Law Council
OF AUSTRALIA

Disability Discrimination Act 1992 Review

Attorney-General's Department

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Introduction

1. The Law Council thanks the Attorney-General's Department for the opportunity to comment on proposed reforms to the *Disability Discrimination Act 1992* (Cth) (**DDA**), as outlined in the Department's **Issues Paper** published on 1 August 2025.[1]

2. Apart from input from the bodies acknowledged above, this submission draws on previous relevant Law Council submissions, including particularly our 2019 submission to the Australian Human Rights Commission (**AHRC**) on *Priorities for Federal Discrimination Law Reform* (**2019 Submission**).[2]

3. The submission does not provide answers to all 51 Consultation Questions in the Issues Paper. The absence of a response to a question merely indicates that a position has not been reached on it in the time available.

4. In terms of guiding principles, the Law Council is of the view that discrimination law reform should make the law clear, consistent, comprehensive, intersectional, remedial, accessible and preventive. These principles have informed several submissions the Law Council has made to Commonwealth anti-discrimination law reform consultations for more than a decade now.[3]

5. Reform to the DDA is welcome, particularly with a view to modernising the legislation to meet the evolving needs of stakeholders and protect human rights. Despite noteworthy revisions in 2009,[4] most of the DDA is now more than three decades old, predating major developments such as the adoption of the *Convention on the Rights of Persons with Disabilities* (**CRPD**)[5] in 2006, and the establishment of the National Disability Insurance Scheme in 2013. As noted in the Issues Paper, community understanding and expectations have also shifted significantly.[6]

6. A major driver of the proposed reforms was the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission or **DRC**), which handed down its final report in September 2023.[7] The DRC made clear that Australian law has not adequately protected the rights of many people with disability. In relation to the DDA, concepts such as reasonable accommodation/adjustment and unjustifiable hardship, along with evidentiary burdens on those attempting to assert their rights, have allowed barriers to participation in society to remain in place, despite the original intentions behind the legislation.[8]

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1 AGD, *Review of the Disability Discrimination Act* (Consultation Resources, August-October 2025).
2 Law Council, *Response to Discussion Paper: Priorities for federal discrimination law reform* (Submission, 20 December 2019) (**2019 Submission**).
3 Ibid, [12].
4 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)
5 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).
6 Issues Paper, 4.
7 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report*.
8 *Disability Discrimination Act 1992* (Cth), s3. See further Disability Discrimination Bill 1992, *Explanatory Memorandum*.

7. As a starting point for consideration of the recommendations in this submission, changes to the DDA as a result of this consultation should:

   - not result in any diminution of protection in practice;
   - prioritise the voices of those with relevant lived experience;
   - be drafted with a view to implementing Australia's relevant international obligations, in particular under the CRPD, and
   - not arbitrarily increase the existing regulatory burden on business (especially small business), including through the cumulative effect of the multiple reforms proposed in the Issues Paper.

8. In addition, harmonising the DDA and state/territory anti-discrimination regimes, where possible, is desirable. At present, feedback from practitioners around the country suggests that use of the DDA (along with other federal anti-discrimination legislation) can often be a less attractive path to redress for clients than state/territory legislation or the Fair Work regime (for reasons such as accessibility, clarity and cost). We acknowledge that a modern, streamlined, consolidated Anti-Discrimination Act at the Commonwealth level is not proposed at this time.[9] However, this should not prevent individual Acts such as the DDA from being updated in line with the principles set out at paragraph 4 above.

9. Some of the DRC's recommendations represent significant shifts in regulation and responsibility (for example, the positive duties in relation to elimination of discrimination and adjustments). Accordingly, as was the case regarding the recent SDA reforms, adequate additional funding must be allocated to relevant bodies such as the AHRC if the reforms are to be implemented successfully. The impact on civil legal need must also be factored in and funded so that people can uphold their rights in practice, including before the courts.

10. Finally, in accordance with feedback received to date and the Law Council's policy on a Federal Human Rights Charter,[10] DDA reform should be seen as part of a broader project to implement a comprehensive national human rights framework.[11] Some of the reform proposals in the Issues Paper use language derived from human rights law and jurisprudence. Although this language is common in other jurisdictions, it would be best supported (including in the interests of clarity and consistency of terminology) if accompanied by a federal Human Rights Act.[12] Such an Act should be adopted as the keystone of a comprehensive and cohesive Australian human rights framework.

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9 Law Council, *Policy Statement – Consolidation of Commonwealth Anti-Discrimination Laws* (2011).

10 Law Council, *Federal Human Rights Charter Policy Position* (November 2020).

11 The Law Council's most recent recommendations in this regard are set out in our 2023 submission to the inquiry of the Parliamentary Joint Committee on Human Rights into Australia's Human Rights Framework.

12 Similar considerations apply to reforms needed in light of other Royal Commissions, including the Royal Commission into Aged Care Quality and Safety and the Royal Commission into the Protection and Detention of Children in the Northern Territory. See further discussion under Question 8.

11. Please note that many of the responses below are subject to consideration of the exact wording to be used in any amendments to the DDA resulting from this review. The Law Council would be pleased to consider draft amendments once they are available. We strongly encourage the public release of an exposure draft of the legislation for consultation.

Comments on specific consultation questions

Part 1—Updating understandings of disability and disability discrimination

Question 1

How should disability be defined in the Disability Discrimination Act?

12. The Law Council's position is that the DDA should have a clear and accessible, rights-based, functional and inclusive definition of disability that avoids the medicalised models of the past.

13. The current definition in section 4 of the DDA, while progressive at the time it was introduced, reflects a medicalised approach which is incompatible with contemporary understandings of disability. The medicalised approach can present its own barriers to justice, as it can be difficult for people with disability (particularly without legal advice) to determine whether/how their disability fits within the definition.

14. The starting point for a suitable definition should be the CRPD. Article 1 provides relevantly:

> *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.*

15. We note that this definition has been adopted in the *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas), albeit with the addition of cognitive impairments.[13] However, the inclusion of "long-term" in the CRPD definition still reflects the medicalised approach and is not in keeping with current medical guidance.[14]

16. The definition in the *Disability Inclusion Act 2024* (ACT) is more consistent with current theory and practice:[15]

> *disability—*
>
> *(a) means any impairment or functional limitation that, in interaction with a barrier to accessibility, hinders the full and equal participation of a person with disability in society; and*
>
> *(b) includes an impairment or functional limitation—*
>
> *(i) that is permanent, temporary or episodic in nature; and*
>
> *(ii) whether or not it can be noticed by others.*

---

[13] *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas), s 5.

[14] See eg World Health Organisation, *International Classification of Functioning, Disability and Health* (2025-01). Duration is not mentioned in the ICF as an element of disability.

[15] *Disability Inclusion Act 2024* (ACT), Dictionary (Schedule).

17. The DDA definition should draw on these examples, but be as simple as possible and informative for all those who might use the Act.

Question 2

What factors should be considered in developing a new definition of disability?

18. Further to our response to Question 1, considerations may include:

- Outdated language such as "malfunction, malformation or disfigurement" should be discarded (see paragraphs (e) and (f) of the current definition in section 4 of the DDA);
- The DDA requires a tailored (as opposed to imported) definition, that is compatible with duties set out in the Act (including the level of knowledge expected of duty-holders),[16] and
- There should be clear delineation of the types of disabilities covered, to avoid confusion about the scope of protection.

Question 3

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

19. Yes, the Law Council supports coverage of intersectional discrimination in the DDA, in line with the guiding principles set out in the Introduction to this submission.

20. Whilst it is already possible to bring an action for discrimination occurring for disability and other reasons under section 10 of the DDA, claims in relation to other attributes require people with disability to address other anti-discrimination legislation. This can impede accessibility of remedies, particularly for those without legal representation (see further discussion under Question 4 below).

21. The UN Committee on Rights of Persons with Disabilities has also expressed its concern that "there is no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination, especially at the Commonwealth level",[17] with the following recommendation:

> *In line with its general comment No. 6 (2018) on equality and non-discrimination, the Committee reiterates its previous recommendation (CRPD/C/AUS/CO/1, para. 15) that the State party strengthen anti-discrimination laws, particularly the Disability Discrimination Act 1992, to:*
>
> *(a) Address and prohibit systemic, intersectional and multiple forms of discrimination, recognizing discrimination on a single or on multiple and/or intersectional characteristics and allowing for systematic complaints,*

[16] DRC Recommendations 4.26 and 4.27.
[17] *Concluding Observations on Combined 2nd and 3rd Periodic Reports of Australia*, [9].

> *representative and group actions and sanctions for addressing lack of access and discriminatory behaviour …*[18]

22. To address these issues, the DDA could be amended to cross-reference other federal anti-discrimination laws so that an intersectional complaint may proceed under the DDA alone, notwithstanding that it is based on multiple attributes, as long as disability is one of those attributes.

23. We also note in this context that the AHRC has proposed related changes to the *Australian Human Rights Commission Act 1986* (Cth) and federal discrimination laws to address intersectional claims.[19]

Question 4

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

24. The tests for discrimination in the *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic), which practitioners have found useful, are similar to that proposed by the DRC in Recommendation 4.23 (discussed below in the response to Question 5).[20] These Acts provide for claims based on multiple protected attributes. This approach better recognises the need to protect intersectional identities, but is not directly adaptable to the Commonwealth jurisdiction with its separate anti-discrimination laws.

25. Practitioners report that the need to meet the requirements of multiple Commonwealth laws to run an intersectional claim is a significant disincentive to use of the federal discrimination jurisdiction.

Question 5

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

26. The Law Council supports replacing the current definition of direct discrimination in the DDA with the DRC's recommended definition, as outlined below.

27. The current definition has often been construed narrowly by the courts, and submissions to the DRC (including by Victoria Legal Aid and the AHRC) argued that this has led to unfairness.[21] It has also been reported that the current test can lead to

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18 *Concluding Observations on Combined 2nd and 3rd Periodic Reports of Australia*, [9]-[10].
19 AHRC, *Free and Equal: A reform agenda for federal discrimination laws* (Position paper, December 2021), 301-303.
20 *Discrimination Act 1991* (ACT), ss 7 and 8; *Equal Opportunity Act 2010* (Vic), ss 6 and 8.
21 DRC, *Final Report – Volume 4*, 300.

conceptual difficulties and over-reliance on intent evidence, particularly in factually complex matters. Its inadequacies have been highlighted in numerous reviews and cases.[22]

28. The Law Council noted in its 2019 submission to the AHRC that a focus on unfavourable treatment—that is, the actual impact on the individual—would simplify the law and avoid the complexities that have emerged in the jurisprudence around the identification of 'comparators' (defined as those who are treated less favourably in circumstances that are the same or not materially different).[23]

29. The Final Report of the DRC stated in relation to the current definition that:

> *There is a compelling case to simplify the definition of direct discrimination in section 5(1) of the DDA. There is also a case for modernising the way discrimination is understood. This can be done with two reforms:*
> - *first, to remove the need to prove comparative less favourable treatment*
> - *second, to mirror the approach used in the FWA with a rebuttable presumption, so that the onus rests on the respondent to prove on the balance of probabilities that the reason for the treatment was not disability.*[24]

30. Accordingly the DRC's proposed definition (in Recommendation 4.23) was:

> *(1) For the purposes of this Act, a person (the **alleged discriminator**) directly discriminates against another person (the **aggrieved person**), if the person treats, or proposes to treat, the aggrieved person unfavourably on the ground of the aggrieved person's disability.*[25]

31. Feedback from practitioners strongly supports moving to a simpler test such as that proposed by the DRC. This test could accommodate a comparative analysis if useful,[26] but would not mandate one.

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[22] See, eg, *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 [19] (Mahoney J); *Commissioner of Police v Mohamed* [2009] NSWCA 432 [25]-[26] (Basten JA, highlighting difficulties of comparator test in that it relies on hypothetical / abstract comparisons, artificial ones that are not truly equivalent, distracting from actual harm); *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd* (No 3) [2012] FCA 697 (Katzmann J, noting the real difficulty in identifying a comparator); *Baird v Queensland* (2006) 156 FCR 451 [63] (Allsop J, explaining that the effectiveness of s 9(1) of the *Racial Discrimination Act 1975* (Cth) should not be denied because there is no directly comparable situation); See also, eg, Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)' (2007) 35(1) *Federal Law Review* 111; Belinda Smith, 'From *Wardley* to *Purvis* – How far has Australian anti-discrimination law come in 30 years' (2008) 21 *Australian Journal of Labour Law* 3; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Report No 92, November 1999) [3.51]; Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti–Discrimination Laws* (Discussion Paper, September 2011) 10; AHRC, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 279.

[23] 2019 Submission, [64]-[65].

[24] DRC, *Final Report – Volume 4*, 302.

[25] DRC, *Final Report – Volume 4*, Recommendation 4.23. NB this definition is linked to a second paragraph on the burden of proof, discussed below under Question 6.

[26] *Kaplan v State of Victoria (No 8)* [2023] FCA 1092 [48], [70], [379], [608], [666]. This judgment notes that, while a comparator is not required under the *Racial Discrimination Act 1975* (Cth), comparative analysis may still serve as a useful evidentiary tool.

Question 6

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

32. The Law Council supports the shifting burden of proof proposed by the DRC, as set out below. This is appropriate to achieve the objects of the DDA, and to address the information asymmetries between parties identified by practitioners (and recognised by the DRC).

33. The Law Council has previously recommended a shifting burden,[27] akin to the approach adopted for discrimination claims under the Fair Work regime[28] or the *Equality Act 2010* (UK).[29]

34. The DRC recommended that a further subsection be added to the proposed definition discussed in Question 5 above, namely:

> *(1A) For the purposes of subsection (1), an alleged discriminator who has treated, or proposes to treat, the aggrieved person unfavourably bears the burden of proving that the treatment or proposed treatment was not on the ground of the aggrieved person's disability.*[30]

35. The rationale is clear: the reasoning behind less favourable treatment is, in most circumstances, within the unique knowledge of the alleged discriminator. As such, the current test, which places the onus on the complainant, represents a significant barrier to relief.

36. Some practitioners have expressed concerns that the shifting burden could lead to more litigation, which could in turn lead to increased court workloads and access to justice issues. Careful consideration of any increased resourcing required for courts and legal assistance would need to follow.

37. However, it can be difficult to attribute trends in litigation to certain factors. For example, practitioners report that the Fair Work regime—which places an evidentiary burden on alleged discriminators in relation to workplace discrimination claims[31]—is better utilised than the DDA, but its popularity could also be attributed to a range of other factors, such as familiarity, accessibility (including in relation to costs)[32] and availability of desired remedies.

38. By contrast, the Law Council has not seen any evidence to date of a significant increase in litigation under other regimes with comparable shifting evidentiary burdens, such as in the whistleblower protections in the *Corporations Act 2001* (Cth).[33] We note that a shifting burden is also being considered for inclusion in

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27 2019 Submission, [133].
28 *Fair Work Act 2009* (Cth), ss 351 and 361.
29 *Equality Act 2010* (UK), s 136.
30 DRC, *Final Report – Volume 4*, 302 (Recommendation 4.23).
31 *Fair Work Act 2009* (Cth), s 361.
32 *Fair Work Act 2009* (Cth), s 570.
33 *Corporations Act 2001* (Cth), ss 1317AC and 1317AD.

relation to reprisals under the *Public Interest Disclosure Act 2013* (Cth) as part of the Stage Two public sector whistleblower reforms.[34]

39. In addition, practitioners note that more evidence from alleged discriminators could help to resolve cases at the settlement or conciliation stage.

Question 7

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

40. The Law Council recommends that the definition of indirect discrimination in section 6 of the DDA be largely retained, but with changes to the reasonableness element as addressed in the response to Question 8 and the wording of 6(1)(b) and 6(2)(b) as set out in the response to Question 9.

41. In its Final Report, the DRC noted that the definition of indirect discrimination contains a number of discrete elements that need to be made out by a claimant.[35] The person with disability must first identify the relevant "requirement or condition"; then show they would suffer serious disadvantage in complying with that requirement or condition; and then demonstrate further that *other people with the same disability* would also be disadvantaged by the relevant requirement or condition.

42. Even having established these things, no discrimination will be found if the respondent can prove the requirement or condition was reasonable (see subsection 6(3)). The respondent could also rely on the defence of "unjustifiable hardship" in sections 21B and 29A of the DDA, even if the requirement or condition is found to be unreasonable.[36]

43. The DRC recommended simplifying the test by replacing the reasonableness requirements in subsections 6(3) and (4) (Recommendation 4.24):

> *The Disability Discrimination Act 1992 (Cth) should be amended by inserting a new subsection 6(3) to substitute existing subsections 6(3) and (4) as follows:*
>
> *6(3) Subsection (1) or (2) does not apply if avoiding the discrimination would impose an unjustifiable hardship on the alleged discriminator.*

44. We address this recommendation in our response to Question 8 below.

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[34] AGD, *Public sector whistleblowing reforms – Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers* (Consultation Paper, November 2023), 17.

[35] DRC, *Final Report – Volume 4*, 303-304.

[36] Ibid, also *Disability Discrimination Act 1992* (Cth), ss 6, 11, 21B and 29A.

Question 8

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

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

Please expand on your response.

45. There are mixed views amongst the profession on this question. On balance, the most suitable option for the DDA in the absence of a federal Human Rights Act would be Option (b)—that 'reasonableness' be retained and supplemented with a list of factors to consider. Alternatively, in the interests of avoiding a 'double defence' for respondents as identified by the DRC,[37] Option (a) may also be acceptable.

46. As set out above, the current definition of indirect discrimination under the DDA includes a 'reasonableness element': ie the requirement or condition is not indirect discrimination if it is reasonable in the circumstances of the case.[38] Practitioners report that meeting the statutory requirements for indirect discrimination is generally more complex than making a claim for direct discrimination.

47. Simplification of the legislation is desirable in the interests of clarity, being one of the Law Council's overarching policy priorities for reform.[39] We also share concerns raised in Commonwealth anti-discrimination law reviews that the reasonableness test can be ambiguous and may give rise to different interpretations, given the difficulties of identifying "the limits of indirect discrimination claims using this approach".[40] Supplementing the reasonableness element with a list of factors to consider would mitigate this concern.

48. Practitioners also note that there is a reasonableness element in most other jurisdictions' indirect discrimination tests,[41] as well as in other federal anti-discrimination laws.[42] In some cases, comparable legislation such as the *Equal Opportunity Act 2010* (Vic) sets out a non-exhaustive list of factors to consider in assessing reasonableness, which has been praised as a practical approach.[43]

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37 Ibid.
38 *Disability Discrimination Act 1992* (Cth), ss 6(3).
39 2019 Submission, [7].
40 AHRC, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 296; also Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Report, December 2008) [11.13], [11.17].
41 See eg *Equal Opportunity Act 2010* (Vic), s9 or *Discrimination Act 1991* (ACT) s 8.
42 The Law Council raised concerns regarding departures from the reasonableness test in indirect discrimination law in *Religious freedom bills – second exposure drafts* (Submission, February 2020), [5] and [33]-[36].
43 See eg *Equal Opportunity Act 2010* (Vic), s9(3).

49. Consistent with DRC Recommendation 4.24, Option (a) would remove the reasonableness element altogether. In doing so, it would remove a layer of defence to focus on the test of unjustifiable hardship. This would clarify the normative sequence for indirect discrimination: prima facie discrimination is established where the requirement or condition disproportionately impacts people with disability, and the onus then shifts to the respondent to establish unjustifiable hardship. For this reason, Option (a) may be an acceptable alternative to Option (b). In relation to the latter, guiding judicial consideration with a list of factors to be taken into account could clarify differences between reasonableness and unjustifiable hardship, and how they should be interpreted consistently with the objects of the DDA.

50. In relation to Option (c), this approach is reflected in section 19 of the *Equality Act 2010* (UK):

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *…*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

51. The concept of proportionality is a core feature of human rights law. It plays a key role in the interpretation and application of international human rights treaties to which Australia is a party,[44] including those upon which the DDA is based. It is important to note that the 'principle of proportionality' has a particular meaning in European law and, by extension, under the *Human Rights Act 1998 (UK)* which incorporates the European Convention on Human Rights. However, the concept of proportionality is incorporated within reasonableness tests in many Australian laws, particularly at the state and territory level. This includes the "reasonable limits" provisions of those states and territories that have enacted a domestic Human Rights Act or Charter, namely the ACT,[45] Victoria[46] and Queensland.[47] A recent example is section 13 of the *Human Rights Act 2019* (Qld) which provides:

> *(1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.*
>
> *(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—*
>
> *(a) the nature of the human right;*

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[44] See eg Committee on the Rights of Persons with Disabilities, *General Comment 6 (2018) on equality and non-discrimination* (UN Doc CRPD/C/GC/6, 26 April 2018), in which proportionality is mentioned throughout (see eg paras [18], [23], [25], [26]); also Committee on Economic, Social and Cultural Rights, *General Comment 20 (2009) – Non-discrimination in Economic, Social and Cultural Rights* (UN Doc E/C.12/GC/20, 2 July 2009), [13].

[45] *Human Rights Act 2004* (ACT), s 28.

[46] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

[47] *Human Rights Act 2019* (Qld), s 13.

> *(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;*
>
> *(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;*
>
> *(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;*
>
> *(e) the importance of the purpose of the limitation;*
>
> *(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;*
>
> *(g) the balance between the matters mentioned in paragraphs (e) and (f).*

52. The concept of proportionality is also incorporated within the "reasonableness" test for indirect discrimination in section 9 of the *Equal Opportunity Act 2010 (Vic),* through the factors in section 9(3):

> *Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—*
>
> *(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;*
>
> *(b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;*
>
> *(c) the cost of any alternative requirement, condition or practice;*
>
> *(d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;*
>
> *(e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.*

53. The Law Council supports supplementing the existing "reasonableness" requirement with a list of factors that more clearly require assessment of the proportionality of the condition, similar to the approach adopted in the Victorian legislation.

54. It is important to note that the first recommendation in Volume 4 of the DRC Final Report (Recommendation 4.1) was to commit to the enactment of a Disability Rights Act, which would operate alongside the DRC's other recommended reforms to the DDA. The DRC's recommendations for the DDA should be understood in that context. In the Law Council's view, although a Disability Rights Act could complement the DDA and create a more cohesive framework for people with disabilities, a comprehensive federal Human Rights Act is preferable, including to ensure consistent use and understanding of human rights concepts (including reasonableness and proportionality) when implementing disability rights and the rights of other groups in society.

Question 9

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

55. Practitioners' feedback suggests that this language is redundant and/or implies a choice that may not exist in practice. We also note that the AHRC recommended removal of the 'does not comply or is not able to comply' requirement in its *Free and Equal* report.[48] We encourage consultation on any revised language in the definition of indirect discrimination resulting from this review, including through an exposure draft of the relevant legislation.

Question 10

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

56. The Law Council supports the inclusion of the CRPD in the objects clause of the DDA, in line with DRC Recommendation 4.33. Such an amendment would be welcome on two bases:

- it would align with the Law Council's general position that federal anti-discrimination law should implement Australia's relevant international obligations, and
- it could strengthen the constitutional foundations of the DDA.

57. In respect of the DDA's constitutional foundations, the Commonwealth does not have any express power to legislate in respect of discrimination, and therefore relies on a number of heads of legislative power. Most significantly for present purposes, the Commonwealth relies on its power to legislate with respect to "external affairs" under section 51(xxix) of the Constitution, which has been held to include the implementation of Australia's obligations under international treaties such as the CRPD.[49]

[48] AHRC, *Free and Equal: A reform agenda for federal discrimination laws* (Position paper, December 2021), 295.

[49] See further 2019 Submission, [17]-[18].

Question 11

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

58. This requirement, per DRC Recommendation 4.34, could make the DDA more consistent with modern rights-protective legislation, such as the *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2019* (Qld).[50]

59. While some practitioners support this recommendation, others consider that including the CRPD in the objects of the DDA may be sufficient in terms of guiding its interpretation.

60. An interpretive direction of this nature would be unusual in Commonwealth legislation, (including anti-discrimination law), and consideration would need to be given to the potential effects on respondents' cases, in line with the principle of equality of arms. Having said that, there is already a common law requirement for all Commonwealth statutes to be interpreted, where possible, consistently with relevant international obligations,[51] and for beneficial legislation (especially legislation that protects or enforces human rights) to be interpreted liberally.[52]

Part 2—Positive duty to eliminate discrimination

Question 12

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

61. The Law Council supports the introduction of a positive duty in the DDA to take reasonable and proportionate measures to eliminate disability discrimination, harassment and victimisation, so far as possible, although practitioners have mixed views on the scope of its application.

62. The Law Council has previously supported positive duties in federal anti-discrimination law to enhance protection in relation to a range of attributes.[53] A positive duty was incorporated into the SDA in 2022,[54] with the support of the Law Council.[55]

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50 *Human Rights Act 2004* (ACT) ss 30 and 31, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2019* (Qld) s 48.

51 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, [26] per Mason CJ and Deane J; also *Momcilovic v The Queen* [2011] HCA 34, [18] per French CJ.

52 *Waters v Public Transport Corporation* [1991] HCA 49 [21] per Mason CJ and Gaudron J; *AB v Western Australia* [2011] HCA 42, [24] per French CJ, Gummow, Hayne, Kiefel and Bell JJ.

53 2019 Submission, [128].

54 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

55 Law Council, *Submission no 249 to AHRC, National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) [167].

63. Informed by the 2022 amendments to the SDA, the DRC's Recommendation 4.27 was:

> *The Disability Discrimination Act 1992 (Cth) should be amended to introduce a positive duty on all duty-holders under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the Sex Discrimination Act 1984 (Cth):*
>
> ***Duty to eliminate discrimination on the ground of disability***
>
> *(1) A person must take reasonable and proportionate measures to eliminate all forms of discrimination on the ground of disability.*
>
> *(2) In determining whether a measure is reasonable and proportionate the following factors must be considered—*
>
> *(a) the size of the person's business or operations;*
>
> *(b) the nature and circumstances of the person's business or operations;*
>
> *(c) the person's resources;*
>
> *(d) the person's business, risk management plans and operational priorities;*
>
> *(e) the practicability and the cost of the measures;*
>
> *(f) whether the person has a disability action plan;*
>
> *(g) nature and extent of the person's consultation with any person with disability concerned; and*
>
> *(h) all other relevant facts and circumstances.*
>
> ***Other duties not limited or otherwise affected***
>
> *(3) This section does not limit, or otherwise affect, a duty that a duty-holder has under:*
>
> *(a) the Work Health and Safety Act 2011 (Cth); or*
>
> *(b) a law of a State or Territory that deals with work health and safety.*

64. The inclusion of this duty in the DDA could prompt a significant cultural shift and improve responses to disability. Similar positive duties have been recommended (as noted in the Issues Paper) by a number of discrimination law reviews.[56] A shift away from the present reactive approach towards a preventive approach would be more consistent with Australia's obligations under the CRPD,[57] and place less burden on people with disability to drive change. It has also been observed that a positive duty can better underpin Disability Action Plans, which have had substantial positive effects.[58]

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[56] DRC, *Final Report – Volume 4*, Recommendation 4.27; AHRC, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 82–83, 92, 95; AHRC, *The National Anti-Racism Framework: A Roadmap to Eliminating Racism in Australia* (2024) Recommendation 10; Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, 2025), Recommendation 53.

[57] CRPD, articles 4 and 5.

[58] See eg Commonwealth, *Targeted Action Plans Report: Australia's Disability Strategy 2021-2031*; or Victorian Government, *Inclusive Victoria: state disability action plan (2022-2026) midway report*.

65. The Law Council observes that the DRC's proposed positive duty is more expansive than the positive duty in section 47C of the SDA, which is on employers and persons conducting business or undertakings (**PCBU**s), and is restricted to workplace sexual harassment and discrimination on ground of sex in the workplace context. By contrast, the positive duty proposed by the DRC would apply to all duty-holders and to all disability discrimination, harassment and victimisation, much like that in the *Equal Opportunity Act 2010* (Vic).[59]

66. Overall, practitioners have mixed views on the appropriate scope of the application of the positive duty. At a minimum, such a duty should apply to employers, PCBUs, as well as healthcare and education providers, given the known impact of their operations on the lives of people with disability. Some practitioners noted that consistency with the SDA positive duty would be sensible given the work the AHRC has already done with the relevant employers and PCBUs.[60] Others supported the broadest possible scope of application. There is, however, also a concern to ensure that the positive duty does not impose disproportionate burdens on small business.

67. Feedback from practitioners suggests that the Victorian positive duty has operated well and been beneficial to people with disability. Notably though, the positive duty only applies to persons who have a duty not to discriminate under Part 4, 6 or 7 of that Act. Recent arguments being advanced on behalf of Victorian police, prison and child protection authorities mean that, if a government agency does not provide a "service", they are under no duty to take any measures to eliminate discrimination.[61] This is a significant gap in the protections for persons with disability in their interactions with government agencies. There is a strong view that, consistent with Australia's relevant obligations under international human rights treaties, government agencies should be under a positive duty to eliminate discrimination when exercising their powers and responsibilities irrespective of whether it involves the provision of a "service" under the DDA.[62]

68. We recommend that the scope of application of the positive duty be developed with the above considerations in mind. In any event, the positive duty should be accompanied by appropriate guidance and support for duty-holders, and breaches of the duty should be subject to appropriate consequences.[63]

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59 *Equal Opportunity Act 2010* (Vic), s 15.

60 See eg AHRC, *A Quick Guide for Complying with the Positive Duty under the SDA* (August 2023).

61 In *Soo v Corrections Victoria Department of Justice and Community Safety* (Human Rights) [2023] VCAT 135 at [79]-[83], the Tribunal member accepted the submissions on behalf of Corrections that that the failure or refusal by prison authorities to provide the minimum entitlements in s 47 of the *Corrections Act 1986* (which includes special dietary requirements, medical treatment, special care and treatment if intellectually disabled or mentally ill) does not involve the provision of a 'service' under the *Equal Opportunity Act 2010 (Vic).* Practitioners report that similar arguments are being run by police and child protection authorities.

62 See eg *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**), articles 2(1) and 26 or the CRPD generally (neither treaty restricts the scope of the prohibition on discrimination to government "services").

63 The AHRC has recommended a civil remedy regime for the SDA as well – see *Speaking from Experience: What needs to change to address workplace sexual harassment* (Report, June 2025), Recommendation 11.

Question 13

Are there lessons from the operation of the positive duty in the Sex Discrimination Act that could be incorporated into a positive duty in the Disability Discrimination Act?

69. The implementation of the positive duty under the SDA may offer several important lessons for reform of the DDA.

70. A positive duty under the DDA should be accompanied by broad inquiry powers and sufficient resourcing for the AHRC to conduct proactive investigations and issue compliance notices. The resourcing would also need to be adequate to fund the substantial guidance work for duty-holders that has been necessary to facilitate the implementation of the SDA positive duty.

71. We note in this context DRC Recommendation 4.28, which would extend relevant powers of the AHRC to a new positive duty under the DDA:

    a. *Division 4A (ss 35A–35K) of the Australian Human Rights Commission Act 1986 (Cth) should be amended by inserting the words 'or disability discrimination' after 'sex discrimination' where these words appear.*

    b. *A reference to 'disability discrimination' means any conduct that is unlawful under the Disability Discrimination Act 1992 (Cth)*.[64]

72. The AHRC has only had the power to enforce compliance by organisations and businesses with the positive duty since 12 December 2023. It is therefore relatively early days in understanding how well the positive duty is being implemented across PCBUs. We acknowledge the AHRC's regulatory approach, which is based on collaboration and engagement and is intended to proactive and voluntary compliance with positive duty obligations, focusing compliance and enforcement activities where risks and impacts of harm are greatest.[65]

73. We have, however received some feedback that SDA experience may also reveal the risk of procedural compliance without cultural change. Despite the welcome efforts of the AHRC to undertake a comprehensive public awareness campaign and prepare detailed guidance material for different audiences, practitioners report that many employers and duty-holders continue to look for (or employ) a "box-ticking" minimum compliance approach—drafting policies and conducting training without addressing the structural and cultural drivers of inequality. Such an approach is particularly problematic for people with disability who experience intersecting forms of disadvantage, such as racism, gender-based violence, or economic insecurity. A positive duty under the DDA must therefore be structured in such a way as to incentivise and support systemic, structural change within organisations and duty-

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[64] DRC, *Final Report – Volume 4*, 315. NB the heading of Part II, Division 4A of the AHRC Act would also need to be amended if these changes were made.

[65] President of the AHRC, Statement of Intent from the Australian Human Rights Commission, letter to former Attorney-General Mark Dreyfus KC, MP, 17 October 2024.

holder communities, including leadership accountability, inclusive governance, and meaningful consultation with people with disability.

74. While the AHRC has issued guidance on what constitutes "reasonable and proportionate measures" under the SDA model, these materials are not legally binding and may have limited influence on judicial interpretation.[66] We have received some support for the need for a positive duty under either the SDA or DDA to be accompanied by statutory codes of practice or binding standards, developed in consultation with people with disability and disability rights organisations. We recognise, however, that a positive duty would be applied to a very wide range of duty holders, including small and large employers, accommodation providers, clubs and incorporated associations, sports clubs, principals or agents of land interests, schools and universities. In determining what is reasonable and proportionate, various factors will need to be considered, including organisational size, resources, budget, nature of budget, operational priorities, costs of measures and whether they can actually be put into place. Some flexibility is needed in the measures adopted to meet the positive duty. This means that it may be difficult to create prescriptive statutory codes of practice or binding standards for all scenarios.

75. Finally, the SDA model does not mandate consultation with affected communities. By contrast, the Work Health and Safety framework includes consultation obligations and codes of practice, offering a more structured and participatory approach.[67] A positive duty under the DDA should incorporate similar requirements, ensuring that compliance strategies are co-designed with people with disability and reflect their lived experience to the greatest extent possible.

Question 14

What costs, benefits and other impacts would duty holders experience in meeting a positive duty under the Disability Discrimination Act? If you are an existing duty holder under the Disability Discrimination Act, please specify how you think meeting a positive duty would impact you.

76. There is an important normative and legal distinction between the existing reasonable adjustments provisions under the DDA and the proposed positive duty, which has implications for the overall costs, benefits and impacts of the proposed reform.

77. The existing reasonable adjustments provisions are reactive and individualised. They are triggered when a person with disability requests an adjustment to remove a barrier to participation. The duty-holder must then assess whether the adjustment is reasonable, considering factors such as cost, feasibility, and potential unjustifiable hardship.

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[66] They might be considered, along with other extrinsic materials, under s 15AB of the *Acts Interpretation Act 1901* (Cth).

[67] *Work Health and Safety Act 2011* (Cth), Part 5. Part 14 Division 2 and Schedule 2.

78. In contrast, the proposed positive duty is proactive and systemic. It requires duty-holders to anticipate barriers and take steps to eliminate them before harm occurs, without waiting for a complaint or request. Duty-holders would need to assess their online content and other means of providing goods and services and improve their accessibility where necessary. New premises and facilities would need to be built with accessibility in mind.

79. Other costs involved in, for example, staff training, infrastructure upgrades and policy updates should be weighed against the substantial benefits of compliance. The DRC estimated that the cost of violence, abuse, neglect, and exploitation of people with disability in 2021–22 was approximately $46 billion, with $27.7 billion attributable to systemic failures such as lack of access to employment and health services. Addressing these failures through a positive duty could significantly reduce long-term economic and social costs.[68]

80. In terms of impact on duty-holders, the positive duty should also be formulated with reference to relevant obligations under the FWA, workplace health and safety laws or other applicable frameworks.

Question 15

Should there be exceptions or limits to the application of a positive duty?

81. Yes, there should be exceptions or limits to the application of a positive duty, but only to the extent necessary to ensure proportionality and fairness, and care must be taken to ensure they cannot undermine the purpose of the duty.

82. A positive duty in the DDA should be contextual and flexible, taking into account the size, nature, and resources of the duty-holder, the practicability and cost of compliance measures, and any competing legal obligations. These factors are already embedded in the SDA[69] and the ACT[70] and Victorian[71] models, and should be replicated in the DDA to ensure consistency and legal certainty.

83. Any exceptions should be framed carefully as part of a proportionality assessment, rather than as blanket exemptions. This is crucial for the duty to constitute a robust mechanism for driving systemic change.

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68 DRC, *Final Report – Volume 4*, 92.
69 *Sex Discrimination Act 1984* (Cth), s 47C(6).
70 *Discrimination Act 1991* (ACT), Part 9.
71 *Equal Opportunity Act 2010* (Vic), s 10.

Part 3—Encouraging inclusion of people with disability in employment, education and other areas of public life

Question 16

Would the creation of a standalone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?

84. Yes. The Law Council supports the introduction into the DDA of a standalone duty to make adjustments, as per DRC Recommendation 4.26. This duty would both strengthen and make more coherent the DDA adjustment framework.

85. In terms of adjustments generally, the DRC made two pertinent recommendations. The first was Recommendation 4.25, which was to amend all references to "reasonable adjustments" in the DDA with "adjustments". This recommendation is discussed below in the response to Question 18.

86. Recommendation 4.26 suggested a 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*
>
> *unless making the adjustment would impose an unjustifiable hardship on the person.*

87. The Law Council understands that this standalone duty would constitute a novel addition to the DDA, and would replace references to adjustments in sections 5 and 6 (the definitions of direct and indirect discrimination) as well.[72]

88. Such a duty could help overcome some of the difficulties with the current provisions on reasonable adjustments under the DDA identified by the DRC, including that they are not well understood by employers and education providers, and place an inappropriate onus on the person with disability.[73] Practitioners have noted that analogous duties already exist in the *Equal Opportunity Act 2010* (Vic).[74] It would also be in line with obligations arising under the CRPD, which requires the reasonable accommodation of people with a disability to fully enjoy their human rights.[75]

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[72] Such changes may only be required if DRC Recommendations 4.23 and 4.24 are not implemented. As noted in the Introduction, the Law Council would be pleased to consult on the draft wording of any amendments once it is available.

[73] DRC, *Final Report – Volume 4*, [4.6] (from 310).

[74] *Equal Opportunity Act 2010* (Vic), ss 20, 22A, 33, 40 and 45 (separate duties for each area of public life).

[75] CRPD, article 2.

89. In addition to establishing a clearer framework for adjustments, the imposition of such a duty would better reflect the original intent behind the adjustment provisions of the DDA, as described in the relevant explanatory materials.[76]

90. The DRC Final Report states: '[w]e recognise that this is a significant change, but we do not consider it will place an unrealistic burden on persons, entities or governments'.[77] Some duty-holders may need assistance from people with disability to obtain the information necessary to determine the appropriate type/level of adjustment, as well as appropriate non-legislative guidance. Still, the standalone duty would shift some of the current burden away from people with disability to initiate adjustments (a burden which has increased over time as a result of certain decisions requiring proof of discriminatory motivations[78]). Importantly, such a duty would still be subject to the 'unjustifiable hardship' defence.

91. We note that the duty is framed as a duty "not to refuse", which implies a "trigger" event of a request for adjustment. We consider this to be appropriate.

92. As this duty would be a novel addition, however, some ongoing consideration of how to ensure proportionality may be required. This may be best undertaken at the exposure draft stage.

Question 17

Should the scope of the duty to provide adjustments apply only to the existing areas of public life covered by the Disability Discrimination Act, or extend to other contexts?

93. We received feedback from practitioners that adjustments should extend to other contexts which may not presently be covered by the DDA, depending on how far "services" is defined (for example, in relation to policing).[79] As outlined in our response to Question 12 in relation to the positive duty, practitioners are concerned about gaps in the protection of persons with disabilities from discrimination in interactions with government agencies. Practitioners have also noted that other federal anti-discrimination laws, such as the *Racial Discrimination Act 1975* (Cth) (**RDA**) are not artificially restricted to certain "areas of public life" (although they still do not apply to acts done or things said in private). Extension to other areas of public life might be considered in the context of the DDA (see response to Question 50).

94. Although its scope should be broadened, the duty (if adopted) should be drafted to ensure that duty-holders are not responsible for circumstances outside their knowledge and/or control. Any such extension of duties under the Act would also

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[76] Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), *Explanatory Memorandum*, [39].

[77] DRC, *Final Report – Volume 4*, 309.

[78] See eg *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128 (Analysis by People with Disability Australia).

[79] See DRC, *People with disability over represented at all stages of the criminal justice system* (Media Release, December 2020); see further Law Council, *The Criminal Justice System – Issues Paper* (Submission, August 2020).

need to be drafted with constitutional constraints in mind (for example, if applicable to state government officials).

Question 18

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

95. The Law Council supports DRC Recommendation 4.25, noting that its implementation would align with the original intention for the adjustment-related provisions of the DDA, as well as the requirements of the CRPD. The Law Council does not foresee negative unintended consequences if the "unjustifiable hardship" defence is maintained as proposed.

96. In its Final Report, the DRC explained that the DDA was intended to create an implicit duty to make adjustments to move towards substantive equality. However, the qualifier "reasonable" has been interpreted by the federal courts to excuse failures to make adjustments, undermining the original intent.[80] In particular, the DRC noted:

> *In Watts v Australian Postal Corporation, Mortimer J (now the Chief Justice of the Federal Court) explained the adjective 'reasonable' has no qualitative character, in the sense that the adjustment has to be assessed against a standard of reasonableness. The expression 'reasonable adjustment' simply means 'alteration or modification'. Accordingly, an adjustment has nothing to do with whether an adjustment is reasonable, or if a request for an adjustment is reasonable or if a respondent's response to the request is reasonable.*[81]

97. The DRC also recommended removing the word reasonable on the basis that failure to make adjustments is a form of discrimination in itself under the CRPD.[82] This is linked to Recommendation 4.26 for a standalone duty to make adjustments.

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80 DRC, *Final Report – Volume 4*, 306-309.
81 Ibid, 307.
82 Ibid, 308; also CRPD, article 2.

Question 19

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

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

Please expand on your response.

98. The Law Council supports Option (a) subject to clarification of its scope and careful consideration of its implications for duty-holders with limited resources for compliance.

99. Option (a) refers to the DRC's proposed amendment to section 11 of the DDA relating to 'unjustifiable hardship'. Specifically the DRC recommended (Recommendation 4.32):

> *Section 11 of the Disability Discrimination Act 1992 (Cth) should be amended by inserting the new subsections 11(1)(aa), 11(1)(ab) and 11(1A) as follows:*
>
> ***11 Unjustifiable hardship***
>
> *(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:*
>
> *(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;*
>
> *(aa) the nature and extent of the first person's consultations with any person with disability concerned;*
>
> *(ab) the first person's consideration of all available and appropriate alternative measures or actions;*
>
> *(b) the effect of the disability of any person concerned;*
>
> *(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;*
>
> *(d) the availability of financial and other assistance to the first person;*
>
> *(e) any relevant action plans given to the Commission under section 64.*
>
> *Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.*
>
> *(1A) The person relying on unjustifiable hardship must:*
>
> *(a) create and retain all documents recording the person's consideration (if any) of each of the factors in subsection (1); and*
>
> *(b) provide reasons to the person concerned, if so requested, for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.*

> *(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.*

100. We have received feedback that recommendation 4.32 would require decision-makers to consult with the person concerned to identify and consider alternatives, to keep contemporaneous records, and to provide reasons on request, and would place the onus on the party asserting hardship. These procedural obligations promote transparent, evidence-based decision-making and deter post hoc rationalisation. Taken together, the measures align the DDA with modern equality legislation while preserving a principled defence against disproportionate burdens.

101. The Law Council supports these proposed amendments, subject to clarification of their scope of application and consideration of their feasibility and the need for any safeguards. The Government should be mindful to impose only proportionate burdens on duty-holders such as small businesses and others with limited resources for compliance.

102. There are also issues to be carefully considered in the ultimate design of any provisions, noting, for example, that 'right to reasons' provisions are more commonly found in administrative law contexts involving the exercise of government decision-making. These issues might include:

- how consultation with 'any person with disability concerned' might feasibly apply in practice, eg across large organisations and noting that people may not self-identify;
- record-keeping requirements eg, length of period kept, data protection obligations, destruction;
- privacy obligations;
- whether there are matters which it would be reasonable not to disclose, eg commercial-in-confidence or otherwise confidential matters, and
- how any genuinely vexatious requests should be handled.

103. The Issues Paper (at page 53) puts forward an alternative definition of "unjustifiable hardship" requiring an assessment of whether the benefit to the person affected/community outweighs the detriment/cost to the alleged discriminator. Feedback received to date indicates that although there is merit to such a test, the DRC's formulation, which would build on the existing law, is preferred.

Question 20

What are your views on amending the Disability Discrimination Act to consider the nature and extent of any adjustments made and encourage consultation between prospective or current employers and prospective or current employees before making employment decisions?

104. The Law Council supports the implementation of DRC Recommendation 7.26.

105. The DRC heard evidence that uncertainty over 'inherent requirements' rules has led to unnecessary exclusion of candidates with disabilities.[83] Accordingly, the DRC recommended that:

> ***Section 21A** of the Disability Discrimination Act 1992 (Cth) should be amended to expand the factors to be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of a particular role.*
>
> *These factors include the:*
> - *nature and extent of any adjustments made*
> - *extent of consultation with any person with disability concerned.*

106. The proposed additions to the list of factors to be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of a particular role represent a principled expansion.

107. The inherent requirements exception is a narrow derogation from the primary norm of non-discrimination, and should be construed strictly. Requiring express consideration of (a) the nature and extent of available or implemented adjustments and (b) consultation with the person with disability would embed proportionality within the statutory test and align section 21A with the DDA's hardship framework. It would also accord with the fact that "inherent requirements" concern the essential functions of the role, not incidental tasks or employer preference, and must be assessed by reference to the position as adjusted, not in an unmodified form.[84] Incorporating these factors informs decision-making, guards against stereotypes, and ensures that incapacity is not asserted without first interrogating practicable adjustments. The amendment would promote coherence across the DDA (in conjunction with Recommendations 4.25, 4.26, 4.32), and give effect to relevant CRPD requirements relating to work and employment.[85]

108. Subject to the response to Question 21 below, such encouragement seems appropriate for inclusion in guidance materials accompanying amendments to the DDA, rather than in the Act itself.

Question 22

Should any other amendments be made to the definition of inherent requirements, including factors that should be considered when deciding whether a person could carry out the inherent requirements of a job?

109. Consideration should be given to inserting protections for the privacy of people with disability, who may not wish to share details such as sensitive health information for the purposes of "inherent requirements" tests. Guidance material to support people with disability and (prospective) employers could also help to address this issue.

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83 DRC, *Final Report – Volume 7B*, from 388.

84 See eg *X v Cth* [1999] HCA 63 at [11] per Gleeson CJ; [104] per Gummow and Hayne JJ and [144]-[160] per Kirby J.

85 CRPD, article 27(1).

Question 23

Should the concepts of exclusion and exclusionary discipline be defined in the Disability Discrimination Act?

110. The Law Council supports the implementation of DRC Recommendation 7.2 with respect to the DDA, as set out below. Section 22 of the DDA should also be amended to refer to the "best interests of the child", as per article 3(1) of the *Convention on the Rights of the Child*.[86] We note that this principle is already reflected in the Disability Standards for Education.[87]

111. DRC Recommendation 7.2 stated (in relation to the DDA):

> ***Prevent the inappropriate use of exclusionary discipline against students with disability***
>
> *…*
>
> *Section 22(2)(b) of the Disability Discrimination Act 1992 (Cth) should be amended to cover 'suspension and exclusion' as well as expulsions.*

112. Section 22 of the DDA protects equal access to education and operates to prevent discriminatory suspension and exclusion. On a proper construction of sections 22 and 11, exclusion is permissible only where unjustifiable hardship is established. A "last resort" requirement implements proportionality: the provider must adopt the least-restrictive means before invoking the hardship defence. This accords with the DDA's purpose[88] and with the CRPD's approach to inclusive education.[89] Expressly adding "suspension or exclusion" to section 22(2)(b)—though arguably not strictly necessary in light of section 22(2)(c)—removes textual ambiguity and captures rolling or temporary exclusions.

113. As far as the specific inclusion of the words "suspension and exclusion" in section 22(2)(b) goes, some practitioners are concerned that "exclusion" may be too broad a term to support a prohibition, and cause confusion for both educational authorities and students with disability.[90]

114. The DRC's recommendation aims to address an important national issue, the scope of which was explored by a 2016 Senate inquiry.[91] The Castan Centre for Human

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86 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

87 Education Standards for Education 2005, clause 10.2 (Notes). The difficulty with international law terms of art is avoided here because the best interests of the child are known to the federal courts from the *Family Law Act 1975* (Cth).

88 As set out in its objects clause.

89 CRPD, article 24.

90 The term 'suspension' is clearer.

91 Senate Education and Employment References Committee, *Access to real learning: the impact of policy, funding and culture on students with disability* (January 2016).

Rights Law also did an in-depth study into the issue as it manifests in Victorian public schools in 2018.[92]

115. The Law Council observes in this context that exclusion from education can be an important factor in children becoming caught up in the criminal justice system. Such a result is inherently undesirable given the deficiencies of many child justice systems around the country.[93]

Question 24

Should there be exceptions or limits on when exclusion is unlawful?

116. A clear scope of "exclusion" will be required to avoid confusion as to what may constitute legitimate discipline, or perhaps legitimate measures to prevent harm that cannot be mitigated by other means.

Question 25

Should any of the state and territory provisions relating to exclusionary discipline be adopted in the Disability Discrimination Act?

117. Practitioners' feedback indicates that state and territory provisions on exclusion and exclusionary discipline are inconsistent and not necessarily appropriate for adoption in the DDA.

Part 4—Improving access to justice

Question 27

How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?

118. The Law Council has received consistent feedback from practitioners strongly supporting DRC Recommendation 4.29, subject to the addition of a comparable provision to section 18D of the *Racial Discrimination Act 1975* (Cth) to provide for important exceptions, as discussed in our response to Question 29 below, and noting our remarks at paragraphs [121]–[122] below.

119. The DRC Final Report notes that it is presently unlawful to harass a person with a disability in three areas: employment or work; the provision of goods, services and facilities and education.[94] Nevertheless, the DRC heard evidence from individuals of

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92 Castan Centre for Human Rights Law, *Improving Educational Outcomes for Children with Disability in Victoria: Final Report* (June 2018).
93 Law Council, *Policy Statement on Child Justice Reform* (March 2025).
94 DRC, *Final Report – Volume 4*, 316.

significant harassment and even vilification or hate speech.[95] The DRC concluded that "people with disability require protection against offensive behaviour by public acts and harassment on the ground of disability."[96] Accordingly, the DRC recommended that a new provision comparable to section 18C of the RDA be inserted into the DDA (Recommendation 4.29) in the following terms:

> ***Offensive behaviour***
>
> *The Disability Discrimination Act 1992 (Cth) should be amended by inserting a new provision:*
>
> ***Section 39A Offensive behaviour because of disability***
>
> *(1) It is unlawful for a person (the **first person**) to do an act, otherwise than in private, if:*
>
> *(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
>
> *(b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.*
>
> *(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
>
> *(a) causes words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the sight or hearing of people who are in a public place.*
>
> *(3) In this section:*
>
> ***public place** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

120. The Law Council supports stronger anti-vilification provisions in federal law, both civil and criminal (for more serious offending). However, we have associated reservations about incorporating criminal sanctions into the DDA (see discussion under Question 30 below), and concerns about protection of freedom of speech (see discussion under Question 29 below).

121. To the extent the Commonwealth intends to rely on the external affairs power for the implementation of Recommendation 4.29, it should consider the nature and scope of relevant international human rights obligations, in particular under the CRPD. In this respect, the DRC referred to article 16(1) of the CRPD.[97] The relevant provision in the DDA would need to be "reasonably appropriate and adapted" to the implementation of that international obligation or treaty.[98]

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95 Ibid, 316-318.
96 Ibid, 323.
97 DRC, *Final Report – Volume 4*, 318.
98 *Commonwealth v Tasmania* [1983] HCA 21; also *Aldridge v Booth* [1988] FCA 170, [36]-[54]. On the scope of article 16 CRPD, see Keeling, 'Freedom from Exploitation, Violence, and Abuse' in *Women with Disabilities* (Bantekas, Stein, and Anastasiou Eds, OUP 2018). Cf *Bropho v HREOC* [2004] FCAFC 16, in

122. We have not undertaken a full analysis on this point, however, we note that the DRC refers to the CRPD interpreting "exploitation, violence and abuse" broadly, including for example "the infliction of fear by intimidation through bullying, verbal abuse and ridicule on the grounds of disability".[99]

123. Subject to the above, section 18C of the RDA has long supplied a coherent, civil standard for racially offensive conduct. A disability-specific analogue would:

- adopt an objective "reasonably likely" test;
- concern public conduct, and
- require causation (with wording such as 'because of disability or perceived disability').

124. This provision would target harms to people's dignity that could hamper access to public life; regulate behaviour rather than ideas; and operate at the appropriate (civil) level.

125. In terms of potential restrictions on the implied freedom of political communication under the Australian Constitution, the proposed measure would:

- pursue a legitimate end (equality and participation);
- be suitable (empirically tailored to public conduct);
- be necessary (no equally effective, less-restrictive federal alternative presently exists), and
- adequately balance competing interests (a defence as discussed below under Question 29 would preserve space for artistic, academic, scientific and public interest discourse, and fair, accurate reporting).

126. Remedies should include AHRC conciliation, injunctions, apologies/retractions, and compensation.

127. In the spirit of the guiding principle of prevention,[100] article 8 of the CRPD provides relevantly:

> ***8(1)*** *States Parties undertake to adopt immediate, effective and appropriate measures:*
>
> - *To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;*
>
> - *To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;*
>
> - *To promote awareness of the capabilities and contributions of persons with disabilities.*

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which the support for s 18C RDA in international law was said not to be very strictly confined – at [60]-[68].

[99] DRC, *Final Report – Volume 4*, 51-52.

[100] See Introduction above.

128. The Australian Government should undertake broader awareness-raising measures pursuant to this obligation to complement the proposed DDA reforms.

Question 29

Should there be exemptions for any behaviour, similar to the Racial Discrimination Act?

129. Yes. The Law Council considers there should be equivalent exemptions for behaviour to those in section 18D of the RDA. Case law has found these exemptions under the RDA to be important to ensure the prohibition is a constitutionally valid limitation on free speech.

130. An equivalent of section 18D of the RDA would also ensure that a prohibition on offensive speech in the DDA respects article 19 of the *International Covenant on Civil and Political Rights*.[101]

131. The Law Council received feedback that legitimate speech around disability could involve, for example, artists and performers with disability commenting on their own community. Such commentary should not incur liability under a civil penalty regime.

Question 30

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

132. The Law Council supports further anti-vilification measures in Commonwealth law generally.[102] However, care must be taken to maintain civil/criminal distinctions in legislation such as the DDA.

133. The DRC's Recommendation 4.30 was:

> ***Vilification because of disability***
>
> *A. The Disability Discrimination Act 1992 (Cth) should be amended by inserting a new provision as follows:*
>
> ***Section 39C Vilification because of disability***
>
> *It is unlawful for a person (the first person) to do an act otherwise than in private, if:*

[101] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See further CCPR General Comment 34 on Freedoms of opinion and expression (UN Doc CCPR/C/GC/34, 12 September 2011).

[102] See eg Law Council, *Legal protection necessary as postal survey hits letterboxes* (Media Release, 14 September 2017).

(a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;

(b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and

(c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

B. States and territories that already have legislation imposing criminal penalties for vilification of people on grounds that do not include disability should extend the legislation to vilification of people on the ground of disability.

134. Consideration of the need for such a provision in the DDA should take into account the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) which passed earlier this year.[103] Paragraph 80.2A(2)(c) of the *Criminal Code* now includes disability as a ground.

135. Practitioners have observed that, in light of the Criminal Code provisions, the DDA should remain a civil scheme and should not be used to plug perceived gaps in criminal law protections for protected groups, including persons with disabilities.

Question 31

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

136. The Law Council supports Recommendation 8.19 of the DRC in relation to police "services". We reserve judgment on extension of the application of the DDA to the "justice system" more broadly.

137. The Law Council considers this to be an important issue to address. The Justice Project identified real concerns about people with disability being both over-policed and under-policed.[104] The Law Council updated its work on this theme in its submission to the DRC on persons with disabilities in the criminal justice system.[105] Intersectional discrimination (for example, on the basis of disability and First Nations status) is particularly problematic in the criminal justice system, leading to significant overrepresentation of affected groups.

138. The DRC noted that "services" under the DDA do not currently include police services (and nor do the relevant definitions under state and territory laws).[106] The DRC's Recommendation 8.19 was:

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[103] Law Council, *Criminal Code Amendment (Hate Crimes) Bill 2024* (Submission to Senate Legal & Constitutional Affairs Legislation Committee, November 2024).
[104] Law Council, The Justice Project, *Final Report*, People with Disability Chapter, Final Report (August 2018), 5.
[105] Law Council, *The Criminal Justice System – Issues Paper* (Submission, August 2020) from [70].
[106] DRC, *Final Report – Volume 8*, 275-276.

Amendment of the Disability Discrimination Act 1992 (Cth) to cover police provision of 'services'

The Disability Discrimination Act 1992 (Cth) should be amended to expressly include 'services provided by police officers in the course of performing policing duties and powers' in the definition of 'services' in section 4.

139. While we support this recommendation as an important clarification of the existing application of the DDA, we suggest that any constitutional issues in seeking to extend the DDA to cover state and territory police officers and other public officials be carefully considered prior to any reforms in this space.[107]

140. Equality duties affect the performance (rather than the existence) of powers, and are limited by the unjustifiable hardship defence and section 47 of the DDA (acts done in direct compliance with another law). The express inclusion of policing "services" in an appropriate way could facilitate proportionate, practicable adjustments (eg communication supports, accessible procedures, trauma-informed practice) while preserving operational safety and legal authority.

141. The Issues Paper suggests that a separate provision dedicated to police activities could also extend to the "justice system". It would be necessary to clarify what is covered by that term, as its use could cause potential confusion given the separation of powers. For example, while federal courts are part of the "justice system", judicial immunity would prevent judges and federal magistrates from being held civilly liable for conduct undertaken in the exercise of their judicial functions.[108] Concerns about whether and when corrections authorities are providing a "service" should be addressed as part of the scope of the "justice system". We would support the extension of the provisions to corrections authorities.

Question 32

Are there any specific circumstances or situations relating to policing or justice that should be excluded from the application of the Disability Discrimination Act?

142. Consideration should be given to the potential effects of introducing positive duties on police, particularly on front-line operations.

143. Care must also be taken to ensure that any exclusion does not have the potential to undermine the protective purpose of extending the DDA to cover police activities.

[107] *Melbourne Corporation v Cth* [1947] HCA 26.
[108] *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3 [12], [74]-[114] (per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

Part 5—Exemptions

Question 33

Could any of the permanent exemptions be narrowed or updated, while balancing other policy considerations?

144. The Law Council recommends that the necessity for all permanent exceptions/exemptions should be reconsidered as part of this review, in particular under sections 46 and 52 of the DDA.

145. As set out in the Issues Paper, the ten permanent exemptions to what would otherwise be unlawful disability discrimination in Part 2, Division 5 of the DDA are intended to achieve a careful balancing of competing public policy priorities.

146. The Law Council has previously expressed concerns about the breadth of exceptions to, and exemptions from, discrimination under the existing federal anti-discrimination regime.[109] In our 2019 submission to the AHRC, we stated relevantly:

> *[The Law Council] further supports the AHRC's view that all permanent exceptions should:*
>
> - *only exist in a permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people's rights that are required; and*
> - *be regularly reviewed to ensure that they reflect community standards and appropriately balance competing rights.*
>
> *As noted in the Discussion Paper, permanent, unreviewed exceptions have the effect of 'freezing in time' community standards in relation to sex, age, disability, sexual orientation and gender identity at the moment at which relevant legislation was passed. The Law Council agrees that it is important to consider all permanent exceptions in light of the overall purpose in discrimination law to promote equality and fair treatment, having regard to whether they remain necessary, reasonable and proportionate. This is particularly the case with legislation which was passed several decades ago and may not accord with current community standards.*[110]

147. The Consumer Law Committee of the Law Council's Legal Practice Section has observed that certain standing exemptions, including the "superannuation and insurance" exemption in section 46 of the DDA, particularly require reform. Section 46 provides important consumer protections such that discrimination in relation to superannuation and insurance is only allowed if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the insurer or super fund to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or

[109] 2019 Submission, [99]-[102].
[110] Ibid, [99]-[100].

- in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

148. This exemption is important because it is designed to ensure that insurers and superannuation funds only discriminate when there is a proper basis to do so. However, in practice, the reality for most consumers is that the decisions of insurers and superannuation funds are often opaque and consumers are generally not provided with any actuarial or statistical data which would assist them in understanding the basis of a particular decision. Where an insurer or superannuation fund relies upon actuarial or statistical data to discriminate against a consumer relying on section 46 for legality, that data and an explanation from the insurer or super fund as to the basis of their decision should be required to be disclosed or made available on request. This would assist in ensuring that consumers have confidence that the process is transparent and fair. It should also curb the practice of applying blanket exclusions for, for example, mental health concerns.[111] The Parliamentary Joint Committee on Corporations and Financial Services made a related recommendation in 2018 which has not been implemented.[112]

149. In relation to the migration exemption in section 52 of the DDA, the DRC recommended:

> *The Australian Government should initiate a review of the operation of section 52 of the Disability Discrimination Act 1992 (Cth), insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination.*
>
> *The review should be conducted with particular reference to the rights recognised by the Convention on the Rights of Persons with Disabilities and the Concluding Observations on the combined second and third periodic reports of Australia made by the United Nations Committee on the Rights of Persons with Disabilities.*[113]

150. The Law Council recommended that this be taken into account in a review of the Visa Significant Cost Threshold in 2023,[114] and reiterates the DRC's recommendation in the context of the present review. We acknowledge that Australia's declaration on ratifying the CRPD covers migration, but it specifies that measures adopted in this context must still be based on "legitimate, objective and reasonable criteria".[115] The Significant Cost Threshold is one manifestation of migration policy which arguably does not meet these criteria,[116] and revising the blanket migration exemption under the DDA would be a good way to bolster accountability in policy-making in this space.

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[111] See Life Code Compliance Committee, *Keeping the Promise: Mental Health and Life Insurance Commitments*, September 2025 (September 2025), 8.
[112] Parliamentary Joint Committee on Corporations and Financial Services, *Report of Inquiry into the life insurance industry* (March 2018), Recommendation 10.2.
[113] DRC, *Final Report – Volume 4*, Recommendation 4.31.
[114] Law Council, *Review of Australia's Visa Significant Cost Threshold* (Submission to DHA, November 2023).
[115] Australia, Declaration on ratification of the CRPD (17 July 2008) (Available via UN Treaty Collection).
[116] Law Council, *Review of Australia's Visa Significant Cost Threshold* (Submission to DHA, November 2023), [2]-[6]. See further Women with Disability Australia, *Discrimination against migrants and refugees*

Question 34

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

151. Yes. This power could provide greater certainty to duty-holders who wish to ensure that their conduct falls within the scope of a special measure.[117]

152. It would also be desirable for the AHRC to have an online register of certificates granted. Adequate resourcing should be allocated to keep this register (along with the existing register of Disability Action Plans[118]) up to date.

Question 35

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

153. Yes. The Law Council supports a definition of special measures being added to the DDA (in section 45 or elsewhere), provided that the definition is aligned with relevant international standards and makes clear that such measures must be developed in consultation with those affected.[119] The definition should also identify the purpose of specific measures, for example "promoting or realising substantive equality" for people with disability[120] or being "necessary to accelerate or achieve de facto equality of persons with disabilities."[121] Illustrative examples, such as those provided in section 12 of the *Equal Opportunity Act 2010* (Vic), might also be useful.

154. We note that the CRPD uses "specific measures" rather than "special measures" due to the problematic history of the latter term in relation to people with disability.[122] The terminology in the DDA should be revised accordingly.

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with disability (CRPD Factsheet 7, 2019); also Carrick, 'Immigration and Discrimination Law: A Story of the Collusion of Legal Categories Against Temporary Migrants in Australia' (2023) 49(3) *Monash University Law Review* 129, 137-139; Parliamentary Joint Committee on Migration, *Enabling Australia* (Inquiry Report, June 2010), Chapter 2.

117 AHRC, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 127-128.

118 AHRC, *Register of Disability Discrimination Act Action Plans*.

119 This point was emphasised in *Maloney v The Queen* [2013] HCA 28 [24] (French CJ), [91] (Hayne J), [128]–[136] (Crennan J), [186] (Kiefel J), [240] (Bell J), [357] (Gageler J).

120 Equal Opportunity Act 2010 (Vic), s 12(1).

121 CRPD, article 5(4).

122 Ibid. See further CRPD *General Comment 6 on equality and non-discrimination* (UN Doc CRPD/C/GC/6, 26 April 2018), [28]-[29].

Question 36

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

155. The Law Council supports adding a definition of temporary exemptions to differentiate them from special or specific measures and to avoid any confusion amongst duty-holders.

Question 37

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

156. Feedback to date indicates that the process under existing section 55 of the DDA is largely appropriate.

157. However, if a temporary exemption is granted for multiple years (it can be up to five under section 55(3)(c) of the DDA), we recommend that it be reviewed regularly as a safeguard to ensure that the exemption is fit for purpose and operating effectively.

Part 6—Modernising the Disability Discrimination Act

Question 45

How could compliance with and enforcement of the Disability Standards be improved?

158. The Law Council has received feedback that compliance with the Disability Standards could be improved. We support reform of the enforcement architecture for the Disability Standards, so that primary decisions issue as administrative decisions at first instance, and are subject to merits review.

159. A front-end, regulator-led model would facilitate systemic compliance activity (guidance, audits, enforceable undertakings), reduce delay and cost inherent in purely complaint-driven pathways, and preserve judicial supervision through review and appeal.

Part 7—Further options for reform

Question 48

Are there examples of legislative provisions in Commonwealth or state and territory anti-discrimination law that could be drawn on to modernise or strengthen the Disability Discrimination Act?

160. The Law Council received feedback that the modern, preventive anti-discrimination regime under the *Equal Opportunity Act 2010* (Vic) has been working well. Other jurisdictions' anti-discrimination regimes, such as the *Discrimination Act 1991* (ACT), have also been revised recently,[123] and careful consideration should be given to those reforms. The *Building Belonging* report on the operation of the *Anti-Discrimination Act 1991* (Qld) is a particularly useful and comprehensive resource in this regard,[124] as is the Law Society of New South Wales's recent submission to the New South Wales Law Reform Commission for its review of the *Anti-Discrimination Act 1977* (NSW).[125]

Question 50

How can we ensure the Disability Discrimination Act remains fit-for-purpose into the future?

161. A review should be prescribed after a reasonable period (for example, five years) to examine the effectiveness of reforms resulting from this review.

[123] ACT Government, *Discrimination Law Reform* (Consultation, 2022).
[124] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's* Anti-Discrimination Act 1991 (July 2022).
[125] Law Society of NSW, *Submission to the NSW Law Reform Commission on the Review of the* Anti-Discrimination Act 1977 (NSW) (1 September 2025); see further LSNSW Young Lawyers, *Submission on the review of the* Anti-Discrimination Act 1977 (NSW) (29 August 2025).

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- the Law Society of the Australian Capital Territory;
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- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
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