McCabe Centre FOR LAW & CANCER

Cancer Council

Submission to the Review of the Disability Discrimination Act 1992 (Cth)

McCabe Centre for Law and Cancer

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Advancing law to fight cancer

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This submission may be published. There is no need to anonymise this submission.

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The McCabe Centre and Cancer Council would like to acknowledge the traditional custodians of the many lands and waterways on which we live and work. We would also like to pay respect to Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander Peoples.

About Us

We welcome the opportunity to contribute to the Review of the *Disability Discrimination Act 1992.*

Our submission focuses on the impact of discrimination on the **cancer community**, but we emphasise that these issues impact many other people.

Our submission focuses on responses to consultation question in **Parts 1, 2, 3, 4** and **7** of the Review's Issues Paper.

The **McCabe Centre for Law and Cancer** is working for a world free from preventable cancers and in which all people affected by cancer have equitable access to safe, effective, and affordable treatment and care. The McCabe Centre is a Melbourne-based joint initiative of Cancer Council Victoria, the Union for International Cancer Control and Cancer Council Australia. The McCabe Centre conducts world-leading legal research, policy development, and capacity building programs to promote the use of law as an essential tool in the prevention and control of cancer in Australia and overseas. The McCabe Centre is a WHO Collaborating Centre on Law and Noncommunicable Disease, and the WHO Framework Convention on Tobacco Control Knowledge Hub on Legal Challenges.

Cancer Council Victoria is a non-profit organisation that has been leading the fight against all cancers for more than 80 years in the areas of research, patient support, cancer prevention and advocacy. Its mission is to prevent cancer, empower patients and save lives.

Cancer Council Australia is Australia's peak national non-government cancer control organisation and advises the Australian Government and other bodies on evidence-based practices and policies to help prevent, detect and treat cancer.

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Executive Summary

Cancer is not just a disease — it is a life-altering experience with significant physical, emotional, financial and social impacts — not only for a person with cancer, but for their families, carers and communities. Almost all Australians are likely to be impacted by cancer during their lifetime, either personally or through family, friends and colleagues: Two in five Australians will be diagnosed with cancer before the age of 85.[1] Over one million Australians currently live with or have cancer and it is estimated that between 2022 and 2031, a total of 1.7 million new cases of cancer will be diagnosed.[2] The number of cancer cases is expected to increase both as Australia's population grows and ages,[3] and as cancer survival rates increase.[4]

The *Disability Discrimination Act 1992* (Cth) ('DDA') is a critical law to the lives of people affected by cancer as it recognises cancer as a disability, thereby offering them protection against discrimination in employment, education, and access to services. This protection is becoming increasingly important as cancer survivorship increases.[5] Thanks to investments in addressing cancer from federal and state/territory governments, today almost seven in 10 Australians will survive for at least five years after a cancer diagnosis.[6]

"*People who have a disability due to cancer should be protected under law"*
— Cancer Council Victoria Community Advisory Network Member

Anti-discrimination and equal opportunity laws have played a pivotal role in shaping behaviour in workplaces, schools and in the delivery of goods and services.[7] Yet, disability discrimination persists.[8] Limitations of the DDA mean that its intent and the protections afforded under it are not being fully realised.[9] People affected by cancer report discrimination in workplace,[10] in accessing travel and life insurance,[11] and in access to services,[12] including healthcare services.[13] Unpaid carers of people with cancer also report similar experiences of discrimination and challenges in adjustments to their work due to caring responsibilities.[14]

"Since I have been diagnosed with cancer, I have been sidelined by the company I work for. Often to avoid face to face contact with clients, and also excluded from social interactions, including internal communications." — Cancer Council Victoria Community Advisory Network Member

"It is very difficult to fully explain the subtle discrimination cancer patients experience, it doesn't stop at work but is implicit in society in the way people speak to you and behave around you. Discrimination occurs at many levels." — Cancer Council Victoria Community Advisory Network Member

"I travelled overseas recently and wanted medical insurance for when I was away. I couldn't get any because of my previous diagnosis." — Anonymous[15]

"My husband at the time was treated harshly by his employers when he asked for reduced hours during the months that I had active treatment. Asking for time off being so hard, that he felt he had no choice but to stop working and become my full-time carer. He has since found it hard to find work, as he had been honest in his interviews that he may require time off occasionally as he was my carer" — Anonymous[16]

Our anti-discrimination laws must adapt to reflect the ways in which people experience discrimination in all its forms, including based on disability, and provide a more effective response to the challenges of modern life.[17]

We therefore welcome the Australian Government's Review of the Disability Discrimination Act. There is significant scope to improve how the DDA is operating to improve the lives of people affected by cancer and the wider community — this Review offers a once-in-a-generation opportunity to transform federal discrimination protections — to advance substantive equality and align Australia with global standards.

We strongly support legislative reforms that implement the *United Nations Convention on the Rights of Persons with Disabilities* ('CRPD') [18] and align with recommendations of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* more commonly referred to as the Disability Royal Commission ('DRC') [19] and the Australian Human Rights Commission's ('AHRC') reports '*Free and Equal: A reform agenda for federal discrimination laws* (2021)'[20] and '*Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023*' ('Free & Equal Final Report').[21]

Reform must shift the DDA from a complaints-driven system that places the burden on individuals — often without the resources to shoulder the weight of systemic problems — to one that proactively prevents discrimination and promotes systemic compliance and access to justice.

While we commend the Australian Government's intention to improve the DDA, we emphasise that the highest priority for the reform of Australia's discrimination laws is the need to streamline, consolidate and modernise the existing patchwork of federal discrimination laws into a single coherent statute. This will improve equity, accessibility, clarity and ensure more consistent and effective enforcement of pro-active anti-discrimination and equal opportunity measures.

In the interim, we call for modernising the definition of disability to align with the CRPD, clarifying and simplifying the law, including the legal tests for direct and indirect disability discrimination, reversing the onus of proof for proving disability discrimination, addressing intersectional discrimination, introducing positive duties to prevent disability discrimination, improving access to 'reasonable accommodations', strengthening protections for unpaid carers and improving access to justice by modernising and strengthening the regulatory powers of the AHRC.

We also commend the Australian Government for its action on addressing genetic discrimination in life insurance. This has been a longstanding concern that disproportionately impacts people affected by cancer.[22] We welcome the introduction of legislation banning the use of genetic test results in life insurance underwriting that will fix a problematic exemption within the DDA.

Alongside these efforts, Australia urgently needs a national Human Rights Framework centred around a National Human Rights Act to provide comprehensive and enforceable human rights protections to all people living in Australia. We urge the Government to commit to progressing these essential reforms which were recommended by the Inquiry into Australia's Human Rights Framework in 2024.[23] In the interim, we call on Australian Government to commit to passing legislative amendments to strengthen the DDA in this parliamentary term.

Recommendations – Summary

To ensure the DDA reforms effectively achieve their aims, our recommendations are summarised as the following:

Recommendation 1: The definition of 'disability' should remain broad, align with Australia's human rights law obligations and reflect the thinking of people with disability in the community today and be drafted in close consultation with people with lived experience of disability, legal experts, CRPD experts, and the Australian Government Solicitor.

Recommendation 2: Five factors should be considered in developing a new definition of disability: (i) focus on the interaction between impairments and barriers to inclusion in society, (ii) consistency with a human rights approach to disability, (iii) a broad definition of discrimination, (iv) target discriminatory acts, not groups, and (v) people with disabilities play a key role in developing a new definition.

Recommendation 3: The DDA should explicitly define intersectionality and make explicit provision for combined claims to ensure that multiple and overlapping grounds of discrimination are recognised and to provide more effective redress.

Recommendation 4: The DDA should more clearly recognise caring responsibilities and explicitly recognise socio-economic status as a protected attribute.

Recommendation 5: The 'comparator test' for direct discrimination should be replaced by an 'unfavourable treatment' test.

Recommendation 6: The burden of proof under the DDA should shift to the respondent as per the model under the *Fair Work Act 2009* (Cth).

Recommendation 7: The reasonableness element should be removed from the definition of indirect discrimination and replaced by a 'legitimate and proportionate test'.

Recommendation 8: The language of 'does not or would not comply, or is not able or would not be able to comply' should be removed from the definition of indirect discrimination under the DDA.

Recommendation 9: The objects provision of the DDA should explicitly reference Australia's international human rights obligations including those under the CRPD.

Recommendation 10: The DDA should be expressly required to be interpreted in a way that is beneficial to people with disability, in accordance with human rights treaties.

Recommendation 11: The DDA should include positive duty provisions that apply broadly to duty holders including employers, education providers, government, government agencies and public authorities, people delivering services on behalf of government, and providers of goods and services and should expressly include hospitals and healthcare services.

Recommendation 12: The DDA should include a stand-alone duty to provide adjustments. The Department should seek advice from the Australian Government Solicitor as to whether removing 'reasonable' from the term 'reasonable adjustments' would create unintended consequences.

Recommendation 13: The existing areas of public life covered by the DDA should explicitly include hospital and healthcare settings and the duty to provide adjustments should apply to these contexts.

Recommendation 14: A new definition of 'unjustifiable hardship' is developed that combines Disability Royal Commission recommendation 4.32 and the Productivity Commission approach.

Recommendation 15: In considering reforms regarding adjustments and employer-employee consultation, the Department considers and consults with CRPD experts within and beyond Australia given international approaches and jurisprudence may offer significant guidance on this matter.

Recommendation 16: A general prohibition on offensive behaviour and/or harassment should be included in the DDA with appropriate thresholds, defences and regulatory powers.

Recommendation 17: The definition of offensive behaviour should be similar to that in the *Disability Education Standards for Education 2005* (Cth) and offensive behaviour (vilification) provisions could be modelled on Victorian laws. Harassment should be broadly defined.

Recommendation 18: Reforms to the DDA should be subject to review after five years to ensure the law remains fit-for-purpose.

Recommendation 19: The AHRC should be well-resourced and empowered to effectively enforce and monitor the DDA to ensure it is meeting its aims.

Recommendation 20: The Australian Government should commit to consolidating federal discrimination laws and establish a holistic National Human Rights Framework and National Human Rights Act.

Recommendation 21: The Australian Government should introduce authoritative guidance (such as secondary legislation, relevant Standards or similarly authoritative documents) to ensure that people who believe they have been subjected to discrimination, duty holders and the community in general are better able to understand and interpret the reformed law as intended.

We thank you for your consideration of this submission.

Submission Response

Responses to consultation questions in Part 1 – updating understandings of disability and disability discrimination

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

The definition of 'disability' should:

- remain broad;
- align with Australia's international human rights law obligations; and
- reflect the thinking of people with disability in the community today.

Retain a broad definition of disability

A positive feature of the existing DDA definition of disability is its breadth. This is important to ensure that people affected by cancer are adequately covered by the DDA — whether they have cancer, have had cancer, are at risk of cancer reoccurrence, have a genetic predisposition or family history of cancer or who may be viewed as having or likely to have cancer (for example, if they have had repeated cancer diagnoses), or if they are caring for someone with cancer. We would expect that none of the existing protections in the DDA are weakened as a result of the review process.

Recommendation: The definition of "disability" in the DDA should remain broad and continue to capture past, present and future disability (including due to genetic predisposition to that disability) as well as imputed disability and those associated with a person with disability, including carers.

Furthermore, we support proposals to expand the definition to include reference to genetic variants of disability, inferred genetic pre-disposition to that disability, or genetic heritage including that disability. This is an important step to help future proof the DDA as advances in genomic medicine uncover the genetic bases of more health conditions and disabilities, including cancers and more genetic tests are developed. The genetic discrimination in life insurance example shows how important this broad coverage is.[24]

We also support the proposal of organisations such as People with Disabilities Australia that the definition of disability should cover situations where a disability may fluctuate, or relapse and remit, as is often the case with cancer and other chronic (or noncommunicable) diseases.

These amendments could be clearly explained in the text of the DDA in an explanatory note or within its accompanying Explanatory Memorandum.

A broad definition of disability would ensure Australia is meeting its international obligations under the CRPD as this is consistent with General Comment No 6 (2018) on Equality and Non-discrimination of the Committee on the Rights of Persons with Disabilities ('CRPD Committee')

concerning the interpretation of article 5(2) of the CRPD on the prohibition of discrimination and equal and effective legal protection:[25]

> *Discrimination "on the basis of disability" can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability… The reason for the wide scope of article 5 is to eradicate and combat all discriminatory situations and/or discriminatory conducts that are linked to disability.*

Align with Australia's obligations under international human rights law

The DDA was introduced to implement Australia's human rights treaty obligations. At the time of its passing, it was innovatively drafted and considered international best practice.[26] However, much has changed since the introduction of the DDA in 1992, including Australia's ratification of the 2006 CRPD which entered into force for Australia in 2009.[27] Yet, the DDA fails to reflect modern understandings of disability and disability rights contained within the CRPD.[28] The DDA has been criticised for its narrow definition of disability that reflects a medical model of disability which perpetuates stigma with its focus on individual defects rather than prevention of discriminatory acts, and which contains language considered to be inappropriate or obsolete.[29] Further, the medical model of disability is problematic due to its 'ableist' approach which lists conditions considered 'abnormal'. This approach has been identified by the CRPD Committee as leading to social prejudice and inequality and thereby perpetuating discrimination.[30] It is time the DDA reflects contemporary understandings of disability.

"I would like to see words about health conditions or events that have caused a change in the person's ability to function in society and access services and these changes to their ability can become social barriers because they are outside of the so called 'norm'. These social barriers come from intentional or unintentional bias and from society expecting people to fit into so called 'normal' stereotypes." — Cancer Council Victoria Community Advisory Network Member

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Recommendation: The definition of disability under the DDA reflect the human rights model of disability elucidated in article 1 of the CRPD and be drafted in close consultation with the Australian Government Solicitor and legal experts within Australia and internationally.

Article 1 of the CRPD states that:[31]

> *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.*

The CRPD conception of disability reflects the lived reality of people with cancer and comorbid disabilities who often experience delays or inequities in cancer screening, diagnostic tests, treatment, and survivorship care resulting in poor health outcomes.[32] These delays and inequities can be caused by physical, communication and attitudinal barriers.[33] Physical barriers include healthcare services being unable or not accommodating disability.[34] Communication is a commonly

reported barrier from both the perspective of people living with disability and healthcare professionals which can lead to delays and/or inequities in care.[35]

Adopting the CRPD conception of disability would modernise Australia's approach to disability discrimination, bringing it in line with many other countries from a range of regions and income levels to have amended their laws to reflect the CPRD approach to disability such as Brazil,[36] Japan,[37] Mexico[38] and South Africa.[39]

We note the Issues Paper raises a discussion as to whether the word 'disability' or 'impairment' should be used in Australian anti-discrimination law.[40] Conceptions of disability are complex and will continue to evolve over time.[41] We note the CRPD adopts the term 'impairment'. We submit that, conceptually the terms 'impairment' and 'disability' are not interchangeable.[42] If Australia wishes to comply with its commitments under the CRPD, this must be through ensuring disability is defined to refer to the interaction between 'impairment(s)' and the environment.

We acknowledge some have expressed concerns about the perceived evidentiary burden on complainants under the CRPD's 'interactional' conception of disability. However, we note that the Court of Justice of the European Union in cases such as *HK Danmark (Ring and Skouboe Werge)*[43] and *HR Rail*,[44] have embraced the CRPD approach to disability, influencing case law in several European countries including Austria and Germany.[45] While full harmonisation across Europe and globally is evolving, we submit that a future-looking approach to disability in the DDA is one that incorporates the CRPD framework to inform both the DDA's legislative intent and 'reasonable accommodation' related duties.

However, given these concerns and the CRPD Committee's observations that the broadening of anti-discrimination laws in some jurisdictions reflect inadequate understandings of the human rights model of disability,[46] we recommend that the Department seek advice from legal experts internationally and locally including the Australian Government Solicitor as to how best to incorporate the CRPD's conception of disability into the DDA to ensure contemporary understandings of both the CRPD and disability are examined and incorporated.

Reflect contemporary views of disability from people with lived experience of disability

It is essential that people with lived experience of disability continue to be consulted in redefining the definition of disability under the DDA.

> *"People living with cancer are often impacted on many levels, physically, mentally, socially, financially, it would be good to somehow recognise these issues" — Cancer Council Victoria Community Advisory Network Member*

Recommendation: **The new definition of disability be drafted in close consultation with local and international legal and CRPD experts, disability advocates — and critically — people with lived experience of disability to ensure the legislation is both effective and grounded in real-world needs. We would also expect that an Exposure Draft and proposed Explanatory Memorandum of a revised DDA be open to public consultation.**

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

Recommendation: Five factors should be considered in developing a new definition of disability: (i) focus on the interaction between impairments and barriers to inclusion in society, (ii) consistency with the human rights approach to disability, (iii) a broad definition of discrimination, (iv) target discriminatory acts, not groups, and (v) people with disabilities play a key role in developing a new definition.

We recommend the following five factors be considered in developing a new definition of disability. These are informed by the CRPD and the CRPD Committee's General Comment 6 as necessary to ensure full implementation of the CRPD:[47]

i. **Focus on interaction between impairments and barriers:** The new definition should be broad and must focus on the interaction between a person's impairments and the barriers faced in participating in society on an equal basis with others. In other words, the definition should ensure that disability is not considered to be inherent in an individual because of a deficit (or past or future deficit) caused by a functional limitation, health condition or disorder, but rather arises from the ***interaction*** with any external barriers that prevent an individual's full and equal participation in society. To adopt such a definition would recognise that the key to improving equality for people with disabilities is not through changing a person but rather through addressing the barriers which hinder individuals in their everyday lives. This approach therefore shifts the focus from the individual to the need for systemic change and inclusion. This would broaden protections, be less stigmatising and better reflect lived experience.

ii. **In line with the human rights model of disability:** The new definition should be in line with the human rights model of disability,[48] including addressing intersectionality by:

   a. acknowledging that disability is one of several layers of identity;
   b. accounting for the diversity of people with disabilities; and
   c. recognising that human rights are interdependent, interrelated and indivisible.

iii. **Include discrimination due to past, present, future, presumed disabilities and discrimination by association:** as discussed above in response to consultation question 1, the new definition should include past, present, future and presumed disabilities, as well as persons associated with persons with disabilities, including unpaid carers, reflecting the CRPD definition of disability and disability discrimination.

iv. **Target discriminatory acts not defined groups:** The new definition should be sufficiently broad to ensure the law seeks to prevent discriminatory acts rather than targeting a defined protected group.

   Therefore, we do not propose a list of 'disabilities' be included in the legislation or DDA regulations, however the Explanatory Memorandum may benefit from a non-exhaustive list (clearly stated as such) of impairments (including health conditions, such as cancer, and genetic variants, pre-disposition, family history or genetic heritage) that may fall within the scope of the reformed Act, to educate the public, policy and lawmakers and the judiciary about the intended broad coverage of the law.

v. **People with disabilities to play a key role in developing a new definition:** As discussed above in response to consultation question 1, persons with disabilities, including through their representative organisations must play a central role in developing a new definition of disability.

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

Yes.

"*The law should 100% recognise and deal with this issue better" — Cancer Council Victoria Community Advisory Network Member*

Recommendation: The DDA should include a new provision that explicitly defines intersectionality and should make explicit provision for combined claims to ensure that multiple and overlapping grounds of discrimination are recognised and to provide more effective redress.

Discrimination of any kind is rarely experienced in isolation — many individuals face compounded disadvantage due to the interaction of disability with other attributes such as race, gender, age, or cultural background.[49] Disability intersects disproportionately with LGBTQIA+, CALD communities, First Nations people, those living in poverty, and people experiencing family violence.[50]

This is often the case for people affected by cancer. For example, for those who identify as Aboriginal and Torres Strait Isander,[51] LGBTIQA+,[52] or from culturally and linguistically diverse communities.[53]

A powerful example of how discrimination can manifest differently and more acutely for people based on the combination of their various attributes is from the DRC's *Report Volume 9: First Nations People with Disability* which highlighted the experiences of Ms Narelle Reynolds and her sons Justin and Luke:[54] Despite being an enrolled nurse herself, Ms Reynolds in her statement to the DRC described her difficulties in obtaining a cancer diagnosis and treatment for her son Luke due to their identities as Wiradjuri people and combined with intellectual disability caused by the genetic condition, Fragile X syndrome, as well as challenges in receiving culturally safe and appropriate healthcare and housing assistance. In the words of Ms Reynolds: [55]

> *For me, being Aboriginal on top of being a mother of children with intellectual disability is a double whammy. Being black and fighting through the health system is one thing, but fighting for sons with intellectual disability is another. I don't know if anyone can understand that.*

The current legal framework, which treats protected attributes as distinct and separate, fails to reflect the lived realities of people with disability and undermines the effectiveness of the DDA in addressing systemic inequality.

To recognise intersectionality, we support the inclusion of a new provision in the DDA consistent with the language put forward by the AHRC's Free & Equal Final Report's Reform 35 which identifies that discrimination may occur on the basis of a particular attribute or 'a particular combination of two or

more protected attributes'.[56] Additionally, there are examples of legal provisions from jurisdictions overseas that explicitly prohibit both multiple and intersectional discrimination, which may offer useful guidance. For instance, the Canadian Human Rights Act states that 'a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.' [57]

Reforming the DDA to explicitly recognise intersectionality and permit claims based on multiple and/or combined protected attributes would ensure that Australia is complying with its obligations under the CRPD. The CRPD Committee noted with concern in its 2019 Concluding Observations[58] on Australia's Combined Second and Third Periodic Reports,[59] that there is no effective national legislative framework to protect people with disabilities in Australia from systemic, intersectional and multiple discrimination, and that Aboriginal and Torres Strait Islander persons with disabilities are particularly disadvantaged.[60] The CRPD Committee reiterated its previous recommendation that the DDA specifically should be strengthened by addressing and prohibiting systemic, intersectional and multiple discrimination including allowing for systemic complaints, representative and group actions with requisite sanctions.[61]

In the context of the right to health, the CPRD Committee also noted with concern the significantly poorer health outcomes of people with disabilities in Australia who are also living remotely and/or Aboriginal and Torres Strait Islander, and/or living in institutions, and/or also women or children and/or also living with intellectual or psychosocial disabilities.[62] It recommended that all healthcare services are based on a non-discriminatory, human rights model of disability.[63]

Consideration of multiple or intersectional attributes therefore has the potential to greatly improve Australian law,[64] ensures the DDA's compliance with international human rights law and — most importantly — can improve the lives of people of people affected by cancer and others who are reliant on Australia's anti-discrimination laws to better their lives.

Even though the DDA would undoubtably be strengthened by explicitly recognising and addressing intersectionality, in our view, the most effective way to address intersectionality under Australian anti-discrimination law is for all federal anti-discrimination acts to be consolidated into a single piece of legislation.

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?

Yes. In addition to our response to consultation question 1 and consultation question 3, we make the following recommendations regarding people with disability who are also carers or who have unpaid carers supporting them. We also submit amendments are required to better recognise that people with disability, including people affected by cancer, are disproportionately impacted by poverty.

Recommendation: **The DDA should more clearly recognise caring responsibilities as a protected attribute.**

There are more than three million carers in Australia who are often unseen and providing essential unpaid support to people with disability, including cancer.[65] More than 90 per cent of people living

with cancer in Australia have at least one unpaid carer in addition to formal or paid care services.[66] Research shows that two in five Australians will be diagnosed with cancer at some point in life,[67] meaning most people are likely to either need care, or will provide it and some may experience both at the same time.

Unpaid carers of people with cancer and other disabilities require better protection under the DDA. Currently, unpaid carers who are most likely to be relatives, are protected under section 7 of the DDA if they are discriminated against because of their association with a person with disability. This protection is **indirect** and is in language is not easy to understand for lay persons. To strengthen carer's rights under the DDA, we recommend the Act more clearly recognises caring responsibilities as a protected ground by incorporating **stand-alone prohibitions** on discrimination on the basis of caring responsibilities for persons with disability to ensure that unpaid carers are not disadvantaged in the areas of public life covered by the DDA.

Additionally, the DDA should provide improved definitions of 'carer' and/or 'caring responsibilities' which should be grounded in the multi-dimensional concept of a 'care relationship' which recognises diverse care relationships, including varied domestic relationships and cultural understandings of kinship, and the complexity of care for people with cancer (and others). This would assist in recognising that some people may not necessarily identify with the term 'carer' and may instead prefer to consider their role as part of an ongoing, reciprocal relationship. A broad definition would also avoid stereotypical limitations on the conception of a carer.[68]

Recommendation: Expand the protected attributes under the DDA to include socio-economic disadvantage.

There is a clear link between poverty and cancer.[69] Discrimination, marginalisation and exclusion are also major drivers of poverty.[70] As per the recommendations of the UN Special Rapporteur on extreme poverty and human rights, Australia's discrimination laws, including the DDA, should be amended to include a prohibition of discrimination on grounds of socio-economic disadvantage as a key tool towards eradicating poverty.[71] This would benefit all Australians living in poverty, including people with disability such as people with cancer and their unpaid carers.

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?

Recommendation: The test for direct discrimination in the DDA should be simplified by removing the 'comparator test'. The comparator test should be replaced by an 'unfavourable treatment' test.

The existing 'comparator test' under section 5(1) of the DDA and further elucidated by the High Court in *Purvis v State of NSW (Department of Education and Training)*[72] has long been consistently and comprehensively criticised by disability advocates, legal experts and human rights bodies as overly technical, difficult to apply, unpredictable and uncertain in outcome and undermining of substantive equality (given the focus on equality of **treatment** rather than equality of **outcome**), as well as the lived realities of people experiencing discrimination.[73]

Under the current comparator test, applicants need to prove three elements:

i. that there has been differential treatment compared to a person in similar circumstances without the attribute (conduct element);

ii. that the applicant has experienced detriment or disadvantage because of the differential treatment; and

iii. that the differential treatment was because of their protected attributes (causation element).

The comparator test places a significant evidentiary burden on the applicant such that few cases will succeed.[74] And as noted by the AHRC, 'the issue of how an appropriate comparator is chosen in a particular case has proven complicated and vexed'[75] and confounding for both courts and parties.[76] An applicant's case is enhanced if a real comparator exists, however the comparator is usually hypothetical, requiring a degree of speculation as to how the respondent would have treated the comparator.[77] The comparator test is thus especially problematic for complex or rare conditions, such as rare cancers.

Cancer and the side effects of cancer treatment are not just physical but can also be behavioural,[78] an obvious example being changes in personality, thinking or memory due to brain cancer.[79] While the High Court in *Purvis* confirmed that a person's 'disability' includes the behavioural manifestations of their disability, the majority also held that the appropriate comparator is a person who does not have the disability but who exhibits like behaviour. This interpretation of the comparator test overlooks the inability of a person with a disability to control circumstances that are caused by their disability, such as disruptive behaviour, as in *Purvis*, or infectiousness, as is characteristic of persons with HIV/AIDS.[80] As such, the comparator test is particularly problematic for people who have intellectual or 'invisible' (non-physical) disabilities,[81] as may be the case for people diagnosed with cancer.

As legal experts have noted, a complaint of disability discrimination should not be dismissed simply because a suitable comparator cannot be identified, or because the comparator reflects the very features of the disability that led to the discriminatory treatment. This approach undermines the goal of substantive equality for people with disability and instead reinforces a narrow standard of identical treatment that ignores meaningful differences and the real-world impact of discriminatory actions.[82] Accordingly, we strongly support the DRC's recommendation 4.23 and the AHRC's Free & Equal Final Report Reform 30 that the definition of direct discrimination should be amended to remove the comparator test.

We reiterate our calls for a single anti-discrimination law. In the interim, as per recommendations of the DRC, we recommend the comparator test is replaced with a 'detriment' or 'unfavourable treatment' test that focuses on establishing unfavourable treatment without the need for a comparator, as is the case under section 8(1) of the *Equal Opportunity Act 2010* (Vic)[83] and section 8(2) of the *Discrimination Act 1991* (ACT).[84] While courts may nevertheless conduct a theoretical comparison of the treatment that an applicant would have received but for their disability, they would not be required to do so in circumstances where such comparison either is impossible or inappropriate.[85]

Research on the impact of the *Victorian Equal Opportunity Act 2010* by Professor Dominique Allen found that this test which does not require a comparator was considered to be 'simpler', 'cleaner'

and ‘more accessible’ and made had made it easer to prove direct discrimination. Allen further notes that some lawyers interviewed as part of the study also reported that a consequence of the simpler unfavourable treatment test was that there was ‘now more time to focus on issues in the claim because they do not have to spend as much time on technicalities and debating who the comparator is’.[86]

A shift to an unfavourable treatment test — where the focus is on whether a person was treated less favourably because of their disability — would simplify legal processes, improve access to justice, and better reflect Australia’s obligations under the CRPD to promote substantive equality.

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

Recommendation: The burden of proof under the DDA should shift to the respondent. The burden of proof under the *Fair Work Act 2009* (Cth) is the preferable model that should be adopted in the DDA.

Under the existing DDA direct discrimination test, the burden of proving unlawful discrimination falls entirely on the applicant. This is a significant burden. Research conducted by the McCabe Centre and Cancer Council Victoria found that almost half (48%) of 40 survey respondents questioned about workplace discrimination believed there needed to be changes to the laws and complaints processes relating to unfair treatment at work, to make it easier for people to make complaints[87]

By comparison, in proving indirect discrimination, once an applicant has established the discriminatory impact of a condition, requirement or practice, the DDA shifts the evidentiary burden of proving that the discriminatory condition was reasonable to the respondent.

We support the DRC’s recommendation to adopt a burden of proof of direct discrimination that is similar to the burden of proof for general protections claims (including discrimination) under the *Fair Work Act 2009* (Cth). This is the preferred model as the Fair Work Act approach — unlike the alternative *Equality Act 2010* (UK) model being considered — does not require an applicant to establish a primary case of discrimination and only requires the applicant to prove that the conduct occurred and that they have a disability before the respondent must then prove that the conduct was not based on the person’s disability. This approach would therefore be most beneficial to people affected by cancer and others with a disability who are already dealing with challenging circumstances, let alone proving a discrimination complaint:

> *“[It’s] difficult to make a complaint and cover all aspects of the issues when unwell...most of your energy is spent just trying to get better and resume your normal/usual lifestyle.” — Anonymous*[88]

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?

Recommendation: The reasonableness element should be removed from the definition of indirect discrimination.

Currently, under section 6(3) of the DDA, the respondent would not be found to have indirectly discriminated against a person if they can show that a requirement or condition they imposed upon a person was 'reasonable' in the circumstances. Moreover, even if a condition is found to be unreasonable, the respondent may additionally rely on the unjustifiable hardship provisions under section 11 of the DDA.

As noted by the AHRC, the reasonableness test is 'vague, and leads to disparate judicial interpretations, and it is difficult to identify the limits of indirect discrimination claims'.[89] We support the DRC recommendation 4.24 and ARHC's recommendation that the reasonableness element under section 6(3) of the DDA be removed.

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.

Recommendation: The reasonableness element in the DDA's definition of indirect discrimination should be removed and replaced by a 'legitimate and proportionate test' together with the provision of guidance, which could include provisions of examples in the Act, on what would, and would not be, considered legitimate and proportionate.

We support the replacement of the reasonableness element for indirect discrimination under the DDA with a 'legitimate and proportionate' test — which would require judicial consideration of whether the condition, requirement or practice was for a legitimate purpose and proportional to that purpose — for the following reasons:

- As the AHRC has noted, a 'legitimate and proportionate' test would enable 'more rigour specificity' as courts can better assess whether discriminatory impact is justified in consideration of the intended aim of the condition, requirement or practice.[90]
- Federal and state/territory courts are familiar with the 'legitimate and proportionate' test as they regularly apply proportionality analysis in human rights contexts, for example under human rights legislation in Victoria,[91] the ACT[92] and Queensland,[93] and in constitutional cases, for example cases involving implied freedoms.[94]
- The 'legitimate and proportionate' test reflects principles in international human rights law treaties including the CRPD.[95]
- It aligns with modern anti-discrimination frameworks such as the *Equality Act 2010* (UK) and the *Equal Opportunity Act 2010* (Vic), the latter which while not expressly including a

proportionality test, comes close to it in practice through a list of factors for the 'reasonableness test' under section 9(3) of that law.[96]

To ensure that this new test for indirect discrimination is easy to understand and implement for people with disability and duty holders, we recommend that the 'legitimate and proportionate' test **together with a provision of guidance** in the legislation such as by a non-exhaustive provision on what would, and would not be, considered legitimate and proportionate, be introduced into the DDA.

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?

Yes. The definition of indirect discrimination should be amended to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the additional requirement that the person 'does not comply or is not able to comply'.

Recommendation: The language of 'does not or would not comply, or is not able or would not be able to comply' should be removed from the definition of indirect discrimination under the DDA.

The inability to comply requirement is unnecessary and confusing and should be removed.[97] The Federal Attorney-General's Department has also noted in comparing international and Australian approaches that it was 'rare to include the requirement that people with the protected attribute be unable to comply with the condition'.[98] Removing this requirement this would simplify the current definition of indirect discrimination.

Additionally, the current language of 'does not or would not comply, or is not able or would not be able to comply' implies that non-compliance with a condition, requirement or practice is inherent to a person with disability, rather than being the results of barriers created by society. The language shifts the responsibility away from duty bearers. It is therefore inconsistent with the human rights model of disability which underpins the CRPD — which the DDA is intended to implement — and other human rights law treaties that require substantive equality and the inclusive participation in society of people with disability.[99]

Furthermore, removing this language would mean the legislation is consistent with how it is being interpreted and used in practice — as Professor Beth Gaze and Associate Professor Belinda Smith note, this requirement has 'not generally posed a problem for complainants because it has been interpreted practically rather than theoretically'[100], and as evident in decisions of the Full Federal Court of Australia.[101] Therefore, there should be no issue with its removal.

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

Yes.

Recommendation: The objects provision of the DDA should explicitly reference the CRPD.

Australia's anti-discrimination laws are a critical to Australia's domestic implementation of its human rights law obligations under various international human rights law treaties. As a disability-specific anti-discrimination law, the DDA should mention that the Act gives effect to Australia's human rights law treaty obligations and explicitly reference the CRPD. We propose the DDA should be amended to insert a new subsection 3(d) as follows:

> (d) to give effect to Australia's obligations under international human rights treaties including the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

All aspects of cancer prevention and control are matters of human rights.[102] Including the CRPD in the objects provision would make it clear to the cancer community (and the public more broadly) and to duty bearers that the aim of the DDA is to protect, respect and fulfil the rights of people with disability. Such an amendment would have both symbolic and substantive impact for people with disability by clarifying and strengthening the link between the DDA and the CRPD.

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

Yes.

Recommendation: The DDA should be expressly required to be interpreted in a way that is beneficial to people with disability, in accordance with human rights treaties.

Although Australian courts are required to interpret legislation in favour or rights and freedoms and consistently with Australia's treaty obligations under the common law 'principle of legality', and in accordance with Australia's treaty obligations under the *Acts Interpretations Act 1901* (Cth), this is not commonly known amongst lay persons. Given one of the aims of the Review is to consider whether rights and obligations under the DDA need to be clearer, inserting a new interpretation clause would clarify and further support an interpretation consistent with international human rights law. This clause should (non-exhaustively) expressly reference the CRPD as well as the *International Covenant on Economic, Social and Cultural Rights*,[103] the *International Covenant on Civil and Political Rights*,[104] the *Convention on the Rights of Child*[105] and 'any other relevant human rights instrument'.

Responses to consultation questions in Part 2 – Positive duty to eliminate discriminate

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

Recommendation: The DDA must include enforceable positive duty provisions to prevent discrimination from occurring in the first place. The duty should apply broadly to duty holders including employers, education providers, government, government agencies and public authorities, people delivering services on behalf of government, and providers of goods and services and should expressly include hospitals and healthcare services.

Amending the DDA to include a positive duty is **essential** to move the DDA from being a reactive law based on individual complaints to a proactive law by focusing on preventing discrimination from occurring in the first place. Positive duties are crucial in tackling systemic discrimination[106] and should be drafted in a positive way, rather than as a duty not to discriminate.

Cancer Council Victoria Community Advisory Network members who responded to our consultation on the DDA Review unanimously supported the introduction of positive duty provisions in the DDA. A positive duty could improve people's experiences. When asked how their lives would be different in accessing services such as healthcare if discrimination was stopped before it occurred, a member reported that they could see themselves: *'being more trusting about accessing health services and being more open to engage with health providers'.*

The positive duty should have broad application to duty holders including employers, education providers, government, government agencies and public authorities, people delivering services on behalf of government, and providers of goods and services (this should expressly include hospitals and healthcare services) who should be legally obliged to take reasonable and proportionate steps to prevent discrimination, harassment, victimisation and vilification. Complaints for breaches of the positive duty should be able to be brought by affected individuals as well as registered organisations or unions, to ensure the duty is enforced and has the desired impact.

The positive duty should be backed by effective enforcement mechanisms. The AHRC should be equipped with powers to conduct own-motion investigations, and issue compliance notices, enforceable undertakings, and civil penalties. Reforms should enable targeted audits, sector guidance, court enforceable outcomes, so the burden does not continue to fall on individuals.

Additionally, as recommended by the AHRC, education and outreach on the positive duty must be developed to provide clear and accessible guidance on the duty.[107] The AHRC and others should be resourced to do this.

Responses to consultation questions in Part 3 – Encouraging inclusion of people with disability in employment, education and other areas of public life

13. Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?

Yes.

Recommendation: The DDA should include a stand-alone duty to provide adjustments.

We strongly support the recommendations of the DRC and the AHRC for a stand-alone duty to provide adjustments in the DDA to strengthen protections for people with disability to achieve substantive equality and to clarify obligations on duty holders.[108]

Currently, the duty to provide adjustments sits within prohibitions against direct and indirect discrimination. This has created complex interpretation problems, particularly the decision by the Full Court of the Federal Court of Australia in *Sklavos v Australian College of Dermatologists.*[109] The judgment has been criticised as undermining the reasonable adjustments protections under the DDA as it requires a person with disability to demonstrate not only that they are disadvantaged by

the failure to provide a reasonable adjustments, but that the their disability was **the reason** for the failure to provide a reasonable adjustment.[110] A stand-alone duty to provide adjustments is required to counteract the impact of the *Sklavos* decision. And as noted by the AHRC, it would also help people with disability and duty holders to better understand their rights and obligations in the following ways:[111]

- It would ensure that the duty to make reasonable adjustments is not read down by reference to preconceptions of what constitutes 'direct' and 'indirect' discrimination.
- It would provide more clarity by separating out this positive duty from requirements to not engage in (negative) discriminatory conduct.
- It would make it easier for people to understand their rights and obligations.

A non-exhaustive list of examples of reasonable adjustments should also be provided as a guidance note in the DDA and/or in the Explanatory Memorandum.

The stand-alone duty of reasonable adjustments in the *Equal Opportunity Act 2010* (Vic) has been hailed by lawyers as one of the law's strengths and should be replicated in the DDA given its national application.[112] It's strength lies in the fact that a stand-alone duty of reasonable adjustments requires the duty-holder to do something, rather than waiting for a person with a disability to be discriminated against.[113] Furthermore, as stated by the Canadian Employment Equity Act Review Task Force, the key to achieving substantive equality is that 'a proactive approach to barrier removal means individual workers may not need to seek individual accommodations for those structural barriers that workplaces can identify and remove in advance.' [114]

A positive duty to eliminate discrimination coupled with a positive standalone duty to provide reasonable adjustments would significantly improve the lives of people affected by cancer. For example, research shows that cancer survivors face reduced employment opportunities and quality of work compared to those without cancer with a major contributing factor being the lack of workplace flexibility to accommodate temporary changes in capacity (for most cancer survivors).[115] Similarly, carers of people with cancer are at a higher risk of unemployment, reduced hours, prolonged absenteeism and impaired presenteeism. Many reduce their working hour or leave the workforce entirely.[116] Australia loses nearly $2 billion annually in GDP from people with cancer alone leaving the workforce.[117] A proactive and preventative DDA could help retain both cancer survivors and carers in employment.

14. 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?

No. The scope of the duty to provide adjustments should extend to other contexts.

Recommendation: **The existing areas of public life covered by the DDA should explicitly include hospital and healthcare settings and the duty to provide adjustments should apply to these contexts.**

People with disability, including cancer, do not have adequate protection from discrimination in hospital and healthcare settings under the DDA.[118] National data suggests that there are major

inequities faced by people with disabilities in the healthcare setting including access to medical facilities, hospitals and health-related services.[119] Australian statistics show that the largest inequities in mortality for those with disability are in relation to cancer and cardiovascular disease.[120] People with cancer who have co-morbid disability often experience delays or inequities in cancer screening, diagnostic tests, treatment, and survivorship care resulting in poor health outcomes.[121] Research also shows that healthcare professionals barriers can stem from a lack of knowledge of the need for reasonable adjustments which impacts their ability to acknowledge and consider disability when making treatment recommendations or decisions for their patients.[122] Explicitly stating that the DDA applies to hospitals and healthcare settings could help address these issues.

Failure to have hospitals and healthcare as a standalone area of disability discrimination is out of step with community needs and inconsistent with Australia's human rights obligations.[123] The DDA should be amended to include these areas of public life and the duty to provide adjustments should extend to these areas. Further, the Explanatory Memorandum should state that healthcare services include services for preventative screening, including cancer screening to help reduce the inequities in cancer screening for people with cancer and other disabilities.[124]

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

Recommendation: In addition to seeking advice from legal and disability experts under this Review, the Department should seek advice from the Australian Government Solicitor as to whether removing the word 'reasonable' from the term 'reasonable adjustments' to align the language with the legal effect would create any unintended consequences.

A reasonable adjustment is taken to be an adjustment that does not impose 'unjustifiable hardship' on the person asked to make the adjustment. As 'unjustifiable hardship' is the test, the DDA could remove references to 'reasonable adjustments' (for the reasons outlined by the DRC) and include a definition of 'adjustments' and retain the unjustifiable hardship defence.

However, one of the difficulties with the term 'reasonable adjustments' is that it intersects with legal frameworks including the federal Disability Standards, the *Fair Work Act 2009* (Cth), and return to work obligations.[125] Therefore, in addition to seeking guidance through this Review, we recommend that the Department seeks advice from the Australian Government Solicitor as to whether removing the word 'reasonable' from the term 'reasonable adjustments' would create any unintended impacts.

16. 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. new definition of unjustifiable hardship
    c. other
    Please expand on your response.

Recommendation: **A new definition of 'unjustifiable hardship' is developed that combines DRC recommendation 4.32 and the Productivity Commission approach.**

As explained by Gaze and Smith: [126]

> duty bearers like employers and education providers are **expected** to **bear some cost or 'undergo some hardship**' to ensure that they do not discriminate, and the **question is 'whether any hardship is of such a nature or degree in the circumstances' to be unjustifiable**.

More clarity as to when that hardship is 'unjustifiable' is clearly required.[127] Expanding on the factors to be considered under section 11 of the DDA would provide greater transparency in claims of unjustifiable hardship. Regarding fairness, both the DRC recommendation 4.32 and the approach of the Productivity Commission have merit and address different aspects of the current definition that are deficient. Therefore, our preference is for consideration of a new definition of unjustifiable hardship that combines the two models as a means of providing the greatest clarity, fairness and transparency.

17. 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?

Recommendation: In considering reforms regarding adjustments and employer-employee consultation, the Department considers and consults with CRPD experts within and beyond Australia given international approaches and jurisprudence may offer significant guidance on this matter.

Drawing on European jurisprudence and our understanding of CRPD requirements, we believe that requiring employers to consider the nature and extent of any adjustments could benefit people affected by cancer. For example, in Belgium, the Brussels Labour Court found that an employer had discriminated against a worker with cancer by refusing to allow a reduction in work hours following her return from long-term sick leave and subsequently dismissing her.[128]

Similarly, in the Netherlands, the Human Rights Institute has held that while dismissal of a worker unable to perform the essential tasks of a job due to disability or chronic illness is not unlawful discrimination, this is **subject to** 'the condition that the employer has investigated whether the unsuitability can be removed by making an effective adjustment (accommodation) for the employee'.[129]

The Netherlands Human Rights Institute has also held that employers must consult with people with disabilities regarding reasonable accommodation.[130] On this issue, we highlight the CRPD Committee's views that the process of seeking reasonable accommodation (adjustments) 'should be cooperative and interactive and aim to strike the best possible balance between the needs of the employee and employer' and that employers have a duty to 'work with' employees in this respect including implementing the employee's preference (unless this would impose an undue burden).[131] We also note the CRPD's article 12 requirements to recognise the capacity of people with disability to make decisions about their own lives.[132]

Accordingly, we are generally supportive of amending the DDA to consider the nature and extent of adjustments made and to encourage consultation between prospective or current employers and prospective or current employees before making employment decisions. However, we share concerns acknowledged in the Issues Paper that any consultation with employers would likely require people with disability to share their personal health information, which some may not wish to do, including for fear of discrimination, or they may have concerns that their employer is not appropriately handling this information. We note the CRPD Committee has identified the need for employers to protect personal information throughout the employment cycle, including obtaining the consent of an employee with disabilities before sharing disability-related information that is disclosed to them (including sharing internally, for example with human resources).[133]

A range of views exist within the cancer community. While members of Cancer Council Victoria's Community Advisory Network who responded to our consultation survey about this Review were supportive of this approach, other people affected by cancer have raised concerns about disclosing their cancer diagnosis or status as an unpaid carer of someone with cancer to their employer.[134]

Accordingly, any reforms must ensure adequate legal protections are in place regarding personal health information.[135] Further consultation on this point may be required as an outcome of this Review.

Responses to consultation questions in Part 4 – Improving access to justice

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

Recommendation: **A general prohibition on offensive behaviour and/or harassment should be included in the DDA with appropriate thresholds, defences and regulatory powers. This should expressly cover a person with disability and a person who is associated with a person with a disability, including unpaid carers, and should expressly cover hospitals and healthcare settings.**

We support amendments to the DDA to include provisions relating to offensive behaviour or vilification. The fact that the DDA lacks these provisions makes it out of step with community expectations and Australia's obligations under the CRPD article 16 concerning freedom from exploitation, violence and abuse.[136]

Sections 35-39 of the DDA, which sets out the areas of public life in which harassment of people of disability and their associates is unlawful, should be expanded to expressly include hospitals and healthcare settings given these are common places that people with disabilities and their associates (including paid and unpaid carers) visit.

Appropriate thresholds, defences and regulatory powers should be developed to ensure prohibitions on offensive behaviour and/or harassment are effectively enforced.

28. If the Disability Discrimination Act were to prohibit offensive behaviour and/or harassment, how should these terms be defined?

Recommendation: **Language like that of the *Disability Education Standards for Education 2005* (Cth) is preferable in defining offensive behaviour and/or harassment. Harassment should be broadly interpreted to extend beyond harassment between individuals only.**

The DRC's recommendation regarding offensive behaviour is to adopt section 18C of the *Racial Discrimination Act 1975* (Cth) as the model for new, similar provision in the DDA. However, given the controversies associated with the operation of section 18C and debate as to whether it unreasonably fetters free speech, as acknowledged in the Issues Paper, it is possible similar issues may arise with the DDA if this model is used.[137] Language similar to that of the *Disability Education Standards for Education 2005* (Cth) is preferable, especially as it applies to both a person with disability and to a person who has an associate with a disability.

The Education Standards define harassment as 'any action taken in relation to the person's disability that is **reasonably likely, in all the circumstances**, to **humiliate, offend, intimidate or distress** the person' with disability.[138] Such a provision in the DDA should expressly apply to a person who is associated with someone with a disability, including unpaid carers, for clarity.

We also support provisions relating to harassment to be broadened beyond that between individuals to explicitly address harassment experienced by people with disability that has either been perpetrated by a group or directed towards a group of people with disability. This would ensure the DDA better reflects the lived experiences of people with disability.

29. 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?

Recommendation: The *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) be considered a model for anti-vilification provisions in the DDA.

With regards to offensive behaviour, the DDA could include provisions similar to those in the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) that amends the *Equal Opportunity Act 2010* (Vic) to protect people with disability from vilification.

Responses to consultation questions in Part 7 – Options for further reform

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?

Yes. As noted in our response to consultation questions 13 and 29, provisions in *Victoria's Equal Opportunity Act 2010* and the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* can assist in the drafting of positive duty and anti-vilification provisions, respectively. Additionally, positive duty provisions that now exist in the *Sex Discrimination Act 1984* (Cth) *Anti-Discrimination Act 1992* (NT) and *Discrimination Act 1991* (ACT) could also be drawn on to modernise the DDA.

49. What additional guidance materials should be provided to the community, including duty holders, about the operation of the Disability Discrimination Act or specific amendments proposed in this paper?

Recommendation: The Australian Government should introduce authoritative guidance (such as secondary legislation, relevant Standards or similarly authoritative documents) to ensure that people who believe they have been subjected to discrimination, duty holders and the community in general are better able to understand and interpret the new law as intended.

As we have noted, new legal provisions on their own may not be clear or detailed enough to be easily understood or applied. We therefore recommend authoritative guidance material to be developed. We highlight approaches taken in other jurisdictions such as South Africa which, for example, has a range of guidance documents to assist in interpreting reasonable accommodation requirements including:[139]

- National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (2020) — which sets out government-wide responsibilities and budgeting mechanisms
- Code of Good Practice on Employment of Persons with Disabilities.

Additionally, educational materials should be made available in various modalities specifically for people who believe they have been discriminated against, in easy read and other accessible formats, incorporating culturally safe and appropriate language for Aboriginal and Torres Strait Islander People and in various languages.

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

Recommendation: Reforms to the DDA should be subject to review after five years to consider their effectiveness and ensure the DDA remains fit-for-purpose into the future. The AHRC should be well-resourced and empowered to effectively enforce the DDA to ensure it is meeting its aims.

To ensure the DDA remains fit-for-purpose into the future, the ARHC should be given modern regulatory powers and be well-resourced to ensure the reforms made are effectively enforced. The AHRC should be equipped with powers to conduct own-motion investigations, and issue compliance notices, enforceable undertakings, and civil penalties. Reforms should enable targeted audits, sector guidance, court enforceable outcomes, so the burden does not continue to fall on individuals.

We support the AHRC's recommendation in its Free & Equal Final Report that once the reforms to federal discrimination law have been made, there should be a review of reforms after 5 years, to consider their effectiveness.[140]

51. Are there any other issues with the Disability Discrimination Act that should be considered as part of this review?

Yes.

Recommendation: The Australian Government should commit to consolidating federal discrimination laws and establish a holistic and comprehensive National Human Rights Framework and National Human Rights Act that can include obligations contained in all the international treaties to which Australia has committed itself.

Although reform of the of the DDA is welcome and while we acknowledge that Australia's anti-discrimination framework as a whole is outside the scope of the review, one cannot ignore the fact that the DDA is one of four federal anti-discrimination laws. The federal discrimination law system is a historical artefact, developed in a piecemeal fashion as the Australian government implemented international treaties and agreements.[141] This has led to inconsistencies and complexities affecting the accessibility, practicality, and efficacy of human rights protection at a national level,[142] which will perpetuate with the continued incremental reform to our patchwork of national anti-discrimination protections. Reform which addresses the system as a whole is required to address these challenges.

Reviving past attempts to consolidate the federal discrimination laws into a single Commonwealth anti-discrimination law would also better address intersectional discrimination. It would help move away from the potentially stigmatising effect of the DDA, which, by isolating 'disability', may unintentionally reinforce othering through its focus on individual deficits rather than the societal barriers and discriminatory attitudes that create disadvantage.[143] It would eliminate inconsistencies, reduce complexity, and make the system more accessible and user-friendly. It would also help strengthen protections, promote substantive equality, and better align domestic law with international human rights obligations.[144]

Additionally, Australia remains the only liberal democracy without a National Human Rights Act. Our current of human rights provisions results in significant gaps in protection, diminishing the ability of people affected by cancer and others to have their human rights, including freedom from discrimination upheld. Essential reforms to the DDA can be improved in their operation and effectiveness with the introduction of a national Human Rights Act. As shown in Victoria, Queensland, and the Australian Capital Territory that have both discrimination and human rights legislation,[145] the positive rights in a Human Rights Act improve the interpretation and operation of discrimination acts by including the rights such as the right to equality before the law, the right to privacy, and the right to dignified treatment that can be included in determining whether a person

has been discriminated against. There is strong support for a national Human Rights Act alongside reforms and modernisation of the DDA amongst the disability community. [146]

A new National Human Rights Framework centred around a National Human Rights Act would improve the lives of the one in two Australian men and women who will be diagnosed with cancer by the age of 85, their families, carers, and communities by:[147]

- Ensuring federal government and government bodies consider the human rights of people affected by cancer when creating new laws and policies and delivering services.
- Listing rights and freedoms in one place so that all people in Australia affected by cancer as well as government and government bodies clearly know their rights, freedoms, and responsibilities.
- Enabling people affected by cancer (and others) to take action and seek justice if their rights are violated.

People with disability — including people affected by cancer and their carers — would be better protected by modern discrimination law protections as well as clear, enforceable human rights protections. We urge the Australian Government to implement the recommendations of the Inquiry into Australia's Human Rights Framework,[148] including a National Human Rights Framework and National Human Rights Act.

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[3] Cancer Australia, *Australian Cancer Plan: Current State of Cancer* (Web Page, 2025) <https://www.australiancancerplan.gov.au/current-state-of-cancer>.

[4] *Cancer in Australia 2021* (n 2).

[5] Cancer Australia (n 3).

[6] *Cancer in Australia 2021* (n 2).

[7] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459 <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/3861663/01-Allen-459.pdf>.

[8] See, eg, Commonwealth of Australia Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report - Volume 3: Nature and Extent of Violence, Abuse, Neglect and Exploitation* (September 2023) ('*Royal Commission Volume 3*'); and Commonwealth of Australia Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report - Volume 4 Realising the Human Rights of People with Disability* (September 2023) ('*Royal Commission Volume 4*') <https://disability.royalcommission.gov.au/publications/final-report> .

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[11] *Making the Law Work Better 2015* (n 10); Legal Aid NSW, *What's the risk? Access to insurance for people living with health conditions* (2019) <https://apo.org.au/sites/default/files/resource-files/2019-07/apo-nid254936.pdf>.

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