WOMEN'S LEGAL SERVICE NSW

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

14 November 2025

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About Women's Legal Service NSW

Women's Legal Service NSW ('WLS NSW') advocates for an end to gender-based violence and for gender equality in Australia. As a state-wide specialist women's legal service, we assist women and non-binary people across NSW by providing legal advice and representation from our trauma informed, holistic legal practice across a range of practice areas including family law, domestic/family and sexual violence, compensation and victims support for victims of crime, discrimination, employment and sexual harassment. We prioritise women and non-binary people who are experiencing deep and persistent disadvantage.

Our specialist programs include:

- First Nations Women's Legal Program, led by First Nations staff and supported by a First Nations Women's Consultation Network
- Women's Rights, and
- Working Women's Centre.

All three programs focus on responding to legal issues faced by women with a particular focus on responding to gender-based violence and addressing women's safety, economic security and intersecting discrimination.

We use our experience gained from working with over one hundred thousand women and our feminist analysis of social issues and the law to determine where we can make the most impactful and positive change. We advocate for systemic change through policy and law reform, strategic litigation and providing education and training to the legal profession, the community services sector, and other key stakeholders.

Acknowledgements

We acknowledge the Traditional Custodians of the lands on which we work across NSW and on which we live. We pay deep respects to Elders past and present. This is, was and always will be Aboriginal land.

We acknowledge the many women who have experienced gender-based violence with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

Contributors

This submission is the work of Emily Jol, Emily Gray, Sharmilla Bargon, Gail Thorne and Pip Davis.

Use of language

Victim-survivor

We acknowledge that there are different preferences for the language used to describe a person who has been subjected to gender-based violence. Some prefer the terminology 'victim', some 'survivor', and some 'victim-survivor'. Some people describe the experience as 'living through'

gender-based violence. In this submission we use the term ‘victim-survivor’. This is intended to be inclusive of all.

Gendered language

While acknowledging that anyone can experience gender-based violence, the research and our experience over forty years clearly highlights that gender-based violence is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this.

Opening comments

1. Women's Legal Service NSW (**WLS NSW**) thanks the Attorney-General's Department for the opportunity to comment on the Review of the *Disability Discrimination Act 1992* (Cth) (**the DDA**).

2. WLS NSW advocates for an end to gender-based violence and for gender equality in Australia. As a state-wide specialist women's legal service, we assist women and non-binary people across NSW by providing legal advice and representation from our trauma informed, holistic legal practice across a range of practice areas including family law, domestic, family and sexual violence, compensation and victims support for victims of crime, discrimination, employment and sexual harassment. We prioritise women and non-binary people who are experiencing persistent disadvantage.

3. WLS NSW has long advocated for comprehensive reform and harmonisation of federal anti-discrimination legislation. We reiterate our belief that a modernized DDA must be accompanied by a federal Human Rights Act to fully protect and promote human rights.

4. We welcome this review as an opportunity to modernise protections for people with disabilities, and to enshrine systems that prevent discriminatory treatment and provide tangible remedies.

5. Women with disability experience higher rates of discrimination in all areas of public life.[1] Gendered disability violence is more severe, persistent and likely to result in serious injury.[2] Two in five women with disability have experienced physical violence after the age of 15 and are twice as likely to experience sexual violence compared with women without disability.[3] First Nations women experience even higher rates of violence, with approximately one third of First Nations women and children with

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[1] Women With Disability Australia, *The Status of Women and Girls with Disability in Australia,* (November 2019) 23. Accessed via <https://wwda.org.au/wp-content/uploads/2020/06/The-Status-of-Women-and-Girls-with-Disability-Asutralia.pdf>.

[2] ANROWS, *Women, disability and violence: Barriers to accessing justice* (April 2018) 31. Accessed via <https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024926/Maher-et-al-Horizons-Research-Report.pdf>.

[3] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Alarming rates of family, domestic and sexual violence of women and girls with disability to be examined in hearing (October 2021) accessible at <https://disability.royalcommission.gov.au/news-and-media/media-releases/alarming-rates-family-domestic-and-sexual-violence-women-and-girls-disability-be-examined-hearing>.

disability reporting experiences of sexual abuse in their childhood.[4]

6. We have read and endorse in full the submissions and recommendations of Women With Disability Australia (**WWDA**) in their response to this review.

7. In addition, we make the following supplementary recommendations:

Part 1 – Updating understanding of disability and disability discrimination

8. We join WWDA in supporting a broad and inclusive definition of disability that removes offensive and outdated language. The current definition adopts a medical model of disability and refers to 'malfunction', 'malformation' and 'disfigurement', positioning disabled people as broken or defective individuals in need of fixing.

9. Extending the definition to include 'health status' will further improve outcomes for women, who are more likely to experience invisible and chronic illnesses, including endometriosis.[5]

Case study:
*Tanisha's role as a retail assistant required her to participate in community events outside of rostered working hours without getting paid. These events involved significant physical activity. Our client has endometriosis and is affected by symptoms including inflammation, pain in her pelvic area and lower back and severe cramps. Because the physical demands of these events worsened her endometriosis symptoms, Tanisha refused to participate. After a few weeks of refusing to attend these events, her employment was terminated.

We assisted Tanisha with a general protections involving dismissal claim against her employer. Endometriosis is not a protected attribute under anti-discrimination legislation and is not always recognised as a disability. It can take years to get a proper diagnosis which clearly makes for a long and stressful journey. The severity of Tanisha's symptoms indicate that the condition could meet the threshold of disability under legislation, however, that might not always be the case with endometriosis not being an expressly protected attribute. In the alternative, complainants currently need to consider a sex discrimination claim and argue that

[4] Jones, J., Roarty, L., Gilroy, et al, *Research Report: Wangkiny Yirra "Speaking Up". First Nations women and children with disability and their experiences of family and domestic violence,* Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023) 3.
[5] Institute for Health Metrics and Evaluation, *The Lancet Public Health: Global study reveals stark differences between females and males in major causes of disease burden, underscoring the need for gender-responsive approaches to health* (May 2024) accessible at <https://www.healthdata.org/news-events/newsroom/news-releases/lancet-public-health-global-study-reveals-stark-differences>.

endometriosis is a condition that appertains to women generally to make a successful claim for discrimination on the ground of sex.

**Not her real name*

10. Further, we recommend that the definition includes 'behaviour that is a symptom or manifestation of the disability'.

Recommendation:

We recommend that the DDA adopts a broad definition of disability that removes offensive and outdated language and includes 'health status' and 'behaviour that is a symptom or manifestation of the disability'.

Addressing intersectionality

11. The DDA must explicitly recognise and address the unique and compounded forms of harm that arise from intersectional discrimination.[12]

12. We recommend that the Act explicitly prohibit discrimination arising from the effect of the intersection of two or more protected attributes. While we recommend drafting of the provision should be modelled on s 3.1 of the Canadian *Human Rights Act (*RSC 1985, c. H-6): "For greater certainty, 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." However, we also recommend that the definition use the words 'on the basis of the intersection of two or more attributes' rather than the term 'combination' to ensure it accurately reflects the concept of intersectionality.

13. Further, we note that First Nations people are twice as likely to live with a disability than non-Indigenous people in Australia. First Nations women are 33 times more likely to be hospitalised from domestic violence and are at a higher risk of living with disability resulting from a DV injury. The ongoing impacts of colonisation, such as grief, trauma, child removal are considered to significantly drive psychosocial disability in First

Nations women.[6]

14. We recommend that amendments to the DDA are made in close consultation with First Nations disability advocates. We also recognize that First Nations understandings of 'disability' may differ from the western health model that describes disability in deficit terms.[7]

Recommendation:

We recommend that the DDA explicitly prohibit discrimination arising from the effect of the intersection of two or more protected attributes.

Recommendation:

We recommend that any amendments to the DDA are made in consultation with First Nations disability advocates.

Recommendation 4.23 - Amending the definition of direct discrimination

15. Application of the current comparator test for direct discrimination is complex and overly technical. This approach marginalizes disempowered groups and has been deemed as 'problematic' by disability advocates.[8] Rather than focusing on the harm caused by conduct, the test is an artificial exercise in identifying a hypothetical comparator rather than focusing on the effect of the conduct. This exercise is particularly problematic for intersectional claims where there is uncertainty around selecting an appropriate comparator.

16. We support removing the comparator requirement in favour of an 'unfavourable treatment' or 'detriment' test. The test should ask whether the person was treated unfavourably because the person has a disability, without requiring a hypothetical

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[6] Above n 4, 3. (Wangkiny Yirra)
[7] Ibid. (Wangkiny Yirra)
[8] Queensland Advocacy Incorporated, *Priorities for Federal Law Reform. Submission by Queensland Advocacy Incorporated to the Australian Human Rights Commission* (November 2019) 6, accessible at <https://qai.org.au/wp-content/uploads/2021/04/Priorities-for-Federal-Discrimination-Law-Reform-to-AHRC-Nov-2019.pdf>.

comparator. This approach is easier to apply and better recognises the nuanced ways discrimination can manifest.

17. This would bring the DDA in line with best practice in other Australian and international jurisdictions, including Victoria and the ACT, by adopting a modern, simplified definition of direct discrimination.[9]

Recommendation:

We recommend that the comparator test is removed in favour of an 'unfavourable treatment' or 'detriment' test.

Shifting the burden of proof

18. The current approach, which requires the complainant to prove that discrimination occurred, places an unfair and unrealistic burden on individuals who are already in a position of disadvantage. Placing the burden of proof on the complainant is unduly onerous and inconsistent with the objectives of anti-discrimination laws and the approaches of comparable overseas jurisdictions. [10]

19. In practice, discrimination is rarely overt. Complainants must prove the internal motivation behind a respondent's behaviour which is inherently difficult to do. These difficulties are compounded in cases of intersectional discrimination. The result is that the complainant must rely on circumstantial evidence, with the court asked to make an inference, something which we know the court is reluctant to do.

20. We support the adoption of a shifting burden of proof, modelled on the *Equality Act 2010* (UK) and the *Queensland Anti-Discrimination Act 1991* (Qld). Under these models, once a complainant establishes a prima facie case that unlawful discrimination occurred, the burden shifts to the respondent to demonstrate that the reason for the action was not discriminatory. We refer to commentary from the Parliamentary Joint Committee on Human Rights that provides:

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[9] See s 8 *Equal Opportunity Act 2010* (Vic) and s 8 *Discrimination Act 1991* (ACT).
[10] Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) at [50].

"It is a well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case has been made." [11]

21. This shift of the burden of proof is also similar to the approach implemented in the positive duty provisions under the *Sex Discrimination Act 1984* (Cth) (the SDA).

Recommendation:

We recommend the adoption of a shifting burden of proof modelled in the *Equality Act 2010* (UK) and the *Queensland Anti-Discrimination Act 1991* (Qld).

Recommendation 4.24 - Amending the definition of indirect discrimination

22. The complexity of indirect discrimination provisions creates a barrier to justice, particularly for people experiencing intersectional discrimination. For the reasons outlined in WWDA's submission, we also support the removal of the 'not able to comply' limb from the indirect discrimination test to ensure alignment with a substantive equality approach and modern formulations of the test in international and Australian jurisdictions. This requirement is overly restrictive and does not reflect the lived experience of discrimination.

Case study:

Matilde* had rheumatoid arthritis and lupus that significantly limited her ability to move during 'flare ups'. Her conditions were well managed but the pain, stiffness and fatigue resulting from her conditions meant that being in the office was sometimes very difficult.

Matilde had worked for her employer for several years and had been allowed to work from home when required. Earlier this year, her employer introduced a blanket workplace policy that required all staff to be in the office at least 4 days per week. Following this, Matilde was put under a lot of pressure to attend the office and was expected to be onsite even when experiencing a flare up.

Matilde was not provided with any flexible working arrangements or adjustments following the new policy and struggled to comply when her condition flared up. A few

[11] Parliamentary Joint Committee on Human Rights, Submission No 595 to Senate Legal and Constitutional Affairs Committee, *Preliminary Views on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, 5.

months after the new policy, Matilde was told she was underperforming and put on a performance management plan, despite significant evidence to the contrary.

Matilde felt she had no choice but to resign due to the lack of flexibility and hostility towards her because of her conditions. Matilde came to us for help making an indirect discrimination complaint about her treatment.

Indirect discrimination complainants must prove they cannot comply with a requirement or condition, rather than prove that the condition or requirement causes them disadvantage. Even though Matilde was disadvantaged by the policy, her ability to sometimes comply with the policy during periods of remission mean she may not be able to satisfy the 'inability to comply' limb of the indirect discrimination test.

**Not her real name*

Recommendation:

We recommend the removal of the 'not able to comply' limb of the test for indirect discrimination.

Part 2 – Positive duty to eliminate discrimination

Recommendations 4.27 and 4.28 - Positive duty for duty holders to eliminate discrimination

23. We welcome implementation of equitable provisions in the DDA that work to achieve substantive equality. As such, we support the imposition of a separate, stand-alone duty to eliminate discrimination and provide adjustments to people with a disability that should extend to all duty holders.

24. From WLS NSW advice and case work, it is our experience that many employers are reluctant to make adjustments for workers with disabilities, because of perceived cost, administrative inconvenience, or a lack of understanding about disability inclusion.

25. Without an intention to enshrine substantive equality and positive obligation, a duty to make adjustments is unlikely to be effective to achieve equality for persons with disabilities.[12]

26. We note the Productivity Commission's stance that disability discrimination cannot be 'adequately addressed in the absence of a duty to make reasonable adjustments'.[13] Further, the Disability Royal Commission recommended the implementation of a positive duty to make adjustments for all duty holders.[14]

27. WLS NSW have welcomed the comparable positive duty to prevent sexual harassment at work under the *SDA*. Whilst an important step towards preventing sexual harassment, significant work is still required to improve duty holders' awareness of their responsibilities under the positive duty, and to implement the changes necessary to improve workplace safety for women. According to recent Our Watch data, 40% of employers were not aware of their positive duty obligations, and 24% were unaware that workplace sexual harassment is unlawful.[15] Implementation of positive obligations to eliminate discrimination must coincide with sufficient education and training initiatives.

28. Further, whilst we are supportive of positive duty, piecemeal extension of it to other attributes is inherently problematic and leads to the appearance of a hierarchy of rights. The introduction of obligations to prevent only sexual harassment and disability discrimination, dealt within separate anti-discrimination statutes, fails to adequately consider intersectionality and is inconsistent with the way discrimination manifests. We advocate for a positive duty to prevent discrimination against all groups with protected attributes, including people with disabilities.

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[13] Productivity Commission, *Review of the Disability Discrimination Act 1992* (Final Inquiry Report No 30, vol 1, April 2004) 193.
[14] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Our Vision for an Inclusive Australia and Recommendations (Final Report Executive Summary, 29 September 2023) 64.
[15] Our Watch, *New Survey: A significant number of workplaces may not be meeting their legal obligation to prevent sexual harassment* (October 2024) accessible via <https://www.ourwatch.org.au/news/new-survey-a-significant-number-of-workplaces-may-not-be-meeting-their-legal-obligation-to-prevent-sexual-harassment>.

29. Anti-discrimination legislation with positive duties in the NT, ACT and Victoria require duty holders to take 'reasonable', 'proportionate' and 'proactive' steps to eliminate discrimination. We recommend that positive duty and other provisions to eliminate discrimination are done in consultation with people with disabilities, and focus on protecting their dignity, agency and autonomy.

30. To ensure positive obligations are as effective as possible, it is imperative that the body enforcing positive duties is properly resourced, empowered, and has the necessary skills to undertake this important work. We also recommend granting the enforcement body the power to seek penalties.

Case study:

When Lei* applied for her job, the recruitment form required her to disclose whether she had a disability, and whether she required any adjustments. Lei had several health conditions and multiple disabilities. She ticked the box to confirm she had a disability and clearly stated that she did not require any adjustments.

After Lei got the job, she was called into a meeting with Human Resources. Citing concern about her capacity to work without adjustments, she was directed by her employer to get a medical examination.

The medical report deemed that Lei would have the capacity to work, subject to some reasonable adjustments. Lei's employer deemed that making some of those adjustments would cause unjustifiable hardship, and she was declared unfit for work.

Lei's agency and autonomy was taken away throughout the process, with her employer making assumptions about her capacity without proper consultation.

**Not her real name*

Recommendation:

We support the imposition of a separate, stand-alone duty to eliminate discrimination and provide adjustments to people with a disability that should extend to all duty holders.

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

Recommendations 4.25 and 4.26 – Strengthening the duty to provide adjustments

31. We support the recommendation to remove the quantifier of 'reasonable' in the requirement to make adjustments. In her commentary of what constitutes a 'reasonable' adjustment in *Watts v Australian Postal Corporation*, Mortimer J stated:

> *"However, unlike other aspects of the DDA (see, for example, s* 6) *the statute does not leave it to the discriminator in the first instance and the Court in the second instance to determine whether an adjustment is "reasonable". Although the word "reasonable" is used, it has no qualitative character in its context."*[16]
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> *"There is no room in the operation of s 5(2) for a discriminator, or a court, to assess conduct, or modifications by reference to notions of reasonableness. The statute removes that capacity... One consequence is that what constitutes 'hardship' and the circumstances in which it might be 'unjustifiable' may be broader than if the statute used reasonableness as a criterion of liability".*[17]

32. The *Equality Act 2010* (UK) treats the duty to make adjustments for people with disabilities as separate and distinct, setting out 13 subsections that identify actions required under the positive duty.[18] This requirement to treat persons with disabilities differently, and potentially more favourably, aims to ensure equal outcomes, rather than equal treatment.[19] It also enshrines a high justification threshold where a duty holder fails to make adjustments.[20] This approach could provide guidance in the drafting of positive duty in the Australian jurisdiction.

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[16] Watts v Australian Postal Corporation [2014] FCA 370 [27] at [22].
[17] Watts v Australian Postal Corporation [2014] FCA 370 at [27].
[18] See *Equality Act 2019* (UK) s 20.
[19] Above n 14, 479. (Alice Taylor)
[20] Ibid. (Alice Taylor)

Case study:

Allira* was a woman working in a rural town. A few months into her employment, management required her to get tested for ASD following claims that she had been struggling to connect with her colleagues.

As instructed, Allira saw a medical professional and received diagnoses for generalized anxiety disorder and ASD. When Allira informed her employer of the diagnoses, she was not provided with any adjustments and told not to tell any of her colleagues.

Allira started implementing strategies to assist her in managing her ASD symptoms. Her employer told her she was not professional enough to continue working in that branch and was transferred to a branch much further from Allira's home. Her symptoms worsened following the stress and lengthy commute resulting from the transfer. Allira felt she had no choice but to resign.

**Not her real name*

Recommendation:

We support the recommendation to remove the quantifier of 'reasonable' in the requirement to make adjustments.

Part 4 – Improving access to justice

Recommendations 4.29 and 4.30 - Offensive behaviour and vilification protections

33. As discussed above, the piecemeal approach to providing additional protection to groups with protected attributes is problematic and fails to address the compounded discriminations that exist at the intersection of gender, race, disability, and sexuality. In the absence of the harmonisation of federal anti-discrimination legislation, WLS NSW welcomes provisions that protect all groups with protected attributes from offensive behaviour and vilification, including people with disability.

Vilification

34. The Disability Royal Commission recommended that vilification be defined to include behaviour that incites hatred or threatens violence toward a person or group of people with disability. Advocacy groups have also long been calling for the inclusion of disability as a protected attribute from vilification.[14]

35. We note the recent passing of the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) that expands protection for people with disability in the criminal jurisdiction. In the absence of consistent state and territory vilification protections for people with disability in both criminal and civil jurisdictions, we support the inclusion of a vilification provision in the DDA.

36. If vilification provisions were to be adopted in the DDA, we recommend the use of a harm-based test, rather than an incitement test, to determine whether a person has been vilified. An incitement test requires proof that a person intended to stir up hate, contempt or ridicule. By contrast, harm-based tests instead examine whether the conduct caused or was likely to cause harm to the targeted person or group, regardless of the speaker's intent. Harm-based tests have been implemented in federal and Victorian anti-discrimination legislation to better reflect changing social norms and safeguard at risk of individuals.[21]

Harassment and offensive behaviour

37. We support Recommendation 4.29 and Recommendation 4.30 from the Disability Royal Commission, in prohibiting offensive behaviour because of a person's disability. We believe s 18C of the *Racial Discrimination Act* is an appropriate model for a comparable provision in the DDA.

38. If defined in the same way as s 18C, we recommend a broad interpretation of a space considered 'otherwise than in private'. This will avoid workplaces as being considered ' in private.' Further, we encourage consideration of the increasing use of online forums and social media as platforms to vilify and perpetuate hate speech against people with disabilities. According to ABS data, 79% of adults with disabilities have had at least one negative experience online in the previous year.[22] These provisions must also be broad

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[21] See s 18C *Racial Discrimination Act* 1975 (Cth) and Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025 (Vic) for an example.

[22] Australian Bureau of Statistics, *Online safety*, *Living peacefully and feeling safe (*September 2025) accessible via < https://www.abs.gov.au/statistics/measuring-what-matters/measuring-what-matters-themes-and-indicators/secure/online-safety>.

enough to encompass dating apps, with 88% of women with disabilities reporting experiences of violence and harassment on dating apps.[23]

Recommendation:

We recommend the implementation of provisions that protect people with disabilities from offensive behaviour and vilification.

Recommendation 8.19 – Services provided by police officers

39. People with disabilities have consistently reported they feel unable to rely on police for protection against violence, especially women who report sexual violence.[24] Enduring racist attitudes and ablism within the police force produce especially negative outcomes for First Nations women with disabilities, who are more likely to be misidentified as perpetrators and incarcerated for inappropriate or unjustified reasons.[25]

40. Many of our clients - women with disabilities, particularly First Nations and CALD women - have told us that police failed to take their reports of violence seriously, that their experience of violence was minimized and that insufficient action was taken.

41. We welcome further exploration as to whether police should be considered a service under the DDA, with a view to improving access to justice for all people with disabilities, including victim-survivors of violence.

Recommendation:

We recommend further exploration as to whether police should be considered a service under the DDA, with a view to improving access to justice for all people with disabilities, including victim-survivors of violence.

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[23] Heather Wolbers and Hayley Boxall, *Online dating app facilitated sexual violence victimization among people with disability,* Australian Institute of Criminology (2024) accessible via https://www.aic.gov.au/sites/default/files/2024-05/ti695_online_dafsv_victimisation_among_people_with_disability.pdf>.
[24] Above n 2, 30. (ANROWS, WDV Report)
[25] Ibid, 74. (ANROWS, WDV Report)

Part 5 – Exemptions

Superannuation and insurance

42. Under the current DDA, it is lawful to refuse a person with disability an insurance policy or superannuation fund if the refusal is based on the reasonable reliance on actuarial or statistical data.

43. Notably, people who have experienced a mental health condition, whether periodic or chronic, face significant difficulty in obtaining insurance products, with barriers including increased premiums, excessive policy restrictions and rejection of their applications.[26] This disproportionately impacts women, who experience higher rates of mental illness than men. Women have higher rates of anxiety and depressive disorders, and are more than twice as likely to be diagnosed with PTSD.[27]
[28]

44. In 2016, the Australian Human Rights Commission issued non-binding guidance to insurance and superannuation providers outlining when it is 'reasonable' to discriminate against an applicant with a disability.[29] The Public Interest Advocacy Centre published a report in 2021 that outlined the many ways in which insurers use blanket exclusions to avoid compliance with the AHRC Guidance, and anti-discrimination law.

45. Following prolonged advocacy, in 2023 the Life Insurance Code of Practice enshrined commitments for insurers to adopt a fairer approach when mental health conditions are disclosed in applications. However, this Code is only binding on the insurance companies who voluntarily adopt it.[30]

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[26] Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (October 2021) 19, accessible at <https://jec.org.au/wp-content/uploads/2021/11/21.11.04-PIAC-Report_Mental-Health-Discrimination-Insurance.pdf>.
[27] Australian Bureau of Statistics, *National Study of Mental Health and Wellbeing* (2023) accessible at <https://www.abs.gov.au/statistics/health/mental-health/national-study-mental-health-and-wellbeing/latest-release>. See also: Australian Bureau of Statistics, *Mental health findings for LGBTQ+ Australians* (2024) accessible at < https://www.abs.gov.au/articles/mental-health-findings-lgbtq-australians>.
[28] Australian Bureau of Statistics, *Mental health findings for LGBTQ+ Australians* (2024) accessible at < https://www.abs.gov.au/articles/mental-health-findings-lgbtq-australians>.
[29] Above n 27, 15. (PIAC MENTAL HEALTH DISCRIM)
[30] See Council of Australian Life Insurers (CALI), Life Insurance Code of Practice (2023).

46. Whilst claim acceptance rates have improved since the introduction of the new code, there is still variation depending on providers and benefits. For example, death claims are more likely to be accepted than Total and Permanent Disability or Disability Insurance claims.[31]

47. We welcome reforms to prohibit discrimination based on adverse genetic and genome testing; however, we are deeply concerned about how disability discrimination manifests in the provision of insurance products more broadly. We encourage exploration into reform options that would prohibit discrimination in superannuation and insurance policies to ensure the rights of people with disabilities are protected.

Recommendation:

We recommend further exploration into reform options that would prohibit discrimination in superannuation and insurance policies to ensure the rights of people with disabilities are protected.

PART 7 – Further options for reform

The need for a Human Rights Act and consolidation of federal discrimination law

48. Essential reforms to the DDA would be enhanced in their operation and effectiveness with the introduction of a federal Human Rights Act. As shown in Victoria, Queensland, and the Australian Capital Territory that have both discrimination laws and a Human Rights Act (in Victoria called a Charter), the inclusion of positive human rights in statute, such as the right to equality before the law, privacy and dignified treatment, strengthens the interpretation and operation of discrimination law. An act's 'dialogue model' can be used to challenge laws and regulations that are in themselves discriminatory. The Disability Royal Commission recommendation both positive rights and reforms to discrimination law,[32] and whilst the Disability Royal Commission was unable to consider a Human Rights Act due to their terms of reference and instead

[31] Australian Prudential Regulation Authority, *Life insurance claims and dispute statistics* (December 2022) accessible at <https://www.apra.gov.au/sites/default/files/2023-04/Life%20Insurance%20Claims%20and%20Disputes%20Statistics%20December%202022.pdf>.
[32] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report, Volume 4: Realising the human rights of people with disability, Commonwealth of Australia, Recommendations 4.01 - 4.34

recommended a Disability Rights Act,[33] the July 2024 joint statement of 12 disability representative organisations advocating for a Human Rights Act[34] shows sector support for the benefits of a Human Rights Act alongside reforms to the DDA. In addition, the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework recommended in May 2024 that a Human Rights Act[35] be introduced in tandem with reforms to the DDA.

Recommendation:

We recommend the introduction of a federal Human Rights Act alongside reforms to the DDA.

Regulation of Non-Disclosure Agreements

49. WLS NSW advocates for the federal regulation of Non-Disclosure Agreements as part of our campaign called 'I'm Speaking.' The campaign sheds light on the ways in which NDAs, along with defamation law, are too often used to silence women who have experienced sexual harassment or sexual violence in the workplace or beyond.

50. It is apparent that the silencing effect of strict NDAs also impacts people with disability who have experienced discrimination. NDAs are commonly used to settle discrimination matters, including for disability discrimination. The Justice and Equity Centre writes in its submission to Industrial Relations Victoria in relation to the *Discussion Paper on Restricting the use of NDAs in Workplace Sexual Harassment Cases*, that many of its clients who have experienced disability discrimination face a significant power imbalance in negotiating the terms of NDAs. Not only do these clients find that they must keep the terms of the settlement confidential in NDAs, but also:

> *"their personal circumstances related to the discrimination; the facts and circumstances leading to the discrimination, including the respondent's*

[33] Ibid, page 107.
[34] Strengthening protection of the rights of people with disability through a national Human Rights Act (HRA), Position Statement by Disability Representative Organisations (DROs), 19 July 2024, accessed at https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/
[35] Inquiry into Australia's human rights framework, Parliamentary Joint Committee on Human Rights, Commonwealth of Australia, May 2024, Recommendations 1 to 4

policies or practices whether systemic or not; the steps taken by the complainant to complain about the alleged discrimination, such as any complaint made directly to the respondent, the specifics of a complaint to a human rights body, and any documents filed to pursue the complaint in a federal court; the complainant's suggestions for reforms to address the respondent's systemic policy or practice; the impact of the discrimination on the complainant; and the fact of coming to a settlement agreement."[36]

51. In some instances, the use of NDAs in some harassment or discrimination matters may be appropriate, especially where the complainant has requested one, or where sufficient consideration has been given to ensuring the NDA does not serve to silence or re-traumatise complainants, or prevent the systematic addressing of discrimination in the workplace.

52. However, the current widespread use of strict NDAs, that is, NDAs with blanket confidentiality and non-disparagement provisions, with unlimited duration, has had the effect of keeping illegal and/or unethical behaviour quiet[37], protecting the reputations of perpetrators, and sending the message that sexual harassment, sexual violence, or discrimination is not an issue that warrants public interest nor scrutiny. The clauses prevent a light being shone on patterns of misconduct, and create fertile grounds for sexual harassment, sexual violence or discrimination to recur, with the tacit, collective knowledge that there will be no substantive consequences for patterns of gendered violence and discrimination in the workplace.

53. Over the past five years, a significant amount of Australian and international academic research and practical guidance has been developed in relation to the misuse of NDAs.[38] In addition, several countries have legislated to restrict the use of NDAs (UK, Canada, Ireland and parts of the USA), and Victoria has introduced a draft Bill.

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[36] https://jec.org.au/wp-content/uploads/2024/09/24.09.06-Submission-to-Industrial-Relations-Victoria-Restricting-NDAs-in-workplace-sexual-harassment.pdf

[37] Rachel S. Spooner, 'The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases' (2020) 37(2) Hofstra Labor & Employment Law Journal 331 ('Spooner, The Goldilocks Approach'), at p. 337. https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1673&context=hlelj

[38] Notably the Australian Human Rights' Commission's Respect@Work report (2020) and subsequent NDA Guidelines (2022), the Bargon and Feathersone 'Let's talk about confidentiality' report (2024), the Champions of Change Coalition's 'Sexual harassment and the use of NDAs' guidelines (2022), the Victorian Legal Services Board and Commissioner, 'Advice for lawyers – Using confidentiality clauses to resolve workplace sexual harassment complaints', the UK Solicitor Regulation Authority, 'Warning Notice: Use of Non Disclosure Agreements (NDAs)'.

54. We recommend federal reform to restrict and regulate the use of NDAs. Furthermore, that any such legislation not only applies to sexual harassment and sexual violence matters, but also to the settlement of discrimination complaints relating to any protected attribute under federal discrimination law, as well as to claims in relation to intersectional discrimination. This approach aligns with Ireland's *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021*, and *Prince Edward Island's Non-disclosure Agreements Act 2021* ('PEI NDA Act') and *Ontario Bill No. 124, Stopping the Misuse of Non-Disclosure Agreements Act 2023* ('Ontario Bill'), where restrictions on NDAs extend to all forms of harassment or discrimination protected by their respective human rights and anti-discrimination legislation.

Recommendation:

We recommend federal reform to restrict and regulate the use of NDAs.

If you would like to discuss any aspect of this submission, please contact Emily Gray, Law Reform and Advocacy Lead at emily.gray@wlsnsw.org.au.

Yours faithfully,

Women's Legal Service NSW



Philippa Davis

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