Vision Australia Submission: Review of NSW Anti-Discrimination Act 1977

Submission to: NSW Law Reform Commission

Submitted to: ADAreview@dcj.nsw.gov.au

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Introduction

Vision Australia welcomes the opportunity to provide this submission to the NSW Law Reform Commission (**the Commission**) regarding its review of the *Anti-Discrimination Act 1977 (NSW)* (**the Act**). The focus of our submission is on that part of the Act which deals with discrimination based on the attribute of disability.

Vision Australia believes that there is need for reform of the Act to take account of the social and technological change that has occurred since its enactment. We recommend the alignment of the Act with corresponding legislation, such as the *Equal Opportunity Act 2010 (Vic)* (**the EOA**) and the *Disability Discrimination Act 1992 (Cth)* (**the DDA**). We also believe that improvements can be made to the Act to strengthen and enhance protection for people with disability, and more specifically those who are blind or have low vision.

At Vision Australia we seek to address systemic discrimination issues, and provide general guidance to individuals who may have experienced disability discrimination. As such, we support measures that will expand the capacity of Anti-Discrimination NSW (**ADNSW**) to address systemic barriers, and enable action to effect systemic change.

This submission provides our response to the Commission's Consultation Paper dated May 2025. We have answered those questions in the Consultation Paper that are relevant to the work of Vision Australia, and to the blindness and low vision community. Our comments are made in the context of the recommendations in the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**the Final Report**).

Tests for Discrimination

Question 3.1: Could the test for direct discrimination be improved or simplified? If so, how?

At present, the test for direct discrimination in the Act is whether a person with a protected attribute has been treated less favourably than a person without the attribute, in the same or similar circumstances. This test requires a comparison to be made, and often the construction of a hypothetical person for this purpose. In circumstances where disability is the relevant attribute, it can be challenging to construct a suitable comparator, and often an unfair and unreasonable result will follow. For this reason, we support a move towards the unfavourable treatment approach as it applies in the EOA and the *Discrimination Act 1991 (ACT)* (**the ACT legislation**). The benefit of this approach is that the impact of the treatment on the person who is making the complaint is the only consideration that is required. The Final Report recommends the same change be made to the DDA.[1]

[1] Refer Recommendation 4.23

Question 3.2: Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

At present, to prove indirect discrimination, the Act imposes a comparative disproportionate impact test. In the context of disability, this test places the onus on the person with disability to determine whether a higher proportion of people without a disability could comply with the relevant requirement that cannot be met by the impacted person. For an individual complainant, it can be difficult to identify the comparative group, then prove that they are proportionally worse off than that group. This places an extra burden on a complainant to make out their prima facie case. Further, the statistical information to prove the comparative access between groups is often unavailable or difficult to source. On this basis, we would support an amendment to the definition of indirect discrimination to mirror that of the EOA and the ACT legislation. These pieces of legislation impose a disadvantage test, which only requires consideration of whether a term or requirement has had the effect of unreasonably disadvantaging a person with a disability.

Question 3.4: (1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it? (2) Should the Act set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

We submit that a reasonableness standard should be maintained as part of the test for indirect discrimination, but that this should be in the context of a 'disadvantage test', rather than a disproportionate impact test (refer question 3.2 above). We also submit that the Act should set out the factors to be considered in determining reasonableness to avoid any ambiguity in relation to this term. Such factors should mirror those in the EOA.

Question 3.6: (1) Should the Act require respondents to prove any aspects of the direct discrimination test? If so, which aspects? (2) Should the Act require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

We believe that, in the context of an unfavourable treatment test for direct discrimination (refer question 3.1 above), the burden of proving that the treatment has occurred should rest with the person making the complaint. However, as recommended in the Final Report, the burden of proof should then shift to the respondent to prove that the treatment was not based on the complainant's disability.[2]

The benefit of this approach can be seen in the area of pre-employment. Consider, for example, that a person who is blind or has low vision applies for a job and is not selected. If it be the case that this was because of the person's disability, it is difficult or often

[2] Refer Recommendation 4.23

impossible for that person to prove. This is because the person does not have objective information regarding the recruitment process. The recruitment and selection information is only available to the potential employer. A fairer outcome would result if the burden rested with the employer, as the holder of the relevant information, to provide evidence as to why the person was not successful in their application.

In relation to indirect discrimination, we believe that, in the context of a disadvantage test (refer question 3.2 above), the burden of proof should rest with the complainant to show that the requirement has caused a disadvantage to the person. However, we submit that the onus should then shift to the respondent to prove that the imposition of the requirement was not unlawful, by relying on reasonableness, or establishing that an exemption, defence or excuse applies.

Question 3.7: Should the Act retain the distinction between direct and indirect discrimination? Why or why not?

Whilst the Act currently distinguishes between direct and indirect discrimination, it is common that a single incident of discrimination can constitute both forms of discrimination. For people who are blind or have low vision and are self-represented, it can be difficult to identify which case should be pursued. We support the adoption of a unified test, where discrimination encompasses both direct and indirect discrimination as we currently know it, and the legal distinction between the two forms of discrimination is not a significant factor.

Disability Discrimination

Question 4.3: What changes, if any, should be made to the way the Act expresses and defines the protected attribute of disability?

We submit that, for the sake of consistency within NSW and across jurisdictions, the Act should maintain a definition of 'disability' which aligns with the substantive nature of the term as it appears in the DDA, but modernises the language used as appropriate.

Animals

The Act also requires modernisation in its provisions relating to assistance animals. Currently, the Act refers to 'dog' rather than 'assistance animal'. While in practice almost all animals that are specially trained to assist a person with a disability are dogs, it has become common practice to refer to 'assistance animals', and we support the Act being amended accordingly.

The Act also limits the types of disabilities that can be assisted by dogs to vision, hearing and mobility. Since the Act came into force, people with other disabilities have also benefited from assistance animals. We recommend that the Act be amended to allow a

person with any disability covered by the Act to have or be accompanied by an assistance animal.

In both respects, the Act would then be consistent with the provisions in the DDA.

We also recommend that the Commission consider an approach whereby the Act include a requirement in the definition of assistance animal that the animal must be trained by a nationally or internationally accredited training organisation (prescribed by regulation). This has been done in some jurisdictions such as the Northern Territory, and is in line with Assistance Animal Principles currently under consideration at a Commonwealth level. In this respect, we believe that it is important for the community to be confident that trainers and organisations who provide assistance animals have consistent, appropriate and recognisable skills in this area. This is necessary to ensure that assistance animals accessing public spaces display proper behaviour. Inappropriate behaviours by animals that do not meet minimum training standards will only increase discrimination against handlers of well-trained assistance animals who are trying to access the community.

Discrimination Areas

Question 6.2: What changes, if any, should be made to the exceptions to discrimination in work?

We support the Act being amended in relation to the Inherent Requirements exemption. In this respect, we advocate for the expansion of those factors to be considered in determining whether a prospective or existing employee can carry out the inherent requirements of a particular role (see also recommendation 7.26 of the Final Report). As recommended in the Final Report, we consider that the additional factors to be taken into account should be: (a) the nature and extent of any adjustments made; and (b) the extent of consultation with any person with disability concerned. It is only fair that whether a person with disability can perform a role be determined in consultation with that person (as the person with the best knowledge of their strengths and limitations), as well as with regard to whether there are any practical measures which might overcome perceived challenges.

Question 6.4: What changes, if any, should be made to the definition and coverage of the protected area of 'the provision of goods and services'?

We submit that the Act should be amended to deal with discrimination in the provision of goods and services to reflect the scope and language of the equivalent section of the DDA.[3] In particular: (a) to add the phrase 'terms and condition' to replace the singular word 'terms'; and (b) to expand the definition of 'services' in relation to 'the use of facilities' to include the terms and conditions on which the facilities can be used, and the manner in which they are made available. Whilst there is an argument that these concepts may

[3] Refer section 24 of the DDA

already be implied in the current language of the Act, we do not think that this is necessarily obvious to the average person, and should be rectified to avoid any ambiguity, and to make the use of the Act simpler for complainants.

Question 6.7: What changes, if any should be made to the definition and coverage of the protected area of 'accommodation'?

We support amendments to the Act which specifically outline the rights of people with disability regarding accommodation, so as to put these rights beyond doubt. In particular, as is stated in the Consultation Paper, we support: (a) an amendment which allows a person with disability to make reasonable alterations to accommodation if certain conditions are met (as currently exists in the EOA, DDA and discrimination legislation in other jurisdictions); and (b) an amendment to make it unlawful to refuse accommodation to a person with disability because they have an assistance animal (being an assistance animal in the terms we have referred to in question 4.3 above).

Question 6.12: Should the Act specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

Digital Goods and Services

We recommend that the Act specifically reference the provision of digital goods and services as a protected area. Whilst digital goods and services may arguably be incorporated in the Act under the broader category of 'goods and services', we do not consider this to be beyond all doubt, and it has not been judicially tested (at least with respect to the equivalent provisions in the DDA). We also believe that the significant and increasing provision of services through digital means across all domains makes it an important area to recognise on a standalone basis.

Digital technologies are now embedded in all aspects of contemporary society, including education and employment. For people who are blind or have low vision, social and economic inclusion and participation is dependent on them being able to access the same digital products and services as the rest of the community. By definition, this access must be provided through non-visual means, and in most cases, this requires compliance with accessibility standards in the design and delivery of products and services.

One of the biggest challenges faced by the blind and low vision community is that technologies and services are often designed in non-compliance with recognised accessibility standards. This is the case for both government services and those developed in the private sector. At the same time, there are few effective mechanisms for reporting and redressing accessibility failures in digital technologies and online services. Many examples of inaccessibility persist despite the existence of anti-discrimination legislation in all Australian jurisdictions.

We believe that elevating the status digital goods and services in the Act would be beneficial in better addressing inaccessibility issues that continue to prevail in their provision. This is particularly the case should the Commission recommend the inclusion in the Act of a positive duty to make adjustments in relation to protected areas (refer question 11.1 below).

Sport

We submit that sport should also be included as a protected area under the Act. Access to sporting opportunities is important to people with a disability, both in terms of community participation, and health and wellbeing. The model in the EOA (which expands the definition of sport beyond traditional categories) would be an appropriate model to adopt. Whilst there may be some overlap with other areas of activity in the Act, we do not consider it to be substantial. Having sport as a separate protected area would also make it easier for individuals to bring a complaint that is a sporting complaint, rather than having to fit it within another category that may not be as suitable to the nature of the issue.

Wider Exceptions

Question 7.6: Should the Act contain exceptions for private educational authorities in education?

In answering this question, our only focus is the impact on students with disability of exceptions for private educational authorities in the Act. It is our position that the ability for private educational authorities in NSW to discriminate against students with disability on the basis of their disability should be removed from the Act. We consider that these authorities should be bound by the same standards as apply to public school authorities. In this respect, the Consultation Paper notes that the discrimination legislation in NSW is the only legislation which currently contains such an exception for private educational authorities. On this basis, the exception must be considered outdated, and out of alignment with current societal expectations. It is also not a satisfactory position for such authorities to be exempted in circumstances where they receive funding from public sources.

Question 7.9: Should the Act provide an exception for voluntary bodies? If so, what should it cover and when should it apply?

We submit that voluntary bodies should not be exempted for the purpose of the Act. People with disability participate across all facets of the community, including with many voluntary associations. It is non-sensical that these associations are not accountable under the Act in the same way as other organisations, particularly given that many are sizeable bodies, receive public funding and deal with various categories of people with protected attributes.

Vilification

Question 8.1: Should the Act protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

The Act currently includes provisions relating to vilification on the grounds of several protected attributes, but disability is not included. We recommend that the Act be amended to make vilification on the ground of disability unlawful. The Final Report included a similar recommendation in relation to the DDA. In this respect, it was suggested that vilification be defined to include behaviour that incites hatred for or threatens violence or serious abuse towards a person or group of people with disability. We submit that this would be an appropriate definition to adopt in the Act.

There seems to be no reason that disability be treated differently from other protected attributes in relation to vilification. The Final Report is evidence enough of the need for strengthened protection of people with disability across all aspects of society.

Promoting Substantive Equality

Question 11.1: (1) Should the Act impose a duty to provide adjustments? If so, what attributes should this apply to? (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach? (3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises? (4) What test should be used to determine the scope of, including any limits to, the obligation to provide adjustments?

It is imperative that a positive duty to make reasonable adjustments for people with disability be adopted in the Act across all areas of activity.

We have advocated for many years that a purely complaint driven process does not achieve the best outcomes in the area of disability discrimination. Individuals and organisations are not motivated to adopt inclusive practices merely because of the possibility of a complaint against them. And the nature of the complaints process under the Act (in terms of its length, cost, and inherent uncertainty) means that people with disability are less likely to engage with it. In our experience, it has always been fairly rare for people who are blind or have low vision and who experience discrimination in their daily lives to lodge disability discrimination complaints, but it is becoming even rarer as the effectiveness of relevant legislation is eroded and perverse respondents find ways of exploiting that erosion.

It is necessary to strengthen the Act by including positive obligations so as to encourage changed behaviours, and to address areas of systemic discrimination by government, industry and the community. The ADNSW should have powers to enforce compliance with any positive duties incorporated into the Act.

Our preferred approach is for the Act to contain a standalone provision requiring reasonable adjustments for people with a disability across all areas of activity covered under the legislation. Corresponding legislation in the ACT and Northern Territory provide for such a duty (which duty applies to all protected attributes across all protected areas). The Act must mirror this approach in order to achieve substantive equality[4]. This approach is also supported in the Final Report[5] Any requirement should be automatically activated, and not reliant on a person requesting an adjustment before it applies.

The imposition of a positive duty can be balanced with a test of reasonableness or unjustifiable hardship. In this respect, a broad approach has been adopted in the EOA, which includes a list of factors to determine the reasonableness and proportionality of positive duties. These factors give some flexibility based on the size, resources and nature of a person's business or operation, and appear sensible in balancing the impact on businesses of the introduction of any positive obligations.

The creation of clear, enforceable and enforced positive duties to make reasonable adjustments and to prevent discrimination must be a key part of reforming the Act.

Question 11.3: (1) Should the Act include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not? (2) If so: (a) what should duty holders be required to do to comply with the duty? (b) what types of unlawful conduct should the duty cover? (c) who should the duty holders be? (d) what attributes and areas should the duty apply to?

We support the inclusion in the Act of a duty to take reasonable and proportionate steps to prevent or eliminate unlawful conduct (in the nature of discrimination, harassment and victimisation). The Final Report alone gives sufficient justification to strengthen discrimination legislation across all jurisdictions to provide increased protections for people with disability. It also makes a recommendation to this effect in terms of the DDA.[6]

Although we don't have any anedoctal evidence as to the efficacy of such measures in other jurisdictions, we note that governments in Victoria, the ACT and the NT have taken steps to include provisions of the kind in question in their discrimination legislation.[7] These provisions provide models of the kind we would recommend be adopted in the Act.

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[4] Refer section 74 of the Anti-Discrimination Act 1991 (ACT) and section 24 of the Anti-Discrimination Act 1992 (NT)

[5] Refer Recommendation 4.26

[6] Refer Recommendation 4.27

[7] Refer section 15 of the EOA, section 75 of the Anti-Discrimination Act 1991 (ACT) and section 18B of the Anti-Discrimination Act 1992 (NT)

Conclusion

Ultimately, in the context of disability, anti-discrimination legislation in NSW (and across other Australian jurisdictions) needs to act as an effective mechanism to prevent and redress instances of individual and systemic discrimination. Amendments of the kind we have addressed in this submission will go some way towards providing a less discriminatory and more inclusive society for those with disability in NSW.

Vision Australia thanks the Commission for its consideration of the matters within this submission. We would be happy to provide further information concerning any of the matters raised.

About Vision Australia

Vision Australia is the largest national provider of services to people who are blind, deafblind, or have low vision. We are formed through the merger of several of Australia's most respected and experienced blindness and low vision agencies, celebrating our 150th year of operation in 2017.

Our vision is that people who are blind, deafblind, or have low vision will increasingly be able to choose to participate fully in every facet of community life. To help realise this goal, we provide high-quality services to the community of people who are blind, have low vision, are deafblind or have a print disability, and their families.

Vision Australia service delivery areas include:

- Allied Health and Therapy services, and registered provider of specialist supports for the NDIS and My Aged Care
- Aids and Equipment, and Assistive/Adaptive Technology training and support
- Seeing Eye Dogs
- National Library Services
- Early childhood and education services, and Felix Library for 0-7 year olds
- Employment services, including National Disability Employment Services
- Accessible information, and Alternate Format Production
- Vision Australia Radio network, and national partnership with Radio for the Print Handicapped
- Spectacles Program for the NSW Government
- Advocacy and Engagement, working collaboratively with Government, business and the community to eliminate the barriers our clients face in making life choices and fully exercising rights as Australian citizens.

Vision Australia has gained unrivalled knowledge and experience through constant interaction with clients and their families. We provide services to more than 26,000 people each year, and also through the direct involvement of people who are blind or have low vision at all levels of the Organisation. Vision Australia is therefore well placed to provide advice to governments, business and the community on the challenges faced by people who are blind or have low vision fully participating in community life.

We have a vibrant Client Reference Group, with people who are blind or have low vision representing the voice and needs of clients of the Organisation to the Board and Management. Vision Australia is also a significant employer of people who are blind or have low vision, with 15% of total staff having vision impairment.

We also operate Memorandums of Understanding with Australian Hearing, and the Aboriginal & Torres Strait Islander Community Health Service.