevantly in NSW, the *Disability Inclusion Act 2014* (NSW) also adopts the *CRPD* definition of disability.³⁶

PWDA believes that in addition to a *CRPD* compliant definition of disability, the social and human rights model of disability can be further reflected in the ADA through standalone positive duties to prevent discrimination and provide adjustments.

Genetic information

In regards to “genetic information” PWDA considers this should be constituted as a new separate protected attribute similar to how this is approached in the *Discrimination Act 1991* (ACT).³⁷

Public health exception

The public health exception can significantly *limit rights*, as was shown recently during the COVID-19 pandemic. PWDA acknowledges that a public health exception to disability discrimination is necessary to control the spread of infectious disease.³⁸ We note that the provision in the NSW legislation³⁹ is similar to that in some other jurisdictions.

³⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), article 1.

³⁵ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Executive Summary, 44.

³⁶ *Disability Inclusion Act 2014* (NSW) s 7 ‘Definitions’.

³⁷ *Discrimination Act 1991* (ACT) s 7(1)(h).

³⁸ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [6.272].

³⁹ *Anti-Discrimination Act 1977* (NSW) s 49P.

We also note that the exception in NSW is quite broad/general, can encourage ambiguity and uncertainty, lacks recognition of human rights, and is potentially open to abuse. As it is, the threshold to trigger the exception is quite low. Its current construction could amplify a negative public view “that people with disabilities generally present health and safety risks” and that discrimination is automatically “necessary and permissible.”⁴⁰ We favour an exception that is more targeted and rights focused, in line with recommendations made by the NSWLRC in its 1999 review of the *Anti-Discrimination Act*.⁴¹

The exception should have a limitation clause/s which explicitly ensures that any identification of risk or harm is based on expert medical opinion. Acts to mitigate risks and harm, which would ordinarily be regarded as unlawful discrimination, must also be based upon medical and expert opinion. Critically, PWDA believes that the ADA exception must have a limitation clause which explicitly states that any act taken to prevent the transmission of ‘a condition’ and which restricts rights must be **proportionate** to the risk,⁴² and that there must be “no reasonable alternative that would avoid the discriminatory action.”⁴³

Proportionality provides a crucial safeguard against abuse. Support for a general limitation clause based on the proportionality test and other relevant factors that must be considered was indicated by the Disability Royal Commission, and formed the basis for their Recommendation 4.17 ‘Limitations on rights’.⁴⁴

⁴⁰ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report 30 (2004) 362.

⁴¹ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 66.

⁴² NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 66.

⁴³ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report 30 (2004) 362.

⁴⁴ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 213-215.

Discrimination - Protected attributes: Question 4.8:

Discrimination on transgender grounds

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “transgender grounds”?

Section 38A of the NSW ADA does prohibit discrimination and vilification on “Transgender grounds”. However, focusing solely on ‘transgender’ identity in these contexts is outdated and not consistent with contemporary international and domestic law approaches which also reject ‘gender’ as being a solely binary construct, for example male or female. The Committee on the Rights of Persons with Disabilities uses the term “all genders” for example which indicates an understanding of gender as not binary.⁴⁵ The Family Court of Australia has stated that

[I]t is now accepted that gender is *not* a binary construct: either male or female ... The concept of gender is fluid and contemporary understanding of the fluidity means that gender differences are now better regarded as lying along a continuum, rather than presenting a polarising election between two stark alternatives.⁴⁶

A wider “gender diverse” community is acknowledged, of which people who may identify as transgender are included.⁴⁷ Recognising this fluidity is critical to ensure rights are not infringed. Thus, there is preference for the term “gender identity” amongst legal experts, legislators, and the gender diverse community to ensure proper coverage of protections. The Gender Centre notes the current definitions of “transgender” in the NSW discrimination law context has limitations, and note “[t]he transgender community itself allows for a far more multi coloured umbrella definition

⁴⁵ United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *Reports on Gender: The Law of Inclusion & Practices of Exclusion*. Reports presented in 2021 at the 47th UN Human Rights Council and 76th UN General Assembly (2021).

⁴⁶ *Linville & Linville* [2018] FamCA 953 (21 November 2018), Austin J at [29].

⁴⁷ United Nations General Assembly, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/73/152 (12 July 2018) [5].

that is inclusive of anyone who transgresses gender norms.”⁴⁸ The Gender Centre defines “gender identity” as

A core sense of self in relation to norms and expectations around gender, but also the means and methods a person uses to navigate personal, private and public spaces shaped by social and cultural expectations of gender.⁴⁹

This preference for “gender identity” is expressed in other Australian jurisdictions Criminal and Anti-Discrimination legislative frameworks. For example, *Crimes Act 1900* (NSW) s 93Z, *Anti-Discrimination Act 1991* (QLD) sch 1, and the *Sex Discrimination Act 1984* (Cth) s 4, use the expression “**gender identity**” as being the protected attribute.

The Queensland *Anti-Discrimination Act 1991* for example (and similar to the approach in the *Sex Discrimination Act 1984* (Cth)), defines “gender identity” in a way that aligns very closely with international law approaches and community preferences:

gender identity, of a person—

- (a) is the person’s internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
- (b) without limiting paragraph (a), includes—
 - (i) the person’s personal sense of the body; and
 - (ii) if freely chosen—modification of the person’s bodily appearance or functions by medical, surgical or other means; and
 - (iii) other expressions of the person’s gender, including name, dress, speech and behaviour.⁵⁰

⁴⁸ The Gender Centre, ‘Family Support Services, Helpful Information’, <<https://gendercentre.org.au/services/family-support-services>>.

⁴⁹ Positive Life NSW, The Gender Centre Inc, TGD Expert Advisory Group. *Trans and Gender Diverse People Health and Social Needs Assessment: A Community Survey* (Sydney NSW: Positive Life NSW, 2020). 2. “Gender Identity” is used extensively in the research space: see e.g., Hill AO, Lyons A, Jones J, McGowan I, Carman M, Parsons M, Power J, Bourne A, *Writing Themselves In 4: The health and wellbeing of LGBTQA+ young people in Australia*. National report, monograph series number 124. (Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University, 2021).

⁵⁰ *Anti-Discrimination Act 1991* (Qld) sch 1. This definition corresponds almost exactly to United Nations definitions – see e.g. United Nations General Assembly, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/73/152 (12 July 2018) [2].

PWDA believes that the term “gender identity” should be used in the ADA instead of “transgender grounds” as it recognises diversity in gender identity and individual experience. Such recognition is rights affirming. All persons with a gender identity that diverges from a particular societal concept are vulnerable to violence and discrimination. Protecting from discrimination based on “gender identity” (which includes persons identifying as transgender and non-binary, gender neutral or gender fluid) provides a greater level of protection for all in the gender diverse community.

Discrimination - Areas of public life: Question 6.2: Discrimination in work — exceptions

What changes, if any, should be made to the exceptions to discrimination in work?

The key issue for PWDA is the operation of the current “inherent requirements” exception in section 49D(4)(a) of the *Anti-Discrimination Act 1977 (NSW)* (ADA).⁵¹ A criticism of “inherent requirements” is that they can be used by employers to discriminate against people with disability, often reflect and reinforce unconscious bias, and often reflect a medical model of disability.⁵²

PWDA shares the concern of the Disability Royal Commission (DRC) that the exception as currently stated can operate to disadvantage employees (and prospective employees) with disability, as it “does not require the employer to consult with the prospective or existing employee about how the inherent requirements of a role can be performed.”⁵³ Furthermore, we are of the view that as the focus of this exception is largely directed to people with disability, this is itself potentially discriminatory.⁵⁴

⁵¹ We note that the exception also operates in s 21A of the *Disability Discrimination Act 1992 (Cth)*, and in the *Fair Work Act 2009 (Cth)* at ss 351(2)(b), 772(2)(a) for example.

⁵² *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 7, “Inclusive Education, Employment and Housing” Part B, 438.

⁵³ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 7, “Inclusive Education, Employment and Housing” Part B, 438.

⁵⁴ We acknowledge it also applies to carers responsibilities: *Anti-Discrimination Act 1977 (NSW)* s 49V(4)(a).

We agree with the DRC that a lack of clear information about the inherent requirements of a job, including job advertisements that are inaccessible, may deter or exclude people with disability from applying for roles.⁵⁵ We agree with the DRC that a particularly significant issue is that the current approach to describing the inherent requirements of a role can prevent employers proactively engaging in dialogue with a prospective or existing employee about adjustments or job design.⁵⁶

While we are not calling for the removal of the exception (similar to the DRC), PWDA is of the view that

- its operation must be significantly improved to prevent abuse (in line with DRC recommendation 7.26 as a start)
- the exception should be extended to **all** protected attributes, and
- **the exception once amended is tied explicitly to a positive duty on all employers (regardless of size of organisation) to make adjustments** (Consultation paper [6.43]). The granting of the exception can only be given if the person cannot meet the inherent requirements of the role, *despite* any adjustments able to be made by the employer.

PWDA is supportive of the approach taken by the DRC in recommendation 7.26 to amend the *Disability Discrimination Act 1992* (Cth) by adding additional factors (alongside existing rules and principles) that must be considered before an exception can be made. These should form the basis of amendments to the ADA. These factors include the:

- nature and extent of any adjustments made, and
- the extent of consultation with any person with disability concerned.

Placing an evidentiary burden on an employer requiring *them* to *demonstrate* that they have *proactively* explored all adjustments options with an applicant/employee

⁵⁵ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 7, “Inclusive Education, Employment and Housing” Part B, 388-89.

⁵⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 7, “Inclusive Education, Employment and Housing” Part B, 389.

(rather than just leave it up to the applicant/employee to raise adjustments) provides a more robust level of safeguarding.

Discrimination - Areas of public life: Question 6.3: Discrimination in education

- (1) What changes, if any, should be made to the definition and coverage of the protected area of “education”?
- (2) What changes, if any, should be made to the exceptions relating to:
 - a. Single-sex educational institutions, and
 - b. Disability and age discrimination in educational institutions?

PDWA submits that all educational authorities in NSW must be subject to a positive duty to provide all necessary adjustments. PDWA is supportive of extending this duty to capture services outside of the current ADA definition of “educational authority”, but which may be related to education, care, and training. Our definition of educational authority would include early childhood education and care (ECEC) services, after school care services (OOSH), and vocational education services for example.

We note that the recent NSW Parliamentary Inquiry into *Children and Young People with Disability in New South Wales Educational Settings*, recommended

That the NSW Government seek to amend the *Anti-Discrimination Act 1977* to include a positive duty on educational institutions to provide reasonable adjustments for a person with disability.⁵⁷

⁵⁷ NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 25.

Wider exceptions - Discrimination in education: Question 7.6: Discrimination against students and prospective students

- (1) Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?
- (2) If you think it is necessary for the ADA to provide exceptions in this area:
 - a. What attributes should the exceptions apply to?
 - b. Should they apply to prospective students, existing students, or both?
 - c. What requirements, if any, should duty holders meet before an exception applies?

S. 49L(3) of the NSW ADA permits a private school to discriminate against a student with disability by refusing to enrol them, or expelling them if they acquire a disability while enrolled, or ‘subjecting them to any other detriment.’ Discrimination against students based on other attributes such as transgender identity (ADA s 38K(3)), and homosexuality (ADA s 49ZO(3)) can also be permitted by a private school under the ADA. Such exceptions need to be reviewed urgently.⁵⁸

PWDA believes that private schools, regardless if they are religious schools, should not be allowed to discriminate against prospective or current students with disability, and not discriminate against a prospective or current student because of identification with the LGBTQIA+ community. Such discrimination is repugnant to reason, and a clear violation of fundamental human rights. It is incongruous with Australia’s obligations under international human rights legal frameworks and civil society. All private schools should be subject to a positive duty to provide all adjustments.

⁵⁸ We note the recent NSW Parliamentary inquiry on children with disability in educational settings recommended that removing this exception should be given consideration by the NSW Law Reform Commission as part of its review into the *Anti-Discrimination Act 1977* (NSW): NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 24.

Civil protections against vilification: Question 8.1: Protected attributes

- (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?
- (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

People with disability are currently not protected against vilification in the ADA. People who identify as bisexual, intersex, non-binary and gender diverse are also not protected. Vilification based on intersectional grounds is also not addressed in the ADA.

PWDA believes that the ADA should provide protection against vilification for people with disability, and all members of the LGBTQIA+ community including those who identify as bisexual, intersex, non-binary and gender diverse. The potential intersectional nature of vilification should also be addressed. PWDA submits that people with disability are a “socially significant” group with a “demonstrable need” for protection. It would not disproportionately diminish freedom of speech. Protections against vilification for people with disability would provide a powerful normative message for the community.

We note that “harassment” is one of the four recognised types of discrimination at international law. Behaviours PWDA would classify as constituting vilification such as creating an intimidating, hostile, degrading, humiliating or offensive environment for people with disability, and using words and comments that “have the effect of perpetuating the difference and oppression of persons with disabilities” have been held to fall under this type by the Committee on the Rights of Persons with Disabilities.⁵⁹

⁵⁹ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18].

Disability based violence in all its forms, including hate-crimes, fall under this “harassment” type. There may be overlap between the forms such as behaviours that may be vilification and a hate-crime. States Parties are under a duty to prohibit “all discrimination” against people with disability – this includes types of discrimination that PWDA submits can be categorised under “harassment” such as vilification.⁶⁰

Since the 1999 NSW Law Reform Commission review of the ADA which did not support expanding the ADA coverage to include disability vilification,⁶¹ (and gender vilification), countless reports and reviews have highlighted the ongoing discriminatory attitudes faced by people with disability in NSW and Australia. We saw the ratification of the *CRPD* by Australia in 2008, entering force in August 2009. The *CRPD* heralded a paradigm shift in how we understand the rights of people with disability.

Despite the promise of the *CRPD*, the DRC identified that people with disability continue to be subject to violence, abuse, neglect and exploitation at rates far beyond those experienced by people without disability. The DRC found relevantly that vilification of people with disability is a significant issue and recommended the *Disability Discrimination Act 1992* (Cth) be amended to make this unlawful.⁶²

Exploring consistency between criminal and civil vilification protections should be explored. DRC rec 4.30 recommends states and territories that already have legislation imposing criminal penalties for vilification of people on grounds that *do not* include disability, extend the legislation to vilification of people on the ground of disability. Relevantly, PWDA notes that *Crimes Act 1900* s 93Z does not provide protection from vilification for people with disability, though it does contain protections inter alia for sexual orientation, gender identity or intersex, and HIV/AIDS status.

⁶⁰ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18].

⁶¹ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.81]-[7.92].

⁶² *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” rec 4.30 Vilification because of disability.

People with disability are protected from vilification in other states and territories, with reviews such as in Queensland, Victoria and Western Australia recommending adding the attribute.⁶³ NSW is out of step with others by not adopting the attribute. It is time to change.

Promoting substantive equality: Question 11.1: Adjustments

- (1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?
- (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?
- (3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

Not providing an adjustment that would, for example, enable a person with disability to comply with a particular requirement or condition, or facilitate the realisation of any of their rights under the *CRPD*, constitutes unlawful discrimination. Failure to provide adjustments is one of the four specific *forms* of discrimination, not just an element of direct or indirect discrimination.⁶⁴

In our 2023 preliminary submission to the current Review PWDA advocated for standalone duties to:

- provide adjustments, and
- prevent discrimination.

⁶³ See, e.g., Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 114; Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 1, 60; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 44, rec 4.

⁶⁴ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18]; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 308.

The duties to provide adjustments and prevent discrimination should apply to all protected attributes.

These duties should apply to all areas of public life and educational services and authorities (including the early childhood education and care, after school hours, and vocational sectors). It should apply to governments and public authorities in the exercise of their functions. It should apply to all employers, regardless of size of organisation.

The onus for beginning a *dialogue* with a person regarding adjustments must lie with the duty holder. The burden should not be placed on a person with a protected attribute. In the case of employment for example, as discussed earlier, this dialogue should start as early as the job advertisement itself. The workspace (for example) should be one where the person with disability feels safe to participate in the dialogue regarding adjustments, and feels supported to raise adjustment requests themselves through dialogue when required as employment progresses.

The DRC noted that a standalone duty to provide adjustments would be consistent with meeting Australia's international obligations in relation to people with disability.⁶⁵

They recommended the *Disability Discrimination Act 1992* (Cth) should be amended to have a standalone duty to make adjustments separate from the tests for discrimination:⁶⁶

Recommendation 4.26 Standalone duty to make adjustments

The *Disability Discrimination Act 1992* (Cth) should be amended to include the following provision:

Duty to make adjustments

It is unlawful for a person to fail or refuse to make an adjustment for:

- (a) a person with a disability; or
- (b) a group of persons with disability

⁶⁵ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, "Realising the human rights of people with disability" 308.

⁶⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, "Realising the human rights of people with disability" rec 4.26 Standalone duty to make adjustments.

unless making the adjustment would impose an unjustifiable hardship on the person.

PWDA agrees with this model recommended by the DRC (noting ‘person’ should include public authority etc) and submit that it should be part of the ADA. A duty to provide adjustments will provide a normative framework to eliminate discrimination, promote substantive equality, and build inclusive communities.⁶⁷

Promoting substantive equality: Question 11.3: A positive duty to prevent or eliminate unlawful conduct

(1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

(2) If so:

- a. What should duty holders be required to do to comply with the duty?
- b. What types of unlawful conduct should the duty cover?
- c. Who should the duty holders be?
- d. What attributes and areas should the duty apply to?

PWDA believes that the ADA should include a positive duty to take reasonable and proportionate measures to prevent or eliminate unlawful discrimination.

As noted in the Consultation Paper, such a duty exists in several other discrimination laws in Australia.⁶⁸ The positive duty will promote substantive equality and prevent discrimination against people with disability.⁶⁹ **It should apply to all protected attributes.**

PWDA supports DRC recommendation 4.27 to amend the *Disability Discrimination Act 1992* (Cth) to include a positive duty on duty holders to take “reasonable and

⁶⁷ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 308.

⁶⁸ *Equal Opportunity Act 2010* (Vic) s 15; *Anti-Discrimination Act 1992* (NT) s 18B; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1998* (Tas) s 104; *Sex Discrimination Act 1984* (Cth) s 47C.

⁶⁹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” 313-314.

proportionate” measures to eliminate disability discrimination.⁷⁰ We believe this recommendation should form the basis for a similar amendment to the ADA.⁷¹

The recommendation provides a range of factors to assist in determining how something may be considered “reasonable and proportionate.” It reflects and builds upon how the duty is expressed in other jurisdictions, and does not conflict with any duties held by the duty holder under applicable work, health and safety laws.

The positive duty should apply to all areas of public life where discrimination is prohibited,⁷² and apply to all duty holders under discrimination laws.⁷³ PWDA submits that all NSW government departments, agencies, authorities and similar, regardless of whether they provide a direct service, must be identified as a duty holder for the purposes of preventing disability discrimination.

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⁷⁰ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) Vol 4, “Realising the human rights of people with disability” rec 4.27.

⁷¹ We note that *Equal Opportunity Act 2010* (VIC) s 15(6) is also instructive.

⁷² Australian Human Rights Commission, *Revitalising Australia’s Commitment to Human Rights: Free & Equal*, Final Report (2023) 82-83, 95.

⁷³ Australian Human Rights Commission, *Revitalising Australia’s Commitment to Human Rights: Free & Equal*, Final Report (2023) 81-83.



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