



Royal Commission
into Violence, Abuse, Neglect and Exploitation
of People with Disability

Realising the human rights of people with disability



Final Report
Volume 4

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Final Report

Volume 4

Realising the human rights
of people with disability

Acknowledgement of Country

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) acknowledges Australia's First Nations peoples as the Traditional Custodians of the lands, seas and waters of Australia, and pays respect to all First Nations Elders past, present and emerging.

We recognise their care for people and country. In particular, we acknowledge the Traditional Custodians of the lands on which our offices are based: the Gadigal people of the Eora Nation where our Sydney office stands, the Jagera and Turrbal people as Traditional Owners and Custodians of the lands on which the city of Brisbane is located and the Ngunnawal and Ngambri peoples upon whose land the city of Canberra is located.

We pay our respects to all First Nations people with disability and recognise the distinct contributions they make to Australian life and to the outcome of this inquiry.

Acknowledgement of people with disability

The Royal Commission acknowledges people with disability who fought and campaigned long and hard for the establishment of this Royal Commission.

We acknowledge the courage and generosity of people with lived experience of disability who shared their knowledge and experiences of violence, abuse, neglect and exploitation with the Royal Commission. Their contributions to the Royal Commission have been indispensable in framing recommendations designed to achieve a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.

Content warnings

This report contains information about violence, abuse, neglect and exploitation that may be distressing to readers.

The report contains first-hand accounts of violence, abuse, neglect and exploitation. As a result, some direct quotes in the report may contain language that may be offensive to some people.

First Nations readers should be aware that some information in this report may have been provided by or refer to First Nations people who have passed away.

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Key terms

cause of action

‘Cause of action’ is the legal term for the set of facts that give rise to a legally recognised wrong. Each of these facts, or elements, has to be proven in court for the legal claim to succeed.

civil penalty

A ‘civil penalty’ is a pecuniary (financial) penalty imposed by a court in civil proceedings for breach of a legal duty.

Commonwealth entity (under the proposed Disability Rights Act)

A ‘Commonwealth entity’ is defined in sections 10–11 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (*Public Governance Act*).

Commonwealth entities can be either corporate or non-corporate (*Public Governance Act*, s 11). Corporate entities include a range of statutory entities including the National Disability Insurance Agency (*National Disability Insurance Scheme Act 2013* (Cth), s 117). Non-corporate entities include Australian Government departments (*Public Governance Act*, s 10(1)(a)) and listed entities (*Public Governance Act*, ss 8, 10(1)(c)) such as the Australian Federal Police (*Australian Federal Police Act 1979* (Cth), s 6(2)(a)).

The definition of Commonwealth entity in the *Public Governance Act* does not include individual ministers or public servants (as the broader definition of ‘public authority’ proposed for the Disability Rights Act would).

Commonwealth entities would have obligations under the Disability Rights Act to consult with people with disability; to provide an interpreter; to provide accessible information; and under the positive duty, to promote disability equality and inclusion.

compliance notice

A ‘compliance notice’ is a legal notice that can be issued by an independent oversight body under a legislative provision requiring a person (under legislation this means a legal person, including an entity) to do, or refrain from doing, something. Compliance notices can be enforced in the courts.

costs

In legal cases, parties can employ lawyers to represent them in proceedings in court. Lawyers usually charge their clients for their services (fees) and expenses they have paid or incurred on the client's behalf (disbursements, which may include court fees as well as things like copying documents). Together, these charges are known as 'costs'.

damages

'Damages' are compensation in the form of a sum of money. Damages may be awarded by a court or tribunal in a civil action to an individual who has experienced loss or been injured or harmed following a tort, breach of contract or breach of a statutory right. Damages may also be awarded under a statutory compensation scheme.

enforceable undertaking

An independent oversight body may enter into an 'enforceable undertaking' with a person (under legislation this means a legal person, including an entity) in relation to compliance with a law. The undertaking given by the person can be enforced through the courts by the relevant regulator.

general public authority obligation (under the proposed Disability Rights Act)

This is a recommended obligation that should be set out in the Disability Rights Act, requiring public authorities to consider and act consistently with the disability rights set out in the Act.

injunction

An 'injunction' is a court order to prevent a person (under the law this can apply to a legal person, including an entity) from engaging in particular conduct or to compel a person to engage in particular conduct. An interim injunction can be made to maintain the status quo, pending the resolution of a claim. A permanent injunction is a court order requiring a person to do, or cease doing, a specific action, that is issued as part of a decision in a case.

'person' in Commonwealth legislation

When Commonwealth legislation refers to a 'person', unless otherwise specified, it includes a 'body politic or corporate, as well as an individual' (*Acts Interpretation Act 1901* (Cth), s 2C(1)). Collectively, this category is commonly referred to as 'legal persons', which is a broader category of legal actors and is not limited to natural persons (human beings).

positive duty to promote disability equality and inclusion (under the proposed Disability Rights Act)

This is a recommended duty that should be set out in the Disability Rights Act requiring Commonwealth entities to have due regard to the need to take necessary and proportionate action to advance the equality and inclusion of people with disability, and respect for the inherent dignity of people with disability.

public authority (under the proposed Disability Rights Act)

A ‘public authority’ would be an authority subject to a duty to consider and act consistently with disability rights under the Disability Rights Act. A public authority would include:

- a minister of the Australian Government when exercising a statutory power or authority
- a Commonwealth entity defined in the *Public Governance, Performance and Accountability Act 2013* (Cth)
- an official of a Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth)
- an individual who is employed by, or engaged in assisting, a Commonwealth entity or a staff member of a Commonwealth entity on behalf of the entity or the Commonwealth
- a contracted service provider for the Commonwealth when providing goods or services under a Commonwealth contract, as well as an officer or employee of the contracted service provider for the contract, and someone who provides goods and services for the purposes of the contract
- an individual who is appointed or engaged as an officer or employee of a federal court or tribunal when acting in an administrative capacity
- other entities prescribed by regulations as public authorities for the purposes of the Disability Rights Act.

The Disability Rights Act would enable other entities to voluntarily ‘opt in’ to having public authority obligations under the Act.

standing

‘Standing’ refers to circumstances where a person (under the law this can apply to a legal person, including an entity) has a legal right to bring a claim or be involved in proceedings before a court.

Summary

Key points

- The Royal Commission's terms of reference recognise that Australia has international obligations to take legislative, administrative and other measures to promote the human rights of people with disability. These include protecting people with disability from all forms of exploitation, violence and abuse under the *Convention on the Rights of Persons with Disabilities (CRPD)*.
- Measures adopted by Australia to date to implement the *CRPD* are positive, but they are piecemeal and have not prevented violence against, and abuse, neglect and exploitation of, people with disability. The *CRPD* has not been fully implemented into laws, policies and practices in Australia.
- Under current Commonwealth, state and territory laws, there is limited legal protection of the rights recognised in the *CRPD* and a lack of effective remedies when rights are breached. There is also a lack of awareness and understanding in Australia of the human rights of people with disability.
- A stronger and more comprehensive legal framework is required to achieve equality and inclusion and advance the rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation.
- After consulting with people with disability, the Australian Government should commit to the enactment of an Australian Disability Rights Act (DRA). This should clearly articulate the human rights of people with disability in Commonwealth law.
- The new National Disability Commission (recommended in Volume 5, *Governing for inclusion*) should support implementation of, and compliance with, the DRA. The Commission should also deliver educational and training programs to build understanding of the rights and duties under the DRA.
- Given the states and territories have responsibilities that affect the rights of people with disability, each jurisdiction should enact legislation complementary or equivalent to the DRA, taking into account their own legal frameworks.
- The DRA would be complementary to our recommendations for a strengthened *Disability Discrimination Act 1992 (Cth)*.

Our terms of reference are grounded in human rights

Recognising that people with disability are: equal citizens and have the right to the full and equal enjoyment of all human rights and fundamental freedoms, including respect for their inherent dignity and individual autonomy.¹

The Royal Commission's strong focus on the human rights of people with disability stemmed from our terms of reference, which expressly recognise:²

- People with disability are 'equal citizens and have the right to the full and equal enjoyment of all human rights and fundamental freedoms, including respect for their inherent dignity and individual autonomy'.
- People with disability 'have the same rights as other members of Australian society to live and participate in safe environments free from violence, abuse, neglect and exploitation'.
- 'Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the Convention on the Rights of Persons with Disabilities'.
- It is 'important that people with disability are central to processes that inform best practice decision-making on what all Australian governments and others can do to prevent and respond to violence against, and abuse, neglect and exploitation of, people with disability.'

The recommendations we make across this *Final report* are grounded in a human rights approach, building on the requirements of our terms of reference that we:

- consider 'what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation'³
- consider 'what governments, institutions and the community should do to prevent, and better protect, people with disability from experiencing violence, abuse, neglect and exploitation'⁴
- have regard to the 'multilayered' experiences of people with disability⁵
- 'make any recommendations' arising out of our inquiry that we 'consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms'.⁶

A package of reforms to respect, protect and fulfil the human rights of people with disability

Across this *Final report*, we present a principled and evidence-based approach to strengthening legal, governance, policy and practice frameworks for realising the human rights of people with disability and addressing violence, abuse, neglect and exploitation. Our recommendations aim to achieve lasting change for people with disability in Australia.

This volume addresses the need for a stronger and more comprehensive legal framework to respect, protect and fulfil the human rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation. It makes recommendations that, in combination with the package of reforms proposed across this *Final report*, would promote the inclusion of people with disability; help prevent violence, abuse, neglect and exploitation; and lead to better responses when they do occur.

This volume includes four chapters:

- **Chapter 1 – Australia’s international human rights obligations regarding people with disability**, sets out an overview of Australia’s international human rights obligations. In particular, it looks at obligations under the *Convention on the Rights of Persons with Disabilities* (CRPD); their applicability in the Australian legal context; and how they inform the human rights approach that underpinned our work.
- **Chapter 2 – Australia’s current implementation of disability rights**, considers the Australian Government’s current approach to implementation of the CRPD. It sets out key weaknesses with the approach and concludes that a significant change is needed to the way we respect, protect and fulfil the human rights of people with disability in Australia.
- **Chapter 3 – Strengthening protection through an Australian Disability Rights Act**, outlines a proposal for strengthening legislative protection of disability rights through a Disability Rights Act. This would set out rights, duties and effective remedies; be accompanied by an education and training program; and be promoted and enforced by an independent oversight body.
- **Chapter 4 – Strengthening the Disability Discrimination Act**, considers key limitations of the *Disability Discrimination Act 1992* (Cth) (DDA). This chapter makes recommendations to reform the ability of the DDA to better meet the needs and protect the human rights of people with disability.

The human rights of people with disability and the guiding principles of the CRPD underpin all volumes of this *Final report*. This volume should therefore be read alongside others, as indicated below in ‘Links with other volumes’.

Australia's international human rights obligations regarding people with disability

Australia has binding international obligations regarding the human rights of people with disability. These are primarily contained in the human rights treaties Australia has ratified, most significantly the *CRPD*. Because our terms of reference require us to consider the particular situation of First Nations people with disability, we also consider the important role of the *United Nations Declaration on the Rights of Indigenous Peoples*.

These international instruments require Australia to respect, protect and fulfil the human rights of people with disability.

Chapter 1 of this volume introduces the human rights framework that underpins our work, based on our terms of reference.

It provides an overview of the core human rights treaties, with a focus on the *CRPD*. It summarises the obligations agreed to by the Australian Government under article 4 of the *CRPD*. These include to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'; to adopt 'all appropriate legislative, administrative and other measures' to implement and safeguard the full spectrum of rights recognised in the *CRPD*; and to 'consult with and actively involve persons with disabilities, including children with disabilities', in the development and implementation of legislation and policies designed to implement the *CRPD*.

The chapter summarises the general principles and substantive rights under the *CRPD*, with a focus on article 16 and its guarantee of freedom from all forms of exploitation, violence and abuse. It also discusses the key concepts of equality, multiple discrimination and intersectionality, and the human rights of First Nations people with disability.

The chapter then outlines how international human rights treaties are given effect to in the Australian legal context, and discusses some key principles and concepts relevant to the interpretation and application of Australia's international human rights obligations. Among others, these include the concepts of 'progressive realisation' and 'immediately realisable' rights, and the right to an effective remedy when rights are breached. They also include the universal, indivisible, interdependent and interrelated nature of all human rights. This means that, in order to protect people with disability from all forms of exploitation, violence and abuse under article 16 of the *CRPD*, we must also consider how to realise other related human rights of people with disability.

Finally, the chapter summarises the human rights approach we took in our work and that informed our recommendations for change.

Australia's current implementation of disability rights

Australia has adopted many positive measures, but takes a piecemeal approach to protecting disability rights

Over time, Australian governments have adopted many positive measures to realise the human rights of people with disability. This includes enacting legal protections through anti-discrimination laws, the creation of national disability strategies and the rollout of the National Disability Insurance Scheme (NDIS). However, implementation of the *CRPD* to date is only partial and has occurred through a range of laws, policies and practices, rather than a single piece of legislation setting out the human rights of people with disability.

Chapter 2 provides an overview of the current legal framework for protecting the human rights of people with disability in Australia. It emphasises that existing measures have not prevented violence against, and abuse, neglect and exploitation of, people with disability. It discusses the lack of legal protection for human rights generally and, more specifically, the limited legal protection accorded to the rights of people with disability. It also considers the lack of effective remedies in Australia when rights recognised by the *CRPD* are breached.

The chapter goes on to note that, while there are some existing mechanisms intended to align laws with Australia's international human rights obligations, none ensures Australian laws are consistent with the *CRPD* in practice. As a result, some existing laws are inconsistent with the requirements of the *CRPD* and there is no guarantee that new laws will be consistent with those requirements.

Further, the chapter outlines that rights recognised by the *CRPD* are not sufficiently incorporated into policy and practice in Australia. There are limited requirements for governments and parliaments to consider the rights of people with disability in decision-making and in the development of law and policy. In addition, people with disability are not sufficiently involved in government decision-making processes and the development of laws and policies affecting their human rights.

The chapter also refers to evidence demonstrating that limited awareness and understanding of the rights of people with disability, coupled with ableist attitudes, are linked to violence against, and abuse, neglect and exploitation of, people with disability.

A new approach is needed to better respect, protect and fulfil disability rights

Chapter 2 concludes that the *CRPD* has not been fully implemented into laws, policies and practices in Australia. The current piecemeal approach is not adequate. Australia has the opportunity to strengthen implementation of *CRPD* rights. Taking advantage of this opportunity involves introducing measures that more effectively respect, protect and fulfil the human rights of people with disability, especially their right to live free from violence, abuse, neglect and exploitation.

The critical question is not whether there are ‘gaps’ in implementing the *CRPD* in Australia; the question is one of much broader scope and approach. As a wealthy, developed nation with strong stated commitments to human rights, the realisation of the human rights of people with disability in Australia is falling behind where it should be.

To address the nature and extent of violence, abuse, neglect and exploitation we have heard about over the course of our inquiry, a new approach to disability rights protection is needed. A stronger and more comprehensive legal framework is required to achieve equality and inclusion and advance the rights of people with disability.

A strong disability rights protection framework should be implemented as part of the broader package of reforms recommended across this *Final report* – reforms aimed at achieving equality of outcomes, creating a more inclusive society and addressing key drivers of violence, abuse, neglect and exploitation.

Strengthening protection through an Australian Disability Rights Act

In Chapter 3, we recommend the Australian Government commit to the enactment of an Australian Disability Rights Act (DRA) and take the necessary steps to introduce the legislation into Parliament and support its enactment. These steps should include consulting with people with disability, disability representative organisations and other key stakeholders on the content of the Act. This would respond to the need for a new approach to better respect, protect and fulfil the human rights of people with disability in Australia.

The rights and duties we propose for inclusion in the DRA would translate and implement rights and obligations recognised in the *CRPD* in a way that is practical, workable and capable of effective enforcement in the Australian legal context.

Chapter 3 sets out rights of people with disability that should be protected under the DRA, including the right to:

- non-discrimination and equality before the law
- recognition as a person before the law – including the right to access and use supports, including advocacy services, in making and participating in decisions that affect them, communicating their will and preferences, and developing their decision-making ability
- live free from all forms of exploitation, violence and abuse
- liberty and security of person
- equitable access to health services.

Through consultation with people with disability and other stakeholders, the Australian Government may decide to include additional human rights of people with disability in the DRA. The objective of the DRA should be to respect, protect and fulfil all rights in the *CRPD*, as well

as the rights of First Nations people with disability that are not specifically articulated in the *CRPD*. These rights should be adapted as needed to be appropriate for the Australian legal context, to ensure they are both practically enforceable and accessible for people with disability.

Chapter 3 then sets out duties to be imposed on primary duty-holders under the DRA – namely, the Commonwealth public sector. These include:

- an obligation on ‘public authorities’ to act compatibly with the rights in the DRA and to give proper consideration to human rights when making decisions
- a requirement that ‘Commonwealth entities’ consult with people with disability when developing and evaluating policies, laws and programs and planning new initiatives or making major changes to services that are provided to the public, or have a direct and significant impact on the public
- a positive duty on Commonwealth entities to promote disability equality and inclusion
- a duty on Commonwealth entities to provide an appropriately trained and credentialed interpreter when required by a person with disability who is accessing or using its services or engaging with its statutory functions
- a duty on Commonwealth entities to ensure that its communications are provided in at least two formats accessible to people with disability when publishing public information or consulting or engaging with people with disability
- duties on Commonwealth entities to support implementation of, and compliance with, the DRA, including disability impact assessments, self-assessment audits on disability inclusion, and transparent reporting.

We also recommend the DRA provide a mechanism for private and community sector entities to voluntarily opt in to having obligations under the DRA from the outset of its implementation. There should be a public register of entities that have chosen to do so. This measure would recognise the impact and responsibility of businesses and community service organisations for the human rights of people with disability.

Expansion of the DRA should be considered at a future review, which should be undertaken in consultation with people with disability within five years of its commencement. The review should consider, among other things, whether and how duties in the DRA should be extended or applied to additional persons or entities, including private sector disability service providers under the NDIS. Commissioners Bennett, Galbally and McEwin alternatively recommend that, rather than considering this question at the five-year review, the Australian Government should examine as a priority how to expand the duty-holders under the DRA to include private sector providers delivering services through the NDIS from the outset.

Chapter 3 also sets out some key considerations for adapting international human rights obligations into Australian law. In particular, we discuss the role of statutory interpretation and the implementation of economic, social and cultural rights. We also recommend a framework for when and how rights may be limited under the DRA, to ensure the rights of people with disability are not unduly limited.

We then go on to consider the important role of remedies and enforcement under the DRA. Our recommendations have been shaped by the general principles under the *CRPD*, good practice in responsive regulation, and what is required to deliver an effective system of rights protection for people with disability.

An independent oversight body should be given statutory functions to support compliance with the DRA. We have given careful consideration to where these functions should sit. The establishment of the National Disability Commission as an independent statutory authority (as recommended in Volume 5, *Governing for inclusion*) provides an opportunity to take a comprehensive approach to promoting and protecting the human rights of people with disability under the DRA. We therefore recommend the National Disability Commission be given capacity-building functions under the DRA, including research, publication of guidelines, provision of advice through voluntary compliance reviews, complaint handling and interventions in relevant court proceedings. We also recommend the National Disability Commission be given functions to address non-compliance with the DRA, including conducting inquiries, entering into enforceable undertakings, issuing compliance notices and seeking injunctions to stop or prevent breaches of the DRA.

We then turn to the question of how to provide access to remedies when the rights of people with disability are breached under the DRA. There, we discuss the need to ensure complaint pathways are clear, accessible, inclusive, efficient and responsive. Available remedies must be effective, meaningful, intersectional and enforceable. The system must be designed to work for people with disability.

We recommend that individuals and representative bodies be able to make complaints about breaches of the DRA to the National Disability Commission. The Commission should co-design its complaints mechanism with people with disability, taking into account key features for effective remedies outlined in this *Final report*, in particular in Volume 11, *Independent oversight and complaint mechanisms*. We also recommend that individuals and representative bodies be able to bring claims to the Federal Court of Australia or the Federal Circuit and Family Court of Australia about certain contraventions of the DRA by duty-holders.

For the DRA to be effective, the Australian Government must prioritise work to build capacity to give life to the rights it protects. In Chapter 3, we recommend the Australian Government fund the National Disability Commission to produce and maintain accessible guidance to explain the rights and duties in the DRA. The Commission should also be empowered and funded to develop and deliver ongoing educational and training programs on the DRA. Training programs and resources should be co-designed with people with disability, and people with disability should be involved in their delivery.

Chapter 3 concludes by noting areas of state and territory responsibility relevant to the violence, abuse, neglect and exploitation experienced by people with disability. We recommend each state and territory enact legislative protections complementary or equivalent to those in the DRA, taking into account their own legal frameworks.

Strengthening the *Disability Discrimination Act*

The DRA would be complementary to a strengthened *DDA*, as recommended in Chapter 4.

People with disability experience discrimination at higher rates than people without disability. Many people who shared their stories with the Royal Commission through submissions and private sessions told us about their experiences of discrimination in different settings and contexts.

When the *DDA* was enacted in 1992, people with disability and their advocates had high expectations that it would lead to transformational change. These expectations have not been realised. The *DDA* needs to be reformed to be made more effective in fulfilling the human rights of people with disability, promoting substantive equality and realising inclusion.

Chapter 4 recommends amendments to the *DDA* to enhance its ability to respect, protect and fulfil the right of people with disability to live free from discrimination, and to better promote equality.

First, the chapter recommends simplifying the definitions of direct and indirect discrimination, along with a new standalone duty to make adjustments for people with disability.

Next, we recommend the *DDA* should impose a positive duty that requires all duty-holders to take reasonable and proportionate measures to eliminate disability discrimination, harassment and victimisation. Achieving substantive equality requires more than making adjustments for one person. It means shifting the focus from a reactive model to prevention and elimination of systemic barriers for people with disability.

The chapter then discusses the ineffectiveness of the *DDA* in addressing the harassment and vilification experienced by people with disability. We recommend the *DDA* be amended to insert new provisions making offensive behaviour and vilification on the ground of disability unlawful. We also recommend that states and territories that have legislation imposing criminal penalties for vilification of people on grounds that do not include disability extend the legislation to include vilification of people on the ground of disability.

Chapter 4 then discusses some of the lawful exemptions, exceptions or defences to discrimination in the *DDA* and recommends the Australian Government reconsider the scope of some of these.

We also discuss the disability standards that supplement the *DDA*: the *Disability Standards for Accessible Public Transport 2002* (Cth), the *Disability Standards for Education 2005* (Cth) and the *Disability (Access to Premises — Buildings) Standards 2010* (Cth).

The chapter concludes by making further recommendations to strengthen the operation of the *DDA*. These include incorporating a reference to the *CRPD* in the objects of the Act and including an express provision stating the *DDA* should be interpreted in a manner that advances the rights of people with disability.

Links with other volumes

Because human rights are core to our terms of reference, we applied a human rights approach across our work and in developing our recommendations for change. In one way or another, all the recommendations we make are aimed at improving the enjoyment of human rights by people with disability, including their right to live free from violence, abuse, neglect and exploitation.

The recommendations in this volume form a key part of the package of reforms proposed across this *Final report*. This volume should therefore be read alongside others, including:

- **Volume 3, *Nature and extent of violence, abuse, neglect and exploitation***, which sets out the nature and extent of the violence, abuse, neglect and exploitation people with disability experience across different settings and contexts and across their different life stages. It looks at the heightened forms of violence and abuse groups of people with disability experience as a result of multilayered or intersecting forms of disadvantage and marginalisation.
- **Volume 5, *Governing for inclusion***, which considers the adequacy of existing national disability policy, strategy and governance arrangements to address violence against, and abuse, neglect and exploitation of, people with disability. It makes recommendations for strengthening these arrangements in order to drive the change needed to improve outcomes for, and ensure equality and inclusion of, people with disability.
- **Volume 6, *Enabling autonomy and access***, which identifies critical areas where legal, policy and practical reforms are needed to better promote respect for autonomy and to ensure access to essential supports and services. These areas include information and communications, supported decision-making, advocacy and informal supports, health care and treatment, restrictive practices and reproductive rights abuses, particularly sterilisation without consent.
- **Volume 7, *Inclusive education, employment and housing***, which outlines the significant reforms needed to remove barriers to meaningful inclusion for people with disability in education, employment and housing settings.
- **Volume 8, *Criminal justice and people with disability***, which discusses key issues relating to the rights of people with disability who come into contact with the criminal justice system, both as people accused of a crime or as victims of crime. It also discusses reforms needed to Australian domestic and family violence laws.
- **Volume 9, *First Nations people with disability***, which discusses the distinct experiences of First Nations people with disability. The volume emphasises the need for cultural safety in service provision and the long-term commitment to attitudinal and structural reform required to ensure respect for the rights of First Nations people with disability. It makes recommendations outlining major changes required within systems and settings, and policy and legal frameworks.

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- **Volume 10, *Disability services***, which discusses what we heard about experiences of violence, abuse, neglect and exploitation in disability services, and examines the role of the NDIS Quality and Safeguards Commission in preventing and responding to violence, abuse, neglect and exploitation. The volume considers reforms needed for disability service providers to fulfil the human rights of people with disability, including their right to choice and control, and areas where the NDIS Commission's functions, performance and resourcing can be strengthened.
 - **Volume 11, *Independent oversight and complaint mechanisms***, which makes recommendations to strengthen other oversight mechanisms to better prevent and respond to violence against, and abuse, neglect and exploitation of, people with disability, and to improve complaints pathways and experiences.

Recommendations

Recommendation 4.1 Establish a Disability Rights Act

The Australian Government should commit to the enactment of a Disability Rights Act and take the necessary steps to introduce the legislation into Parliament and support its enactment. The necessary steps should include consultation with people with disability, disability representative organisations and other key stakeholders.

Recommendation 4.2 Objects of the Disability Rights Act

The objects of the Disability Rights Act should include giving effect to Australia's obligations under, and the general principles set out in, the *Convention on the Rights of Persons with Disabilities*.

Recommendation 4.3 Principles in the Disability Rights Act

The Disability Rights Act should include a set of guiding principles designed to promote and advance the rights of people with disability in Australia. The Disability Rights Act should require that a person or entity exercising functions under the Act have regard to the principles.

Recommendation 4.4 Future review of the Disability Rights Act

- a. The Australian Government should ensure that a review of the Disability Rights Act is undertaken in consultation with people with disability within five years of the commencement of the Act. The review should include consideration of:
 - how the Act should be improved
 - the effectiveness of compliance mechanisms
 - the availability of appropriate remedies that meet the needs of people with disability
 - whether and how duties in the Act should be extended or applied to additional persons or entities, including private sector providers under the National Disability Insurance Scheme (NDIS).
- b. Commissioners Bennett, Galbally and McEwin alternatively recommend the final point above be considered by the Australian Government as a priority and that these additional duty-holders be included from the commencement of the Act.

Recommendation 4.5 The right to non-discrimination and equality before the law

The Disability Rights Act should recognise all human beings are equal in worth and dignity and every person with disability:

- a. has the right to enjoy their human rights without discrimination (on the ground of disability or on a combination of protected grounds where one of those grounds is disability)
- b. is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

Recommendation 4.6 The right to equal recognition before the law

- a. The Disability Rights Act should recognise that people with disability have the right to recognition as a person before the law. Accordingly, they have the same rights as other members of the community to make decisions that affect their lives to the full extent of their ability to do so.
- b. The Disability Rights Act should recognise:
 - the right of people with disability to access and use supports in making and participating in decisions that affect them, communicating their will and preferences, and developing their decision-making ability
 - the right of people with disability to access and use advocacy services in making and participating in decisions, communicating their will and preferences, and developing their decision-making ability.
- c. The Disability Rights Act should define ‘supports’ broadly.
- d. The Disability Rights Act should require supports for people with disability from First Nations communities and culturally and linguistically diverse backgrounds to be provided in a way that:
 - recognises that cultural, language and other differences may create barriers to providing the supports
 - addresses those barriers and the needs of those people with disability
 - is informed by consultation with their communities.
- e. The definition of ‘advocacy service’ in section 7 of the *Disability Services Act 1986* (Cth) should be amended to include a reference to a service that seeks to support people with disability to exercise their rights and freedoms under domestic law, including under the Disability Rights Act. This would be in addition to the existing reference to rights and freedoms under the ‘Disabilities Convention’.

Recommendation 4.7 The right to live free from exploitation, violence and abuse

The Disability Rights Act should recognise:

- a. people with disability have the right to live free from all forms of exploitation, violence and abuse, including the right to freedom from gender-based violence and abuse

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- b. people with disability have the right to accessible information and education on how to avoid, recognise and report exploitation, violence and abuse
 - c. people with disability who are victims of any form of exploitation, violence or abuse have the right to:
 - access protection services that promote the health, welfare, dignity and autonomy of such persons
 - access protection services that are sensitive and responsive to the different needs and experiences of people with disability, due to one or more attributes such as sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socio-economic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma
 - report allegations of exploitation, violence and abuse, with protection from victimisation for making a report.

Recommendation 4.8 The right to liberty and security of person

The Disability Rights Act should recognise every person with disability has the right to liberty and security of person. In particular, no person with disability may be arbitrarily arrested or detained. No person with disability may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Recommendation 4.9 The right to equitable access to health services

The Disability Rights Act should recognise the right of people with disability to equitable access to health services. This right should include:

- a. the right to the same range, quality and standard of free and affordable health care and programs as people without disability
- b. the right to exercise choice about healthcare options and between available services
- c. the right to access and receive quality health services appropriately adapted or specifically designed to meet the needs of the person with disability
- d. the presumption of legal capacity and provision for supported decision-making

- e. the right to adjustments required to access services and to receive treatment and care (to the extent that a duty-holder is required to provide adjustments in accordance with the *Disability Discrimination Act 1992* (Cth))
- f. the right to accessible information
- g. the right of First Nations people with disability to receive health care that is culturally safe and recognises the importance of their personal connection to community and Country
- h. the right to access health services that are safe, sensitive and responsive to the intersectional needs and experiences of the person with disability, noting that intersectional needs and experiences may be due to a variety of attributes, including sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socio-economic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma
- i. the right to voice opinions and to make complaints about health services.

Recommendation 4.10 Public authority conduct

- a. The Disability Rights Act should make it unlawful for a 'public authority' to:
 - act in a way that is incompatible with a right in the Disability Rights Act
 - fail to give proper consideration to a right where relevant to the decision being made.
- b. 'Public authority' should be defined to include:
 - a minister of the Australian Government when exercising a statutory power or authority
 - a Commonwealth entity defined in the *Public Governance, Performance and Accountability Act 2013* (Cth)
 - an official of a Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth)
 - an individual who is employed by, or engaged in assisting, a Commonwealth entity or a staff member of a Commonwealth entity on behalf of the entity or the Commonwealth
 - a contracted service provider for the Commonwealth when providing goods or services under a Commonwealth contract, as well as an officer or employee of the contracted service provider for the contract, and someone who provides goods and services for the purposes of the contract

- an individual who is appointed or engaged as an officer or employee of a federal court or tribunal when acting in an administrative capacity
 - other entities prescribed by regulations as public authorities for the purposes of the Disability Rights Act.
- c. The Disability Rights Act should provide for a mechanism through which a non-Commonwealth entity could ask the minister to declare that the entity is subject to the obligations of a public authority under the Act and for a register of such entities to be published.

Recommendation 4.11 Consultation with people with disability

- a. The Disability Rights Act should require Commonwealth entities (as defined in the *Public Governance, Performance and Accountability Act 2013* (Cth)), in developing and evaluating policies, laws and programs and in planning new initiatives or making major changes to services that are provided to the public, or have a direct and significant impact on the public, to consult with:
- people with disability (including disability representative organisations), recognising the special importance of consulting and actively involving First Nations people with disability in issues that affect them
 - children and young people with disability where appropriate, or representatives of children and young people (including, as relevant, disability representative organisations, the National Children's Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner or equivalents in the states and territories)
 - families, carers and supporters of people with disability (which could include their representative organisations) on issues that will or could affect families, carers and supporters in their caring role.
- b. The Disability Rights Act should specify the nature of any consultation required and the consequences of a failure to consult.
- c. The Disability Rights Act should provide that the consultation requirement does not give rise to a civil cause of action in any person or organisation.
- d. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended, or an accompanying legislative instrument be prepared, requiring statements of compatibility accompanying Bills and legislative instruments to provide information about relevant actions taken by Commonwealth entities to comply with the consultation requirement in the Disability Rights Act.

Recommendation 4.12 Positive duty to promote disability equality and inclusion

- a. The Disability Rights Act should include a requirement for a Commonwealth entity, in the exercise of its functions, to have due regard to the need to take necessary and proportionate action to advance the policy objectives of equality, inclusion and respect for the dignity of people with disability.
- b. The requirement in a. should include the Commonwealth entity having due regard to the need to:
 - ensure equality of rights, opportunities, responsibilities and outcomes between people with disability and other members of the Australian community
 - act consistently with its obligations under the *Disability Discrimination Act 1992* (Cth), including the duties recommended in Chapter 4 to:
 - take reasonable and proportionate measures to eliminate all forms of discrimination on the grounds of disability
 - make adjustments for people with disability so they can enjoy their human rights without discrimination, unless it would cause an unjustifiable hardship
 - address barriers that disadvantage people with disability, including barriers compounded by a person with disability's combination of attributes and experiences
 - promote accessibility and universal design, and appropriate remedial action to existing infrastructure
 - address stigma, stereotyping, prejudice, violence, abuse, neglect and exploitation affecting people with disability
 - foster good relations between people with disability and other members of the community.

Recommendation 4.13 The duty to provide an interpreter

- a. The Disability Rights Act should require Commonwealth entities to provide (arrange and fund) an appropriately trained and credentialed interpreter when required by a person with disability who is accessing or using its services or engaging with its statutory functions. Interpreters may be required in Auslan, First Nations sign languages or spoken languages other than English.

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- b. The Disability Rights Act should provide that it is not a breach of the above duty if the relevant Commonwealth entity can demonstrate that:
- there was no appropriately qualified interpreter available after reasonable enquiry
 - the conversation or activity that the interpreter was required for could not reasonably have been undertaken at an alternative time when an interpreter would have been available.

Recommendation 4.14 The duty to provide accessible information

The Disability Rights Act should provide that a Commonwealth entity must ensure that its communications are provided in at least two formats accessible to people with disability when:

- publishing public information
- consulting or engaging with persons with disability.

Recommendation 4.15 Duties supporting compliance with the Disability Rights Act

To support compliance with the Disability Rights Act, the Act should require Commonwealth entities to:

- a. report annually on action they have taken to implement their duties under the Disability Rights Act
- b. conduct a disability impact assessment when developing or reviewing any policy or law administered, or program or service provided, by the entity that has a direct and significant impact on the public
- c. undertake a self-assessment audit for disability inclusion at least every four years
- d. publish their specific and measurable objectives to further the aims of the positive duty to promote disability equality and inclusion at least every four years.

Recommendation 4.16 Interpretation of the Disability Rights Act consistently with international human rights

The Disability Rights Act should require interpretation of the Act to be compatible, as far as possible, with the international human rights treaties to which Australia is a party, including the *Convention on the Rights of Persons with Disabilities*, and with the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 4.17 Limitations on rights

- a. The Disability Rights Act should require that rights in the Act be subject only to such limitations that are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors (to be specified in the legislation).
- b. The Disability Rights Act should make clear that the right to recognition before the law (see Recommendation 4.6), as an absolute right under international law, is not subject to any limitations.
- c. This issue should be subject to consultation prior to enactment of the Disability Rights Act.

Recommendation 4.18 Functions of the National Disability Commission to support compliance with the Disability Rights Act

To support compliance with the Disability Rights Act, the Act should provide the National Disability Commission (recommended in Volume 5, *Governing for inclusion*) with functions and powers to:

- a. promote understanding and acceptance of the rights of people with disability under the Act
- b. undertake research in relation to the rights and duties under the Act
- c. issue guidelines on any matter relating to the Act
- d. review a person or entity's compliance with the Act (or an aspect of the Act) at that person or entity's request
- e. receive complaints or anonymous or confidential reports alleging a contravention of the Act

- f. inquire into and report on any act or practice that may be inconsistent with or contrary to the Act
- g. require the giving of information and the production of documents during the conduct of a formal inquiry
- h. require the examination of witnesses under oath or affirmation during the conduct of a formal inquiry
- i. enter into an enforceable undertaking with a person or entity in relation to compliance with the Act (engaging Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth))
- j. issue a compliance notice where the National Disability Commission reasonably believes that the relevant person or entity, without reasonable excuse, has failed to comply with the Act
- k. apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia for enforcement of a compliance notice
- l. apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia for an injunction (engaging Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth)) to prevent or stop a contravention of the Act
- m. intervene in any proceedings before a court or tribunal that relate to the application or interpretation of the Act.

These functions would be in addition to those recommended for the National Disability Commission in Volume 5, *Governing for inclusion*, and Volume 12, *Beyond the Royal Commission*.

The Australian Government should provide the National Disability Commission with dedicated resources to undertake these functions.

Recommendation 4.19 Co-design a new complaints mechanism for people with disability

- a. The National Disability Commission should co-design its complaints mechanism under the Disability Rights Act with people with disability, taking into account:
 - the national guideline for accessible and responsive complaint handling and investigative practice to be co-designed with people with disability (recommended in Volume 11, *Independent oversight and complaint mechanisms*)

- processes to support referrals to police and other regulatory or oversight bodies (noting that Volume 11 recommends a ‘one-stop shop’ independent complaint reporting, referral and support mechanism in each state and territory)
 - key features for effective remedies outlined in this *Final report*.
- b. Acts, omissions or practices that are unlawful under the Disability Rights Act (with the exception of duties supporting compliance with the Act, such as reporting obligations) should be added to the definition of ‘unlawful discrimination’ under section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth). This would enable the Australian Human Rights Commission to offer dispute resolution for relevant Disability Rights Act matters alongside related human rights and discrimination complaints involving a public authority.

Recommendation 4.20 Enabling remedies through the courts

The Disability Rights Act should establish a standalone cause of action under which:

- a. the following persons can bring a claim to the Federal Court of Australia or the Federal Circuit and Family Court of Australia that a relevant duty-holder has acted in contravention of the Disability Rights Act (other than compliance with the consultation requirement, notices of the National Disability Commission, duties supporting compliance with the Act such as reporting and self-audit obligations, and the positive duty to promote disability equality and inclusion):
 - an aggrieved person on their own behalf; an aggrieved person on behalf of themselves and others who are also aggrieved
 - two or more aggrieved persons on behalf of themselves or others who are also aggrieved (a group claim)
 - a person or disability representative organisation on behalf of one or more aggrieved persons (a representative claim)
- b. where a claim is brought before a court under a. and the court finds that a person or entity has acted incompatibly with the Disability Rights Act, it can make any order it considers just and appropriate, including damages
- c. provisions in relation to costs are aligned with Commonwealth discrimination law, as amended following the 2022–23 review by the Australian Government Attorney-General’s Department.

Recommendation 4.21 Strengthening awareness and understanding of disability rights

- a. The Disability Rights Act should provide the National Disability Commission with statutory functions to:
 - promote understanding and acceptance, and the public discussion, of the rights of people with disability under the Act
 - develop and deliver guidance materials and educational and training programs in relation to the rights and duties under the Act. Guidance should include how the intersectional experiences and identities of people with disability can affect the ways in which rights are limited or promoted in practice.
- b. The National Disability Commission should co-design and co-deliver training programs and resources with people with disability, and with the Australian Human Rights Commission where relevant, to provide a complete picture of human rights protections for people with disability under the Disability Rights Act and the *Disability Discrimination Act 1992* (Cth).
- c. The Australian Government should provide the National Disability Commission and the Australian Human Rights Commission with dedicated resources to undertake these roles.

Recommendation 4.22 Strengthening disability rights protection in state and territory laws

- a. States and territories should enact legislation complementary or equivalent to the Australian Disability Rights Act, taking into account their own legal frameworks.
- b. The Disability Rights Act should provide that the Act is not intended to exclude or limit the operation of a state or territory law that furthers the objectives of the *Convention on the Rights of Persons with Disabilities* and is capable of operating concurrently with the Act.

Recommendation 4.23 Burden of proof in direct discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting new subsections 5(1) and 5(1A). The subsections would read as follows:

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

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

Recommendation 4.24 Reforming indirect discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 6(3) to substitute existing subsections 6(3) and (4) as follows:

6(3) Subsection (1) or (2) does not apply if avoiding the discrimination would impose an unjustifiable hardship on the alleged discriminator.

Recommendation 4.25 Adjustments

The *Disability Discrimination Act 1992* (Cth) should be amended by replacing all references to 'reasonable adjustments' with 'adjustments'.

Recommendation 4.26 Standalone duty to make adjustments

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

Duty to make adjustments

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

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

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

Recommendation 4.27 Positive duty to eliminate disability discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended to introduce a positive duty on all duty-holders under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the *Sex Discrimination Act 1984* (Cth):

Duty to eliminate discrimination on the ground of disability

(1) A person must take reasonable and proportionate measures to eliminate all forms of discrimination on the ground of disability.

(2) In determining whether a measure is reasonable and proportionate the following factors must be considered—

- (a) the size of the person's business or operations;
- (b) the nature and circumstances of the person's business or operations;
- (c) the person's resources;
- (d) the person's business, risk management plans and operational priorities;
- (e) the practicability and the cost of the measures;
- (f) whether the person has a disability action plan;
- (g) nature and extent of the person's consultation with any person with disability concerned; and
- (h) all other relevant facts and circumstances.

Other duties not limited or otherwise affected

(3) This section does not limit, or otherwise affect, a duty that a duty-holder has under:

- (a) the *Work Health and Safety Act 2011* (Cth); or
- (b) a law of a State or Territory that deals with work health and safety.

Recommendation 4.28 Systemic discrimination

- a. Division 4A (ss 35A–35K) of the *Australian Human Rights Commission Act 1986* (Cth) should be amended by inserting the words ‘or disability discrimination’ after ‘sex discrimination’ where these words appear.
- b. A reference to ‘disability discrimination’ means any conduct that is unlawful under the *Disability Discrimination Act 1992* (Cth).

Recommendation 4.29 Offensive behaviour

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision:

Section 39A Offensive behaviour because of disability

(1) It is unlawful for a person (the *first person*) to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Recommendation 4.30 Vilification because of disability

- a. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision as follows:

Section 39C Vilification because of disability

It is unlawful for a person (the *first person*) to do an act otherwise than in private, if:

- (a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;
 - (b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and
 - (c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.
- b. States and territories that already have legislation imposing criminal penalties for vilification of people on grounds that do not include disability should extend the legislation to vilification of people on the ground of disability.

Recommendation 4.31 Disability discrimination and migration law

- a. The Australian Government should initiate a review of the operation of section 52 of the *Migration Act 1958* (Cth), insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination.
- b. The review should be conducted with particular reference to the rights recognised by the *Convention on the Rights of Persons with Disabilities* and the *Concluding observations on the combined second and third periodic reports of Australia* made by the United Nations Committee on the Rights of Persons with Disabilities.

Recommendation 4.32 Unjustifiable hardship

Section 11 of the *Disability Discrimination Act 1992* (Cth) should be amended by inserting the new subsections 11(1)(aa), 11(1)(ab) and 11(1A) as follows:

11 Unjustifiable hardship

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the *first person*) would be an *unjustifiable hardship*, all relevant circumstances of the particular case must be taken into account, including the following:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;

(aa) the nature and extent of the first person's consultations with any person with disability concerned;

(ab) the first person's consideration of all available and appropriate alternative measures or actions;

(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(1A) The person relying on unjustifiable hardship must:

(a) create and retain all documents recording the person's consideration (if any) of each of the factors in subsection (1); and

(b) provide reasons to the person concerned, if so requested, for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.

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

Recommendation 4.33 Reference to the *Convention on the Rights of Persons with Disabilities*

The *Disability Discrimination Act 1992* (Cth) should be amended to insert a new subsection 3(d) as follows:

- (d) to give effect to Australia's obligations under the Disabilities Convention.

Recommendation 4.34 Interpretation of the *Disability Discrimination Act 1992* (Cth)

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 4(3):

- (3) This Act must be interpreted in a way that is beneficial to a person or persons with disability, to the extent it is possible to do so consistently with—
 - (a) the objects of this Act
 - (b) the Convention
 - (c) the Covenant on Civil and Political Rights
 - (d) the Disabilities Convention
 - (e) the International Covenant on Economic, Social and Cultural Rights.

Endnotes

- 1 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 2 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 3 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 4 *Letters Patent* (Cth), 4 April 2019 (as amended), (a).
- 5 Our terms of reference require that we have regard to the fact that ‘the specific experiences of violence against, and abuse, neglect and exploitation of, people with disability are multilayered and influenced by experiences associated with their age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability’. See *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 6 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.

Claudia*

'I have been taught implicitly and explicitly to never rock the boat. Don't bite the hand that feeds you. To always speak in polite lies. But what I really want, what I really want, is to never again feel like an inconvenience, to never have to say sorry for being disabled, to never stick out like a sore thumb because the venue I'm visiting is inaccessible and I need someone else's help just to find a quiet spot out of the way in the corner where no-one can see me. I don't want to avoid every reflective surface in our house because, by our society's standards, my body is deformed, wrong, unnatural, sub-human.

I never want to feel jealous – jealous – when another disadvantaged person is lucky enough to get a place of their own. I don't want it to be a competition for scarce resources, a survival of the fittest, where the winners are able-bodied young people who can climb a flight of stairs without needing to rest for an hour, or step over the lip of a bathtub without the risk of face planting onto the tiles. I don't want to dredge up my very worst days where I cannot breathe past the pain and would just rather be dead than deal with it for another second longer, or to justify my need for funding, for support, for understanding, for the label of properly disabled to be bequeathed upon me by another.

I want to be grateful for what I have, without gratitude being weaponised by others, as a way of putting me back in my place and ensuring I don't question the status quo, so that I don't dare to imagine that my life could be better and so I don't find the courage to demand these changes. I want to appreciate what works in my life without subsuming what doesn't work. These aren't mutually exclusive and just because I'm lucky enough [to] not be living on the streets or in my car anymore doesn't mean that I don't have valid concerns for how our homelessness services are arranged.

I want a home, not a house, not four walls and a roof over my head, but a real home, somewhere no-one can take away from me because I'm too old or not disabled enough, because I'm struggling to afford my rent. I never want to hear that ever-present truly insidious voice in the back of my mind asking what's the catch? I want to fall asleep every night knowing this place is just for us. So we don't have to turn the music down or always walk around wearing pants just in case someone comes in without knocking. So that we don't have to pretend or apologise, or hide or lie, but just be together, belong together.

I want a goddamn queen-size bed so that when the world becomes too much and I'm without a single iota of hope for our future, I can snuggle with my tiny family without being elbowed in the ribs. I want a space big enough to fit my wheelchair beside my bed without my partner having no room on her side and constantly tripping over the bed frame. I don't want visitors to realise they have to sign-in and be approved by staff and

then decide that I'm not worth the hassle to see. I want to never have to live apart from my partner again, to come home to her every single day and marvel again and again at that sense of security, of stability, of peace.

But this imaginary home, this sand castle dream, so fragile in my mind, is something I've always refused to put into words because the waves of reality are always there poised to crash down. I want to work part-time without feeling ashamed, like I'm not a fully functioning and contributing member of society. I don't want to be labelled as lazy, unmotivated, depressed, only half as capable as real adults. I want to work enough that my life has meaning and vitality and purpose, without compromising my own mental and physical health and my capacity to support my family.

I want education for the sake of learning to be prioritised so that my partner can study a degree without justifying it by the pay rise. I want to earn enough money that I can shop at Woolworths instead of ALDI, so I can be blissfully oblivious to the price of fresh food compared to junk food, so I can pay for things at the cash register without first double-checking my bank account or doing crazy on-the-spot mental acrobatics to calculate the total cost of my basket. I don't want to feel scared to tell you what I want. I don't want to be shut down for being an idealist, for being selfish, for being too childish to understand how the real world works, for being unwilling to make compromises.

I want to be reading this out loud in front of you, with my hands under the bench so you can't see them shaking but still speaking even if it's the hardest thing I've ever done, instead of sitting at home, writing thoughts to myself that nobody will ever see or hear.

Most of all, I want my little brother to hear this in 20 years and be horrified at all of the things I've mentioned, that the discrimination, and marginalisation and invisibilisation of disabled people just seem like a relic from the past, something that would never happen in contemporary Australia, for abuse and neglect and exploitation and violence to be the exception instead of the rule.

I want us to do ourselves out of this job. So the Royal Commission need not exist to investigate systematic breaches of equity, dignity, autonomy and safety. I want you to see that all of these things I've asked for aren't actually wants, but needs. They speak to my unconditional rights as a human being, to move beyond the bare minimum of survival.'

* Name changed. Claudia's vision, conveyed to the Royal Commission at Public hearing 26. Transcript, Claudia, Public hearing 26, 30 August 2022, P-157-58.

1. Australia's international human rights obligations regarding people with disability

Key points

- The Royal Commission's terms of reference recognise that Australia has international obligations to take legislative, administrative and other measures to promote the human rights of people with disability. These include protecting people with disability from all forms of exploitation, violence and abuse under the *Convention on the Rights of Persons with Disabilities (CRPD)*.
- The *CRPD* is the most important human rights treaty for people with disability. It recognises the human rights of people with disability, imposes obligations on States Parties, including Australia, to give effect to those rights and sets out important principles that have informed all of our work.
- We also considered the important role of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in line with the requirement in our terms of reference that we consider the particular experiences of First Nations people with disability.
- International human rights treaties require Australia to respect, protect and fulfil the human rights of all people in Australia, including people with disability.
- Human rights are central to our terms of reference, so we have applied a human rights approach to our work and in developing our recommendations for change across this *Final report*.

1.1. Introduction

... AND that people with disability have the same rights as other members of Australian society to live and participate in safe environments free from violence, abuse, neglect and exploitation.¹

The Royal Commission's inquiry was framed by the human rights of people with disability. They are central to our terms of reference which:

- recognise that people with disability have the 'right to the full and equal enjoyment of all human rights and fundamental freedoms'²
- acknowledge that 'Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the *Convention on the Rights of Persons with Disabilities*' (*CRPD*)³
- require we consider 'what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation'.⁴

This chapter introduces the human rights framework underpinning our work.

It first provides an overview of the core international human rights treaties to which Australia is a party, with a focus on the *CRPD*.⁵ It also outlines Australia's commitment to the rights of First Nations people with disability, in light of the Australian Government's support for the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).⁶

The chapter then provides an overview of how international human rights treaties are given effect in the context of the Australian legal framework.

The chapter also outlines key principles and concepts relevant to the interpretation and application of Australia's international human rights obligations that informed our work. These principles and concepts include:

- the universal, indivisible, interdependent and interrelated nature of all human rights
- the concepts of 'progressive realisation' and 'immediately realisable' rights
- States Parties' duties to respect, protect and fulfil rights
- the right to an effective remedy
- how human rights treaty provisions are interpreted.

Finally, the chapter summarises our human rights approach and how it informed our recommendations for change.

1.2. Human rights of people with disability

We are being promised change will happen, disability employment will be better, inclusion and diversity will be better ... but then they never change ...⁷

In this section, we provide an overview of the core human rights treaties to which Australia is a party. We provide a summary of the *CRPD* and the substantive rights it recognises, including detail on some articles particularly relevant to our terms of reference. We then summarise the concepts of equality, multiple discrimination and intersectionality before discussing the human rights of First Nations people with disability.

At the outset it is important to note that all human rights are universal, indivisible, interdependent and interrelated.⁸ This means that to protect people with disability from all forms of exploitation, violence and abuse under article 16 of the *CRPD* (as emphasised in our terms of reference), it is also necessary to consider how to realise the other human rights of people with disability.

The core human rights treaties

My brother had every right to be heard, and voice his experience, the same as every other person should. But he was never, never once asked, 'what happened?' by the Police.⁹

Our terms of reference recognise that 'Australia has international obligations ... to promote the human rights of people with disability'.¹⁰ This refers to the obligations the Australian Government has assumed under international human rights law, including by becoming a party to human rights treaties. A human rights treaty is an agreement between countries that sets out standards for the treatment of individuals. It is legally binding under international law.¹¹

Australia is party to the seven 'core' international human rights treaties, including the *CRPD*.¹² These treaties set out obligations regarding different groups of rights-holders and relate to particular thematic areas. These treaties operate together, as part of the interrelated, indivisible and interdependent nature of all human rights.¹³

This point was underscored in Public hearing 17, ‘The experience of women and girls with disability, with a particular focus on family, domestic and sexual violence’. Ms Carolyn Frohmader, Executive Director of Women with Disabilities Australia, said:

international human rights treaties that we are a party to are not meant to be viewed in isolation. They’re actually meant to be looked at and considered as a suite, a holistic package ...¹⁴

While the *CRPD* has been our main focus, the six other core human rights treaties may be summarised as follows:

- Under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the Australian Government assumed a duty to take steps to progressively realise an array of economic, social and cultural rights. These include the right to health, education, work, take part in cultural life, have an adequate standard of living, and social security.¹⁵
- The *International Covenant on Civil and Political Rights (ICCPR)* recognises civil and political rights including the right to equality, liberty and security of person; freedoms of thought, speech and assembly; and electoral rights.¹⁶
- The *International Convention on the Elimination of All Forms of Racial Discrimination* addresses racial discrimination which impairs the ‘recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.¹⁷ It also requires States Parties to combat prejudices which lead to racial discrimination and to promote ‘understanding, tolerance and friendship’ among nations and racial and ethnic groups.¹⁸
- The *Convention on the Elimination of All Forms of Discrimination Against Women* addresses discrimination on the basis of sex which impairs the ‘recognition, enjoyment or exercise by women ... on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.¹⁹
- Under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Australia has obligations to prevent torture and cruel, inhuman or degrading treatment or punishment of individuals.²⁰
- The *Convention on the Rights of the Child* sets out the rights of the child.²¹ Among other things, it recognises a child with disability has the right to ‘special care’ and ‘assistance’.²² This treaty marked the first time disability was raised within a binding international instrument as a substantive area of concern.²³

A number of other treaties and optional protocols supplement and support the implementation of the rights in the core treaties. They do so by elaborating on the protection of rights in particular contexts,²⁴ by creating mechanisms to bring individual complaints to the attention of United Nations (UN) treaty bodies,²⁵ and by creating monitoring mechanisms.

In particular, under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Australia has an obligation to establish a formal monitoring system known as a ‘National Preventive Mechanism’. This seeks

to prevent torture and ill-treatment in places of detention or where there is a 'deprivation of liberty'.²⁶ Places covered by *OPCAT* include closed mental health and disability facilities where a person is deprived of their liberty.²⁷ Australia's obligations under *OPCAT* are considered in Volume 11, *Independent oversight and complaint mechanisms*.

The above treaties seldom explicitly mention people with disability, but the rights they recognise apply to all people without discrimination. Further, many rights recognised in those treaties have significance in terms of the multi-layered experiences of people with disability. Our terms of reference require us to have regard to 'experiences associated with their age, sex, gender, gender identity, sexual orientation, intersex status, [and] ethnic origin or race'.²⁸

The evidence and information available to us have indicated that, overall, many human rights of people with disability are not being realised in practice in Australia, as discussed in Chapter 2, 'Australia's current implementation of disability rights'.

In Public hearing 24, 'The experience of children and young people with disability in different education settings', we heard from Gi Brown, a young person with disability, about the difficulty of accessing basic human rights:

It almost feels silly saying it out loud, but the basic human rights of housing, of housing and shelter, access to healthcare, access to clean water, clean food, access to employment, access to income. All those basic human rights are not met by disabled people because it's so difficult to access them ... And I think part of the reason that people may view us as being incapable or lacking or a burden or a liability is that we aren't having our basic human rights and our needs met and respected, so how would you expect us to ... have the capacity to flourish in life?²⁹

Gi was one of many individuals with disability we heard from across our four year inquiry who told us about challenges and barriers to enjoying their fundamental human rights.

Convention on the Rights of Persons with Disabilities

A rights-based approach to disability is not driven by compassion, but by dignity and freedom. It seeks ways to respect, support and celebrate human diversity by creating the conditions that allow meaningful participation by a wide range of persons, including persons with disabilities. Instead of focusing on persons with disabilities as passive objects of charitable acts, it seeks to assist people to help themselves so that they can participate in society, in education, at the workplace, in political and cultural life, and defend their rights through accessing justice.³⁰

The *CRPD* sets out Australia's international obligations to take legislative, administrative and other measures to promote the human rights of people with disability. Australia was one of the first countries to become a party to the *CRPD* after it entered into force in 2008.

The treaty's purpose is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity'.³¹ The *CRPD* sets out obligations on States Parties, such as Australia, to respect, protect and fulfil the human rights of people with disability. Generally, States Parties agree to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.³² The specific obligations are set out in greater detail through the text of the treaty.

The *CRPD* is a hybrid treaty, containing both 'civil and political rights', and 'economic, social and cultural' rights. For example, article 12 (equality before the law) is generally considered to be a civil and political right.³³ By contrast, article 28 (adequate standard of living and social protection) is generally considered to be an economic, social and cultural right.³⁴ However, the distinction between civil and political rights, and economic, social and cultural rights is not always clear cut. They are interdependent and interrelated,³⁵ because the enjoyment of all human rights is interlinked.³⁶ The nature of each *CRPD* right – and whether it is classified in full or in part as civil and political or economic, social and cultural – affects the obligations that flow from it. In particular, the *CRPD* contains a general obligations provision for the progressive realisation of economic, social and cultural rights.³⁷ This is discussed below in Section 1.4 on 'Characterising human rights, and the concept of "progressive realisation"'.

The *CRPD* is regarded as a ground-breaking treaty in several respects. In Public hearing 31, 'Vision for an inclusive Australia', Mr Gerard Quinn, UN Special Rapporteur on the rights of persons with disabilities, described the paradigm shift represented by the *CRPD*.³⁸ It reflects the fundamental shift from a medical model of disability (defining people by their impairments) to a social model and human rights model (treating people with disability as rights holders).³⁹

Convention on the Rights of Persons with Disabilities: General principles and obligations

Unique among human rights treaties,⁴⁰ article 3 of the *CRPD* contains a set of 'general principles', which reflect the underlying principles common to all provisions of the treaty. These principles help in identifying the *CRPD*'s object and purpose, and interpreting the substantive rights under it. The general principles of the *CRPD* are set out in Box 4.1.1.

Box 4.1.1: *CRPD* general principles⁴¹

- respect for inherent dignity, individual autonomy (including the freedom to make one's own choices), and independence of persons
- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4 of the *CRPD* contains general obligations. Australia has a general obligation under article 4(1) to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.⁴² To give effect to this, Australia has a series of additional supporting obligations under article 4(1), including to adopt 'all appropriate legislative, administrative and other measures' to implement and safeguard the full spectrum of rights recognised in the Convention.⁴³ The *CRPD* leaves significant discretion to States Parties to determine what measures will be regarded as appropriate to give effect to the rights of people with disability at the domestic level.

Further, article 4(1)(e) requires that States Parties, such as Australia, take 'all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'.⁴⁴ States Parties must extend the protection against discrimination to the private sector, including entities such as employers and private service providers.⁴⁵

The other measures identified in article 4(1) require States Parties to:

- take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against people with disability⁴⁶
- consider the protection and promotion of the human rights of people with disability in all policies and programs⁴⁷
- refrain from engaging in any act or practice that is inconsistent with the *CRPD* and ensure that public authorities and institutions act in conformity with the *CRPD*⁴⁸

-
- undertake or promote research and development of universally designed goods, services, equipment and facilities which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disability, to promote their availability and use, and to promote universal design in the development of standards and guidelines⁴⁹
 - undertake or promote research, development, availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for people with disability, giving priority to technologies at an affordable cost⁵⁰
 - provide accessible information to people with disability about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities⁵¹
 - promote the training of professionals and staff working with people with disability in *CRPD* rights so as to better provide the assistance and services guaranteed by those rights.⁵²

Article 4(3) requires States Parties to ‘closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations’, in developing and implementing legislation and policies to implement the *CRPD*.⁵³

Article 33 expressly requires States Parties to designate ‘focal points’ within government to implement the *CRPD*.⁵⁴ It also requires States Parties to consider designating or establishing a coordination mechanism within government to facilitate action related to *CRPD* implementation.⁵⁵ In addition, article 33 requires States Parties to have ‘a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation’ of the *CRPD*.⁵⁶ It requires civil society, particularly people with disability and their representative organisations, to be involved and participate fully in the monitoring process.⁵⁷ Australia has designated joint national *CRPD* focal points: the Department of Social Services and the Attorney-General’s Department. *CRPD* focal points are discussed further in Chapter 2.

The CRPD Committee and the *Optional Protocol*

Each human rights treaty is monitored by a committee of independent experts, known as a treaty body. The treaty body for the *CRPD* is the Committee on the Rights of Persons with Disabilities (CRPD Committee).⁵⁸ Committee members are elected for four-year terms.⁵⁹ The CRPD Committee has always comprised a majority of individuals with disability,⁶⁰ and has included two Australians with disability.⁶¹

The CRPD Committee has a number of functions relating to the interpretation of the *CRPD* and monitoring its implementation. One key function is writing ‘general recommendations’, sometimes called ‘general comments’.⁶² These reflect the views of the independent expert members of the CRPD Committee on the meaning and operation of the treaty provisions. While they do not create legally binding obligations on States Parties, the Australian Government has recognised that they ‘can provide useful guidance and are taken into

consideration by Australia in interpreting its international human rights obligations'.⁶³ As at June 2023, the CRPD Committee had issued eight general comments covering a number of different *CRPD* articles.⁶⁴

The CRPD Committee also has a mechanism for receiving claims from individuals or groups concerning alleged violations of the *CRPD*, once domestic remedies have been exhausted. These are called 'individual communications'. The mechanism only applies to countries that are parties to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.⁶⁵ Australia became a party in 2009.⁶⁶

After receiving an individual communication, the CRPD Committee can seek information from the relevant State Party; make findings, comments and recommendations; conduct an inquiry where it receives reliable information indicating grave or systemic violations of *CRPD* rights; and invite the State Party to address particular matters in its periodic reports under the *CRPD*.⁶⁷ After the CRPD Committee issues its findings on whether or not the individual's rights have been violated, the State Party is required to respond within six months.⁶⁸ However, the CRPD Committee's views are not legally binding or enforceable.⁶⁹

As at June 2023, the CRPD Committee had published decisions on 13 individual communications brought against Australia. These included cases concerning:

- people with cognitive impairments being found 'unfit to plead' through denial of legal capacity⁷⁰
- accessibility⁷¹
- whether people who are d/Deaf can serve as jurors, and accessibility of courts⁷²
- independent living and social housing⁷³
- voting rights⁷⁴
- Australia's immigration health criterion and its discriminatory impacts on people with disability.⁷⁵

While the Australian Government considers the views of human rights treaty bodies on individual communications are not legally binding on Australia, it acknowledges 'they are influential factors to which Australian courts may have regard'.⁷⁶ The Australian Government has also stated that, 'Australia gives careful consideration, in good faith, to any adverse views when received.'⁷⁷

The CRPD Committee also monitors how States Parties have implemented and complied with the *CRPD* by examining reports submitted by States Parties. Disability advocacy groups may provide the CRPD Committee with an alternative or 'shadow report'. The CRPD Committee talks to the government and others from the State Party under examination and issues 'concluding observations', including recommendations for strengthening *CRPD* implementation.⁷⁸

The Australian Government told us that ‘views expressed by the Committee in its Concluding Observations ... should be differentiated from legally binding obligations’, but acknowledged ‘they may assist in understanding the content of obligations under the CRPD’.⁷⁹

Substantive rights under the *Convention on the Rights of Persons with Disabilities*

Substantive human rights are enshrined in articles 5 to 30 of the *CRPD*. Table 4.1.1 summarises these articles, each of which is expanded on in the text of the Convention.

Table 4.1.1: Summary of substantive rights under the *CRPD*

Article of the <i>CRPD</i>	Summary
Article 5: Equality and non-discrimination	All persons are equal before the law. Everyone is entitled to the equal protection and benefit of the law without discrimination. Countries must take all appropriate steps to ensure reasonable accommodation is provided to promote equality and eliminate discrimination.
Article 6: Women with disabilities	Countries must take all appropriate measures to ensure that women with disability are able to fully enjoy their human rights and fundamental freedoms.
Article 7: Children with disabilities	Countries must take all necessary measures to ensure the full enjoyment by children with disability of their human rights and fundamental freedoms on an equal basis with other children. The best interests of the child must be a primary consideration in all actions concerning children with disability.
Article 8: Awareness-raising	Countries must adopt immediate, effective and appropriate measures to raise awareness of the rights, capabilities and contributions of people with disability throughout society, including at all levels of the education system, workplace and labour market. The media should be encouraged to portray people with disability in a manner consistent with the purpose of the <i>CRPD</i> .
Article 9: Accessibility	People with disability have the right to access all aspects of society on an equal basis with others, including the physical environment, transportation, information and communications, and public facilities and services. Countries must take appropriate measures to facilitate accessibility rights.
Article 10: Right to life	All people have the right to life. Countries must take all necessary measures to ensure people with disability are able to effectively enjoy this right on an equal basis with others.
Article 11: Situations of risk and humanitarian emergencies	Countries must take all necessary measures to ensure the protection and safety of all people with disability in situations of risk, including armed conflict, humanitarian emergencies and natural disasters.

Article of the <i>CRPD</i>	Summary
Article 12: Equal recognition before the law	People with disability have the right to recognition as persons before the law and the right to enjoy legal capacity on an equal basis with others in all aspects of life. Countries must take all appropriate and effective measures to provide access by people with disability to supports they may need to exercise their legal capacity.
Article 13: Access to justice	People with disability have the right to effective access to justice on an equal basis with others, including through the provision of appropriate accommodations. Countries shall promote training for those working in justice administration to ensure effective access to justice for people with disability.
Article 14: Liberty and security of the person	People with disability have the right to liberty and security of person on an equal basis with others. Countries must ensure that disability is not used to justify deprivation of liberty and if deprived of their liberty, people with disability are entitled to their human rights under international law, including the provision of reasonable accommodation.
Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment	All people have the right to be free from torture and from cruel, inhuman or degrading treatment or punishment. Countries must take all appropriate legislative, administrative, judicial or other measures to prevent people with disability, on an equal basis with others, being subjected to such treatment or punishment.
Article 16: Freedom from exploitation, violence and abuse	People with disability have the right to live free from exploitation, violence and abuse. Countries have a series of specific obligations in relation to this right. <i>The content of this right is considered in detail in Box 4.1.2.</i>
Article 17: Protecting the integrity of the person	Every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others.
Article 18: Liberty of movement and nationality	People with disability have the right to a nationality and to liberty of movement on an equal basis with others.
Article 19: Living independently and being included in the community	Countries must take effective and appropriate measures to ensure people with disability have the right to live independently in the community, choose their place of residence, and have access to in-home, residential and community support services.
Article 20: Personal mobility	Countries must take effective measures to ensure personal mobility for people with disability in the manner and at the time of their choice, and at affordable cost.

Article of the <i>CRPD</i>	Summary
Article 21: Freedom of expression and opinion and access to information	Countries must take appropriate measures to ensure people with disability have the right to express themselves, including the freedom to give and receive information and ideas through all forms of communication. Such measures include providing information in accessible formats, technologies, and facilitating alternative means of communication including sign languages and Braille.
Article 22: Respect for privacy	People with disability have the right to privacy. Countries must protect information about people with disability, including personal information and information about their health.
Article 23: Respect for the home and family	People with disability have the right to marry and found a family. Countries must provide effective and appropriate support to people with disability to decide to have, raise and care for children. Countries must ensure people with disability retain fertility on an equal basis with others and ensure the rights of children with disability not to be separated from their parents against their will.
Article 24: Right to education	People with disability have a right to education without discrimination. Countries must ensure an inclusive education system. This includes ensuring reasonable accommodation and effective individualised support are provided to maximise academic and social development.
Article 25: Right to health	People with disability have the right to the enjoyment of the highest attainable standard of health without discrimination and on the basis of free and informed consent. Countries must take all appropriate measures to provide the same range, quality and standard of health care to people with disability as provided to others, and to also provide disability specific health services.
Article 26: Right to habilitation and rehabilitation	Countries must take effective and appropriate measures to enable people with disability to develop, attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of life. This should be facilitated through habilitation and rehabilitation. Countries must promote the training of staff and the availability, knowledge and use of assistive devices and technologies.
Article 27: Work and employment	People with disability have the right to work, including in a labour market and an environment that is open, inclusive and accessible. Countries should prohibit discrimination in employment on the basis of disability and protect the right of people with disability to just and favourable conditions of work.
Article 28: Adequate standard of living and social protection	People with disability have the right to an adequate standard of living including food, water, clothing and housing, and to effective social protection including poverty reduction and public housing programs. Countries must take appropriate steps to safeguard and promote those rights.

Article of the <i>CRPD</i>	Summary
Article 29: Participation in political and public life	Countries must ensure that people with disability have the right to effectively and fully participate in politics and public affairs, including the right to vote, be elected and form and join organisations.
Article 30: Participation in cultural life, recreation, leisure and sport	People with disability have the right to participate in cultural life on an equal basis with others, including access to cultural performances and to recreational, leisure and sporting activities. Countries must take appropriate measures to ensure people with disability are able to enjoy those rights.

When it ratified the *CRPD*, the Australian Government made an ‘interpretative declaration’ regarding its interpretation about the nature and extent of the rights in articles 12, 17 and 18, which is also relevant to several other articles.⁸⁰ Among other things, the interpretative declaration concerned substituted decision-making and compulsory assistance and treatment. This is discussed in Volume 6, *Enabling autonomy and access*.

We now provide a more detailed overview of some *CRPD* concepts and issues particularly relevant to our terms of reference, starting with article 16.

Article 16 – the right to live free from exploitation, violence and abuse

Box 4.1.2: Article 16 – Freedom from exploitation, violence and abuse

Our terms of reference recognise that Australia has international obligations to promote the human rights of people with disability, including obligations under the *CRPD* to protect people with disability from all forms of exploitation, violence and abuse.⁸¹

This refers to article 16 of the *CRPD*, which requires States Parties to:

take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.⁸²

Definition of exploitation, violence and abuse

The *CRPD* Committee has interpreted ‘exploitation, violence and abuse’ broadly, as including:

violence, physical force; economic coercion; trafficking and deception; misinformation; abandonment; the absence of free and informed consent and

legal compulsion ... the removal or control of communication aids and the refusal to assist in communicating; the denial of personal mobility and accessibility ... the withholding of food or water, or the threat of doing so; the infliction of fear by intimidation through bullying, verbal abuse and ridicule on the grounds of disability; the harming or threat of harming; removing or killing pets or assistance dogs or destroying objects; psychological manipulation; and the exercise of control, for example by restricting face-to-face or virtual access to family, friends or others.⁸³

Article 16 does not expressly mention 'neglect'. However, the CRPD Committee has explained that, in its view, the provision covers 'neglect, including the withholding or denial of access to medication'.⁸⁴

Under article 16, States Parties are required to:

- 'protect' people with disability from all forms of exploitation, violence and abuse both within and outside the home⁸⁵ and 'prevent all forms of exploitation, violence and abuse'.⁸⁶ Prevention includes the provision of 'information and education on how to avoid, recognize and report instances of exploitation, violence and abuse' and 'protection services'.⁸⁷
- 'take all appropriate measures' to promote the rehabilitation of people with disability who have been victims of exploitation, violence or abuse.⁸⁸ This extends to 'physical, cognitive and psychological recovery, rehabilitation and social reintegration'.⁸⁹
- have legislation and policies in place to ensure that exploitation, violence and abuse against people with disability are 'identified, investigated and, where appropriate, prosecuted'.⁹⁰ This may extend to providing training to police officers, justice workers and health professionals.⁹¹
- ensure that 'all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.⁹² This extends beyond the requirement in *OPCAT* to monitor the treatment of persons who are 'deprived of their liberty in places of detention'.⁹³ It requires monitoring for exploitation, violence and abuse of people with disability who are not in places of detention.

Equality

Equality is a bedrock concept of the *CRPD* – a concept that can be understood in many different ways. The concept of equality has underpinned our work. We have considered models of 'formal equality', 'substantive equality', 'inclusive equality' and 'transformative equality'.⁹⁴

General comment no. 6 (2018) on equality and non-discrimination (General comment no. 6) outlines the CRPD Committee's view on the meaning of article 5 of the *CRPD*, which addresses equality and non-discrimination. In *General comment no. 6*, the CRPD Committee explains three different concepts of equality:

- 'formal equality', which 'seeks to combat direct discrimination by treating persons in a similar situation similarly'⁹⁵
- 'substantive equality', which 'also seeks to address structural and indirect discrimination and takes into account power relations'⁹⁶
- 'inclusive equality', which is a 'new model of equality developed throughout the Convention'.⁹⁷

In Australia, anti-discrimination laws are essentially concerned with formal equality, where the focus is generally on treating people the 'same' way or achieving the 'same' outcomes.⁹⁸ However, in practice, taking an approach based on formal equality may entrench inequality because the 'same' treatment is not focused on achieving equal outcomes or providing equal opportunities.⁹⁹

In contrast, substantive equality requires particular individuals or groups of people to be treated differently to achieve equal outcomes or have access to equal opportunities.¹⁰⁰

The *CRPD* takes this one step further, being fundamentally based on the concept of inclusive equality.¹⁰¹ In Public hearing 31, Mr Quinn described how this concept is integral to the *CRPD*:

the assumption about social inclusion that underpins human rights is brought to the surface in the UN *CRPD*. This is why the overarching theme of equality is now styled 'inclusive equality' by the UN treaty monitoring body. That is to say, each human right has to be animated by a philosophy of inclusion. This is visibly seen in both Article 12 and Article 19 – but suffuses the entire treaty.¹⁰²

The concept of inclusive equality has been recognised as introducing an 'innovation to international human rights law'.¹⁰³ It is defined in *General comment no. 6* as 'embrac[ing] a substantive model of equality and extend[ing] and elaborat[ing] on the content of equality' in:

- (a) a fair redistributive dimension to address socio-economic disadvantages
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society and
- (d) an accommodating dimension to make space for difference as a matter of human dignity.¹⁰⁴

The four elements outlined by the *CRPD* Committee are similar to what has been described elsewhere as the 'transformative model of equality'.¹⁰⁵

In *Our vision for an inclusive Australia*, we discuss equality under the *CRPD* in the context of considering what is needed to promote a more inclusive society, as required by our terms of reference.¹⁰⁶

Multiple discrimination and intersectionality

If I had found it hard as a black person, it was three times as hard in a wheelchair. The conversations, the insults, the lack of help. It was amazing.¹⁰⁷

As noted, our terms of reference require us to consider the multi-layered experiences of people with disability, particularly First Nations people with disability and culturally and linguistically diverse people with disability.¹⁰⁸ This requires we consider the way in which people with disability may experience discrimination or maltreatment based on their disability as well as other aspects of their identity.¹⁰⁹

When an individual experiences discrimination based on more than one aspect of their identity, this is referred to as ‘multiple discrimination’.¹¹⁰

Article 6 of the *CRPD* explicitly recognises that ‘women and girls with disabilities are subject to multiple discrimination’.¹¹¹

In Public hearing 17, Ms Catherine Dunn described why identifying the drivers of violence against women with disability requires an understanding of these multi-layered experiences. She said:

I’m a woman, I’m Deaf, I’m part of the disability community, I’m part of the CALD [culturally and linguistically diverse] community. I grew up in regional Victoria. If we understand all of these parts, they are not separate. They’re all intertwined.¹¹²

Where discrimination occurs on multiple and inseparable grounds that expose individuals to ‘unique types of disadvantage and discrimination’, this is referred to as ‘intersectional discrimination’.¹¹³ The *CRPD* Committee has commented:

‘Intersectional discrimination’ occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.¹¹⁴

In Public hearing 4, ‘Health care and services for people with cognitive disability’, Dr Scott Avery explained that the concept of ‘intersectionality’ refers to the ‘notion of being double-disadvantaged’.¹¹⁵ Speaking from his experience, Dr Avery said, ‘some of the stories that you will hear are disability stories, and if you add the Aboriginal component, it’s just like turning the volume switch right up’.¹¹⁶

While the text of the *CRPD* itself does not use the term ‘intersectional’, the *CRPD* has been recognised as addressing intersectional discrimination.¹¹⁷ The preamble recognises that people with disability have intersecting layers of identity, of which disability is one.¹¹⁸

The CRPD Committee considers that States Parties are required to address both multiple and intersectional discrimination.¹¹⁹ For example, the CRPD Committee has commented States Parties are obliged, under article 5, to enact comprehensive anti-discrimination legislation, accompanied by ‘appropriate and effective legal remedies and sanctions in relation to intersectional discrimination in civil, administrative and criminal proceedings’.¹²⁰

In Chapter 2 we discuss the lack of protection for people with disability against intersectional discrimination in Australia, and in Chapter 3, ‘Strengthening protection through an Australian Disability Rights Act’, we recommend legal reform to address this.

The human rights of First Nations people with disability

I have often felt that I represent the three demographic groups in Australian society that are treated worst. I am First Nations, I am a woman and I have a disability. I have felt the impact and burden of all three of these things that are part of who I am.¹²¹

The issue of intersectional discrimination is particularly relevant to First Nations people with disability. As noted, our terms of reference require us to consider the particular experiences of First Nations people with disability.¹²² This means our work was informed by human rights relevant to First Nations peoples as a distinct cultural group, as well as their rights as individuals with disability.

Although the creation of the *CRPD* was a significant development for people with disability, it does not specifically address the rights of First Nations people with disability. This has been identified as a shortcoming of the treaty.¹²³ The only reference to First Nations people is in the preamble, which notes ‘concern’ about the ‘difficult conditions’ faced by people with disability on the basis of indigenous status.¹²⁴

At the same time, we heard in Public hearing 18, ‘The human rights of people with disability and making the *Convention on the Rights of Persons with Disabilities* a reality in Australian law, policies and practices’, that the importance of taking into consideration the situation of First Nations people with disability is being ‘increasingly recognised’ by the CRPD Committee.¹²⁵

Across our work, we have aimed to address the shortcomings of the *CRPD* for First Nations people with disability. In doing so we have also considered other international human rights treaties, instruments and materials relevant to First Nations people with disability, such as the

International Convention on the Elimination of All Forms of Racial Discrimination.¹²⁶ In particular, our work was guided by the *UNDRIP*,¹²⁷ for which the Australian Government expressed its support in 2009.¹²⁸

While not legally binding under international law,¹²⁹ the Australian Government has recognised the *UNDRIP* ‘sets important international principles for nations to aspire to’.¹³⁰ In Public hearing 25, ‘The operation of the NDIS for First Nations people with disability in remote and very remote communities’, Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, described the *UNDRIP* as representing ‘one of the most significant developments in advocacy for indigenous people’s rights globally’.¹³¹

The *UNDRIP* does not create new rights for First Nations people with disability. Rather, the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has described it as providing a ‘contextualised elaboration’ of how general, existing human rights principles and rights relate to the ‘specific historical, cultural and social circumstances of indigenous peoples’.¹³²

Key rights recognised in the *UNDRIP* of particular relevance to First Nations people with disability include the rights to self-determination, health, respect for and protection of culture, equality and non-discrimination.¹³³

Articles 21 and 22 make specific reference to indigenous people with disability. Article 21 states that ‘indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions’,¹³⁴ and requires States Parties to pay ‘particular attention’ to the ‘rights and special needs’ of indigenous people with disability.¹³⁵ Article 22 reinforces this by providing that States Parties, when implementing the *UNDRIP*, should pay ‘particular attention’ to the ‘rights and special needs’ of indigenous people with disability.¹³⁶

According to a study by the UN Permanent Forum on Indigenous Issues:

Implementing the [CRPD] in a way that also respects the Declaration means that, whenever relevant, the measures foreseen in the [CRPD] will need to be applied in a way that is sensitive to the culture and world vision of indigenous peoples in order to best protect the rights of indigenous persons with disabilities.¹³⁷

We have sought to adopt this approach across our work, and in fulfilment of our terms of reference, to ensure our recommendations respond to the reality and experiences of First Nations people with disability.

The rights of First Nations people with disability are discussed further in Volume 9, *First Nations people with disability*. In Chapter 3 of this volume, we recommend legal reform to recognise the rights of First Nations people with disability in Australia.

1.3. Human rights treaties in Australia

Just because someone is different doesn't mean they are less than, and I think that until you have experienced it you don't realise the discrimination.¹³⁸

In Chapter 2, we consider the adequacy of Australia's current approach to implementing the *CRPD*. Here, we briefly outline Australia's overall approach to the domestic implementation of international human rights treaties and the way such treaties can influence domestic law and policy.

The effect of international treaties in Australia

I was asking to be treated like a human being.¹³⁹

When Australia becomes a party to a treaty it assumes international legal obligations. However, the rights and obligations in any treaty Australia has ratified, including the *CRPD*, are not automatically incorporated into Australian law.¹⁴⁰ Translating treaty rights into Australian legal rights requires the Australian Parliament or state or territory parliaments to enact local laws to do so. If they have not done so, the treaty rights are not binding in domestic law and cannot be directly enforced by an Australian court or tribunal.

One of the challenges for the Australian Government is that it will be accountable under international law for ensuring the human rights in the treaties it is a party to apply in Australia. It is not only accountable for its actions, but for the actions of state and territory governments that may affect the relevant human rights.¹⁴¹ The Australian Government has responsibility under international law to ensure the human rights of people with disability in treaties it is a party to, including the *CRPD*, are respected, protected and fulfilled in Australia. It has the legislative power to do so under the *Australian Constitution*.¹⁴²

The Human Rights Committee, which oversees implementation of the *ICCPR*, has emphasised the overarching responsibility of States Parties under international law. States Parties with federal structures like Australia are no exception. The Human Rights Committee has commented:

The executive branch that usually represents the State Party internationally ... may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve

the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.¹⁴³

It should also be noted that treaties impose obligations on the States that are party to them.¹⁴⁴ This means it is the Australian Government that assumes responsibility under international law for obligations under the human rights treaties to which Australia is a party, including the *CRPD*. International human rights treaties do not generally impose obligations directly on individuals, corporations or other kinds of legal persons.¹⁴⁵ However, this is not always straightforward, as discussed below in Section 1.4 concerning the importance of non-government entities respecting human rights.

Implementation of human rights treaties in Australia

In every house that Heidi has ever lived in, including the current one, the rights of the staff always take precedent over the life of the resident. Particularly when you raise complaints, I have found all along the rights of the staff are always protected, sometimes with union backup, but residents are on your own and if you haven't got a determined Mumma like me, god help you.¹⁴⁶

The Australian Government can determine how it ensures and promotes its international human rights obligations within Australia. As noted, article 4 of the *CRPD* requires States Parties to 'adopt all appropriate legislative, administrative and other measures' for the implementation of *CRPD* rights.

The Australian Parliament's powers to make laws are set out in the *Australian Constitution*. The Australian Parliament does not have a general power to make laws with respect to human rights generally or for people with disability. This means the Australian Parliament considers a range of powers in the *Australian Constitution* to support it making valid laws to give effect to international obligations or matters of international concern. One of the powers is to make laws 'with respect to external affairs'. This power has been interpreted to authorise the Australian Parliament to enact laws that are appropriate and adapted to ensuring Australia complies with its international obligations.¹⁴⁷

In a research report prepared for the Royal Commission, *Persons with disability and the Australian Constitution*, Matthew Stubbs, Adam Webster and John Williams concluded '[t]here remains considerable constitutional scope for the Commonwealth to further expand its support for persons with disability and its legislative protection of their rights'.¹⁴⁸ This means the Australian Parliament's powers to make laws to protect the rights of people with disability are not confined only to giving effect to the *CRPD* or international law. The Australian Parliament could rely on a range of heads of power to make laws and impose obligations on governments, corporations and individuals to respect the rights of people with disability.

At the same time, there is generally no impediment to a state or territory making laws to give effect to Australia's treaty obligations within the jurisdiction of that state or territory, provided the laws are not inconsistent with Commonwealth law.¹⁴⁹

Treaties may be implemented by directly incorporating their complete text into Australian law. Treaties may also be partially implemented if an Australian law uses or refers to some terms of a treaty, with a view to achieving the treaty's objectives.¹⁵⁰

One way States Parties can implement rights under international treaties is by enacting domestic human rights legislation. Human rights charters have been implemented in Australia in the Australian Capital Territory, Victoria and Queensland but their operation is limited to their respective jurisdictions and are expressed so as not to bind the Commonwealth.¹⁵¹ Australia is one of the only liberal democracies in the world that does not have a national human rights Act or a constitutional bill of rights.¹⁵²

Human rights treaties can influence domestic law and policy

You see how hard the system is, unfair
and unjust, discriminating.¹⁵³

Commonwealth, state and territory laws that are inconsistent with international human rights law cannot be challenged in, or invalidated by, an Australian court merely because of that inconsistency.¹⁵⁴

However, human rights treaties that are not incorporated into Australian law may still influence Australian law and policy. Unincorporated treaties may inform the interpretation of Australia's statutes, both at the national level and the state and territory levels.¹⁵⁵ For example, if an Australian law operates to impair a human right, there is a presumption, albeit rebuttable, that Australian parliaments intend to legislate in accordance with Australia's international human rights obligations. That is, legislation should be presumed to accord with Australia's obligations under a treaty where it is enacted after, or in contemplation of, entry into, or ratification of, the treaty.¹⁵⁶

There is a common law rule of statutory interpretation that legislation be interpreted and applied, so far as its language permits, in a manner consistent with established rules of international law, including international human rights treaties.¹⁵⁷

The *Acts Interpretation Act 1901* (Cth) also provides that treaties referred to in an Act can form part of the extrinsic material that may be referred to and relied upon when ascertaining the meaning of a statutory provision.¹⁵⁸

Treaties can also influence how Australian courts and tribunals develop the common law.¹⁵⁹

In addition, human rights treaties can inform the development of policy, both at the national and at the state and territory levels. Notably, state and territory policy makers in jurisdictions that have enacted human rights legislation must consider human rights (based on Australia's international treaty obligations) when developing public policy.¹⁶⁰

1.4. Key features of Australia's international human rights obligations

Every day for her in the hospital was a day of suffering and discrimination and lack of dignity, and the fact that they didn't deal with the actual issue at hand meant that she kept going in and in and in, and then eventually it actually meant that she died.¹⁶¹

This section discusses some key concepts relevant to the interpretation and application of Australia's international human rights obligations, including those under the *CRPD*, that informed the rights-based approach we took across our work.

Interpreting Australia's obligations under human rights treaties

Working out the meaning of the rights and obligations in a treaty such as the *CRPD* is referred to as interpreting the treaty. This is not always straightforward and is different to the way domestic laws are interpreted. The *CRPD* and other treaties are to be interpreted in accordance with the rules of international law. Understanding how these rules apply is important because treaties are often expressed in aspirational and broad terms, which can give rise to different understandings and questions about their meaning.¹⁶² This can reflect various factors, including that treaty texts are often the result of extensive negotiation and compromise.

The *Vienna Convention on the Law of Treaties* (VCLT) sets out general rules governing treaty interpretation.¹⁶³ Article 31(1) provides that each treaty is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context

and in the light of its object and purpose'.¹⁶⁴ Where that process leaves the meaning unclear or leads to an absurd or unreasonable result, article 32 allows recourse to 'supplementary means'. These include the preparatory work (negotiation records) for the treaty.¹⁶⁵

Article 31(3) of the *VCLT* makes it clear that the meaning of a treaty can evolve over time, in accordance with subsequent agreement and practice. In this sense, treaties are organic and living instruments. This is important because the *CRPD* needs to be applied over time, as circumstances change. Some terms in the *CRPD* may be capable of evolving in meaning as circumstances change. For example, the preamble recognises that 'disability is an evolving concept'.¹⁶⁶

Other documents may provide useful guidance in interpreting obligations under the *CRPD* and other treaties, subject to the rules in the *VCLT* outlined above. As noted earlier, these documents include the views of UN treaty bodies (in general comments, views on individual communications and concluding observations). They may also include views of other UN entities and office holders – for example, publications by the Office of the High Commissioner for Human Rights; resolutions of the General Assembly; and views of the Human Rights Council and its 'Special Procedures' such as the Special Rapporteur on the rights of persons with disabilities.

In addition, other sources may be taken into account in interpreting treaty obligations, again subject to the *VCLT* rules outlined above. These include judicial decisions of international courts and tribunals and domestic courts, and academic commentary by well-recognised, reputable experts.¹⁶⁷

The normative content and application of human rights described in international treaties may evolve and change over time. The International Court of Justice has affirmed a treaty is not static and is 'open to adapt to emerging norms of international law'.¹⁶⁸ International human rights instruments are interpreted and applied as 'living instruments'.¹⁶⁹ A treaty is not frozen and should be interpreted in light of contemporary conditions.¹⁷⁰ The scope of a treaty may change as the treaty evolves. The 'organic theory' or 'living instrument theory', which is well accepted by international human rights courts and tribunals, sometimes causes difficulties in using new and emerging international law to interpret Australian laws which were intended to implement international treaty obligations as they existed at particular points in time.¹⁷¹

Characterising human rights, and the concept of 'progressive realisation'

As described above, the *CRPD* is a hybrid treaty, including civil and political rights as well as economic, social and cultural rights.¹⁷² The relationship between these two kinds of rights is complex and the distinction between them is not always clear cut.

Traditionally, civil and political rights have been regarded as immediately realisable and primarily requiring a restraint on government activities that can infringe the rights of citizens.¹⁷³

These rights are closely associated with the common law traditions of our legal system.¹⁷⁴ Infringements of civil and political rights have generally been considered more readily capable of determination by domestic courts. By contrast, economic, social and cultural rights often require proactive investment by governments, and may be implemented progressively over time. These rights have sometimes been considered more suitable for consideration by parliaments than by the courts.¹⁷⁵

However, the notion that there is a clear demarcation between civil and political rights and economic, social and cultural rights has been increasingly challenged in international human rights discourse.¹⁷⁶ For example, the view that civil and political rights are more easily justiciable while economic, social and cultural rights are more suitable for programmatic approaches, has been critiqued given that economic, social and cultural rights may be both justiciable and programmatic.¹⁷⁷ The 1993 *Vienna Declaration and Programme of Action* unequivocally affirmed the universality, indivisibility, interdependence and interrelatedness of all human rights.¹⁷⁸ As noted by the Australian Human Rights Commission, ‘many civil and political rights cannot be realised unless economic, social and cultural rights are also secured, and vice versa’.¹⁷⁹

The obligations to which these groups of rights give rise can differ depending on the nature of the right in question. Each right therefore needs to be considered carefully in context.

Article 4(2) of the *CRPD* contains a general obligations provision for the progressive realisation of economic, social and cultural rights:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.¹⁸⁰

The concept of progressive realisation recognises the exact scope of State Party obligations depends on the prevailing conditions and resources within the State.¹⁸¹ It recognises States Parties have resource constraints and full realisation of all economic, social and cultural rights will generally take some time.¹⁸² In this way it operates as ‘a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights’.¹⁸³

Nevertheless, progressive realisation provisions in relation to economic, social and cultural rights do create some obligations that are of immediate effect.¹⁸⁴ First, States Parties should take ‘steps’ towards implementation ‘within a reasonably short time’ after ratifying the treaty.¹⁸⁵ Those steps should be ‘deliberate, concrete and targeted’.¹⁸⁶ Second, States Parties are under an immediate obligation to ensure individuals can enjoy economic, social and cultural rights without discrimination.¹⁸⁷ Any backward steps or ‘deliberately retrogressive measures’ must be ‘fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.¹⁸⁸

The Australian Government has acknowledged that '[i]mplicit in the concept of progressive realisation is that States Parties are obliged to achieve continuous improvement of conditions over time, without backward movement'.¹⁸⁹

Mr Quinn explained in Public hearing 31 that 'matters should not be left to chance in a vague hope or expectation that things might improve and therefore future circumstances might allow for change'.¹⁹⁰ Instead, he said, for progressive realisation:

there must be a deeper level of intentionality, a stock-taking of where things are at, a clear statement of the end-goals and an understanding of the means, tools, timelines and resources needed to move the dial and an institutional architecture designed to oversee the change.¹⁹¹

Examples of *CRPD* rights recognised by the Australian Government as having immediate effect are rights to equality and non-discrimination; the right to liberty and security of the person; freedom from torture or cruel, inhuman or degrading treatment or punishment; and respect for privacy.¹⁹² The Australian Government has also stated that the 'duty of reasonable accommodation is likely an obligation that applies immediately'.¹⁹³

Determining whether the principle of immediate implementation or the principle of progressive realisation applies in a particular context can be complicated. This is in part because some articles of the *CRPD* contain both civil and political, as well as economic, social and cultural elements.

Australia must respect, protect and fulfil human rights

An important human rights concept to bear in mind when interpreting the obligations arising from human rights treaties like the *CRPD*, is the principle that States Parties must respect, protect and fulfil rights.¹⁹⁴

First, States must *respect* rights. This means they must refrain from interfering directly or indirectly with an individual's enjoyment of their rights. For example, States must not perform medical experiments on people with disability without their consent.

Second, States must *protect* rights. This means that, in some circumstances, they must prevent third parties from violating rights. For example, States must require private employers to provide just and favourable working conditions for people with disability, including by providing reasonable accommodation.

Third, States must *fulfil* rights by taking appropriate legislative, administrative, budgetary, judicial and other actions towards their full realisation. For example, the obligation to fulfil the right of people with disability to live independently and be included in the community may require States to eradicate practical barriers to the full realisation of that right. Such barriers may include inaccessible housing; limited access to disability support services; inaccessible facilities, goods and services in the community; and prejudice towards people with disability.¹⁹⁵ The obligation to fulfil rights has been further developed within human rights frameworks into an obligation to *facilitate* and an obligation to *provide*.¹⁹⁶

Treaties generally impose obligations only on States that are parties to the treaty. But States are not the only entities that play a role in realising human rights. Many human rights, if they are to be adequately protected and implemented, require the involvement of other entities such as businesses and non-government organisations (NGOs), as discussed below.

Non-government entities and human rights

Our terms of reference empower us to inquire into not just the role of governments but, also, what institutions and the community should do to prevent violence against, and abuse, neglect and exploitation of, people with disability.¹⁹⁷ As a result, when we considered Australia's international human rights obligations regarding people with disability, we also considered how these obligations may extend to non-government entities.

The private sector includes many non-government entities at the frontline of service delivery, where conduct can enhance or impair the human rights of people with disability. These entities include disability service providers, conducted either for profit or not-for-profit, which play a significant role in supporting people with disability, especially participants in the National Disability Insurance Scheme. As discussed in Volume 10, *Disability services*, these entities should have a clear understanding of human rights and promote conduct that is consistent with human rights. This is also the case with non-government employers of people with disability, which have also been a significant focus of our work.

As discussed in Public hearing 18, there has been limited consideration of how non-government entities, such as businesses and NGOs, may have obligations to respect the rights of people with disability under the *CRPD*.¹⁹⁸ However, over the past decade or so there have been significant developments on the role of business in relation to human rights. There has also been international debate about the extent to which international human rights law should apply to non-government entities.

In 2011, the UN Office of the High Commissioner for Human Rights published an influential publication on the role of business in protecting human rights: the Guiding Principles on Business and Human Rights (Guiding Principles).¹⁹⁹ Australia was a strong supporter of the Guiding Principles when they were unanimously adopted by the UN Human Rights Council.²⁰⁰

The Guiding Principles have three pillars:

- First, States are required to protect against human rights abuses by third parties, including businesses, through appropriate policies and regulation.²⁰¹ This means, for example, that States should enforce laws requiring businesses to respect human rights. They should also provide effective guidance to businesses on how to respect human rights, and encourage businesses to communicate how they address their human rights impacts.²⁰²
- Second, a foundational principle is that businesses should respect human rights, which means that they should act with due diligence to avoid infringing on rights and to address any adverse human rights impacts with which they are involved.²⁰³
- Third, remedies should be available when rights are breached.²⁰⁴

The Guiding Principles set out steps countries can and should take to ensure that businesses respect human rights, and steps businesses can and should take to ensure they are doing so. This forms part of a wider dynamic policy context, in which there is rapidly increasing pressure globally and domestically for businesses to factor environmental, social and corporate governance considerations, including human rights, into their operations.

At Public hearing 18, Professor Justine Nolan, Director of the Australian Human Rights Institute at the University of New South Wales, gave evidence that ‘all businesses, whether public or private and no matter what the size, have responsibilities to respect human rights’.²⁰⁵ Professor Nolan indicated there is an opportunity to use the Guiding Principles to strengthen business approaches to disability rights in Australia:

The fact that business is not grappling with how disability rights are relevant to them largely means it is really not on most of their radars. So it is an opportunity to focus on that and look at how you apply the general principles to other areas. So it is very much an area which is under-addressed in Australia.²⁰⁶

The role of non-government entities in giving effect to the human rights of people with disability is also important because of the way in which certain *CRPD* obligations require a partnership between governments and non-government entities. Some *CRPD* obligations are directed at ensuring that States Parties encourage private entities to respect the rights of people with disability.²⁰⁷ Other *CRPD* obligations, for their practical implementation, call for cooperation between governments and private entities.²⁰⁸

Following Public hearing 32, ‘Service providers revisited’, Counsel Assisting submitted:²⁰⁹

- disability service providers have a duty to respect, protect and fulfil the human rights of people with disability to whom they provide services, while acknowledging that this responsibility is different from that of the Australian Government for meeting its international human rights obligations
- the Guiding Principles provide a practical framework that can assist disability service providers to develop best practice approaches to implementing human rights
- it is open to the Royal Commission to consider making recommendations that assist service providers to embed human rights into all aspects of their operations and, also, to make those obligations legally enforceable.

In response, the Australian Government submitted that ‘non-government service providers are not bound by human rights obligations under the *CRPD*’ and recommended reframing Counsel Assisting’s submission to focus on recommendations that ‘assist service providers to embed human rights into all aspects of their operations in a legally enforceable manner’.²¹⁰ These issues are discussed further in Volume 10, *Disability services*.

Limitations on human rights

Many international human rights may be subject to certain limitations in particular situations. This is a complex issue. The nature and extent of any limitations depend on the specific treaty, the right in question, and whether any proposed limitation applies to a particular individual, groups or generally.

However, it is useful to describe at a general level some key concepts relating to human rights limitations. For example, one important distinction found in the *ICCPR* and *ICESCR* is between 'derogable' and 'non-derogable' rights. Derogable rights may be temporarily suspended in a state of emergency, subject to certain conditions. However, non-derogable rights, such as the right to life, cannot be suspended even in a state of emergency. Non-derogable rights may also be either 'absolute' or 'non-absolute'. That is, while non-derogable rights cannot be suspended, they may allow for some limitations in their ordinary application.²¹¹

Absolute human rights cannot be restricted by governments for any reason. One example is the freedom from torture and other cruel, inhuman or degrading treatment or punishment.²¹² In contrast, there are other human rights that may be restricted by governments within particular parameters. Where limitations are permitted, they must be prescribed by law, pursue a legitimate objective and be reasonable, necessary and proportionate.²¹³

Some limitations are expressly set out in human rights treaties, with provisions that set out the specific parameters by which these rights may be limited. Express limitations may be general in nature – for example, article 4 of the *ICESCR* provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.²¹⁴

The *CRPD* does not include this kind of general limitation.

Some human rights may contain express, built-in limitations; other limitations may be implied. In the *CRPD*, there are no specific 'limitation' provisions. Rather, there are a variety of mechanisms built into the rights, from which certain limitations arise. For example, the duty to ensure that reasonable accommodation is provided is set out in article 5(3) of the *CRPD*.²¹⁵ This duty is not absolute. It is limited by article 2, which defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden'.²¹⁶

It follows that each *CRPD* right needs to be assessed on a case-by-case basis, taking into account the specific text of the relevant article and the particular circumstances under consideration.²¹⁷

The issue of limitations on disability rights is discussed further in Chapter 3 in the context of the proposed Disability Rights Act.

The right to an effective remedy

To hear that a child has no rights to review against a system in which they're being excluded, and the policies and procedures which have been put in place to support them hadn't been followed, was just extraordinary.²¹⁸

A further foundational issue is the right to an effective remedy. This is an essential component of Australia's obligations under the *ICCPR* and is also referred to in the other core human rights treaties.²¹⁹ A number of human rights treaties 'guarantee both the procedural right of effective access to a fair hearing and the substantive right to reparations'.²²⁰

Accordingly, Australia has obligations to respect, protect and fulfil the right to an effective remedy. The Australian Government recognises that '[h]uman rights law imposes an obligation on countries to provide remedies and reparation for the victims of human rights violations'.²²¹

The Australian Government has recognised that the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have stated the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to victims.²²² That is, one critical aspect of the right to a remedy is provision of reparation for harms suffered.²²³

However, beyond this traditional goal of remedies, over recent decades international law has evolved to encompass a newer and more ambitious goal: to prevent violations of rights in the future.²²⁴ There are, thus, twin goals of remedies. The first is a backward-looking goal designed to redress past harms or violations for individuals. The second is a forward-looking goal to minimise future rights violations and to focus on cessation and non-repetition. This second goal has a more systemic focus.²²⁵

Connected to the right to a remedy is provision of reparation for harms suffered.²²⁶ The Human Rights Committee has explained that:

reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.²²⁷

The Human Rights Committee has also stated that remedies 'should be appropriately adapted so as to take account of the special vulnerability of certain categories of person'.²²⁸

In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (van Boven Principles) provide guidance on redress and support for victims of gross violations of human rights.²²⁹ The van Boven Principles state:

victims of gross violations of international human rights law ... should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²³⁰

To give effect to Australia's general obligation under article 4(1) of the *CRPD*, Australia must adopt all appropriate legislative, administrative and other measures to implement the rights recognised in the Convention. The *CRPD* leaves significant discretion to States Parties to determine what measures will be regarded as appropriate to give effect at the domestic level to the rights of people with disability. However, it is clear that such measures would include providing remedies and enforcement mechanisms.²³¹

Chapter 2 discusses how, under current laws in Australia, there is limited legal protection of rights recognised in the *CRPD* and a lack of effective remedies when rights are breached. The right to a remedy is considered further in Chapter 3, which recommends legal reform to ensure access to effective remedies for breaches of disability rights.

1.5. Our human rights approach

We do, by these Our Letters Patent ... require and authorise you to inquire into ... what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation...²³²

As noted at the beginning of this chapter, human rights are central to our terms of reference, which recognise people with disability have the 'right to the full and equal enjoyment of all human rights and fundamental freedoms'.²³³ Our terms of reference also recognise that:

Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the [*CRPD*].²³⁴

We have therefore applied a human rights approach across our work. Our approach was based on Australia's obligations to respect, protect and fulfil the rights of people with disability under international human rights law. Our work has principally focused on the *CRPD*, but we have also considered the other core treaties discussed earlier in this chapter, as well as the *UNDRIP*.

Human rights treaties play an important role by imposing legal obligations on governments. In this context, they also reflect an agreed set of values by which people with disability should be treated and standards against which this treatment can be evaluated. At its heart, human rights law is about dignity, equality and autonomy²³⁵ – all of which are critical for people with disability.

Our human rights approach was shaped by the general principles that underpin the *CRPD*, as reflected in Section 1.2 above. In addition to dignity, equality and autonomy, these include non-discrimination, participation and inclusion, and accessibility. These general principles, along with our trauma-informed approach, informed various aspects of our work, including our community and stakeholder engagement program; active participation of people with disability in our public hearings and our research program; and people with disability sharing their experiences through submissions and in private sessions. These aspects of our work are discussed in our *Interim report*²³⁶ and in Volume 2, *About the Royal Commission*.

Our human rights approach was also fundamental to the way we gathered and presented evidence and conducted policy analysis to fulfil our terms of reference. As noted, our terms of reference require us to consider 'what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation'.²³⁷ We must 'make any recommendations arising out of [our] inquiry that [we] consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms'.²³⁸

Box 4.1.3: Our human rights approach

Our human rights approach:

- uses Australia's international human rights obligations to respect, protect and fulfil human rights as a **benchmark** for measuring the practical application of human rights in the everyday lives of people with disability and for holding governments to account
- focuses on people with disability:
 - knowing their rights
 - having their rights protected through the implementation of 'legislative, administrative and other measures'²³⁹
 - being able to enforce their rights in practice, through accessible remedies

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- is **person-centred** and based on what we heard from people with disability about their experiences of violence, abuse, neglect and exploitation, and how and why they value human rights
 - emphasises the core principle of '**nothing about us, without us**'; treating people with disability as active citizens and rights holders, not passive recipients of support; and actively involving people with disability in decision-making
 - is **intersectional** and sensitive to the cumulative disadvantage and inequality experienced by some people with disability, as required by our terms of reference²⁴⁰
 - reflects the human rights of **First Nations people with disability** as members of a distinct cultural group, as well as their rights as people with disability
 - is linked to our life course approach (discussed in Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*), considering experiences impacting on human rights over the life course.

A human rights approach goes beyond including rights in law or policy – it requires a combination of 'legislative, administrative and other measures' to realise the rights of people with disability in practice. A human rights approach is both proactive and preventive. It does not just wait to respond after a person's rights have been violated, but aims to prevent violations from occurring in the first place. It is person-centred and focused on approaches that achieve substantive equality and equality of outcomes.

In the context of providing services to people with disability, a human rights approach goes beyond referring to rights principles and instruments in corporate documents. It requires a considered approach to embedding respect for rights in practice at all levels of service provision.

We have applied our human rights approach when identifying ways of better respecting, protecting and fulfilling the human rights of people with disability in Australia. Human rights inform our recommendations across this *Final report*. We seek to translate rights not just into laws but also into sustainable policies and practices that will change the way people with disability are viewed, treated and included in society. This approach will reduce the risk of people with disability experiencing violence, abuse, neglect and exploitation across settings and over the course of their lives.

1.6. Conclusion

it was just really hurtful to be treated like an inferior person, like a child really, in that they were treating me like I didn't have these skills just because I am disabled.²⁴¹

This chapter introduces the human rights framework that underpinned our work, in line with our terms of reference. Across this *Final report*, the framework helps us understand the impacts of laws, policies and practices on the rights of people with disability who experience violence, abuse, neglect and exploitation. We also used this framework to inform our recommendations to prevent and better respond to such experiences.

This international human rights framework must also be understood in a dynamic, evolving international context. In recent decades this has seen increased action at the global, regional and sub-regional levels to promote the realisation of the rights of people with disability. In the Asia-Pacific region this has included the *Jakarta Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2023–2032*²⁴² issued by the UN Economic and Social Commission for Asia and the Pacific, of which Australia is an active member State. This followed on from the *Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013–2022*,²⁴³ and the *Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific*.²⁴⁴

This chapter provided an overview of key aspects of Australia's international human rights obligations regarding people with disability. More detailed consideration of specific human rights obligations is found in the following chapters, and across other volumes of this *Final report* which address particular issues and thematic areas regarding the human rights of people with disability.

Endnotes

- 1 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 2 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 3 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 4 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 5 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (*CRPD*).
- 6 United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
- 7 Name changed, private session, 'Alexandre'.
- 8 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993), [5] endorsed by United Nations General Assembly, *World Conference on Human Rights*, GA Res 48/121, UNGAOR, UN Doc A/48/49 (20 December 1993), [2].
- 9 Names changed, private session, 'Mattie' and 'Jaden'.
- 10 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 11 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.
- 12 The seven treaties recognised by the Australian Government as 'core' treaties are the: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); and the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Another important international instrument is the *Universal Declaration of Human Rights*, which includes both civil and political rights as well as economic, social and cultural rights: United Nations General Assembly, *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, UN Doc A/810 (10 December 1948).
- 13 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993), [5] endorsed by United Nations General Assembly, *World Conference on Human Rights*, GA Res 48/121, UNGAOR, UN Doc A/48/49 (20 December 1993), [2].
- 14 Transcript, Carolyn Frohmader, Public hearing 17, 31 March 2021, P-269 [38–40].
- 15 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); Australia ratified the Covenant on 10 December 1975.
- 16 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 17 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 1(1).
- 18 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), arts 2(1), 7.
- 19 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 1.
- 20 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- 21 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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- 22 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 23(2).
- 23 Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, p 10.
- 24 For example, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, adopted 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, adopted 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, adopted 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002).
- 25 With the exception of the *International Covenant on Economic, Social and Cultural Rights*, Australia accepted individual communications (complaints) processes in relation to the remaining six core treaties, through optional protocols and declarations under the respective treaties: *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Declaration by Australia Recognizing the Competence of the Committee on the Elimination of Racial Discrimination*, UN Doc CN.47/1993.TREATIES-2 (28 January 1993); *Declaration by Australia Recognizing the Competence of the Committee Against Torture Under Articles 21 and 22 of the Convention*, UN Doc CN.57.1993-TREATIES-1 (28 January 1993); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008); *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature 28 February 2012, 2983 UNTS 131 (entered into force 14 April 2014).
- 26 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006), arts 4, 11, 17–23. Article 4(2) provides that for the purposes of OPCAT, ‘deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’.
- 27 See, for example, Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report no.3/2019, September 2019, p 5. The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment considers that OPCAT applies to ‘all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 [of OPCAT], which are within [a state’s] jurisdiction ... [and] extends to all those places over which [the state] exercises effective control’: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, 12th sess, UN Doc CAT/OP/12/5 (9 December 2010), [24].
- 28 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 29 Transcript, Gi Brown, Public hearing 24, 7 June 2022, P-91 [28–42].
- 30 United Nations Human Rights Office of the High Commissioner, *The Convention on the Rights of Persons with Disabilities, Training Guide*, No 19, 2014, p 10.
- 31 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 1.
- 32 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1). Article 4 sets out the general obligations on States Parties. For an analysis of each of the substantive articles in the CRPD, see Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia’s level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020.
- 33 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [1].

34 The right to an adequate standard of living is contained in a number of other treaties, including in article 11 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976). The United Nations Human Rights Office of the High Commissioner considered the right to an adequate standard of living as an economic, social and cultural right: see, for example, United Nations Human Rights Office of the High Commissioner, Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights (1 December 2008), p 2; see also Kevin Cremin, 'Article 28: adequate standard of living and social protection' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 811 describing the right to an adequate standard of living as an economic right.

35 For example, see 'What are human rights?', *United Nations Human Rights Office of the High Commissioner*, web page. <www.ohchr.org/en/what-are-human-rights#:~:text=All%20human%20rights%20are%20indivisible,economic%2C%20social%20and%20cultural%20rights>; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993), [5] endorsed by United Nations General Assembly, *World Conference on Human Rights*, GA Res 48/121, UNGAOR, UN Doc A/48/49 (20 December 1993), [2].

36 United Nations Human Rights Office of the High Commissioner, Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights, 2008, p 10.

37 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(2).

38 Exhibit 31-003, 'Statement of Gerard Quinn', 12 December 2022.

39 Exhibit 31-003, 'Statement of Gerard Quinn', 12 December 2022, at pp 4–12; see also Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, pp 8–12; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim report*, October 2020, pp 345–46.

40 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 10.

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

42 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1).

43 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(a).

44 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(e).

45 Andrea Broderick, 'Article 4: General obligations' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 122–23. The *CRPD* also refers to private entities in art 9(2)(b) on accessibility, art 21(c) on freedom of expression and opinion, and access to information, art 25(d) on health, and art 27(1)(h) on work and employment.

46 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(b).

47 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(c).

48 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(d).

49 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(f).

50 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(g).

51 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(h).

52 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(i).

- 53 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(3).
- 54 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 33(1).
- 55 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 33(1).
- 56 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 33(2).
- 57 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 33(3).
- 58 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 34(1); for a background on the CRPD Committee, see Exhibit 3-33, 'Statement of Rosemary Kayess', 3 December 2019, at [17–19], [22–24].
- 59 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 34(7).
- 60 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 11.
- 61 Ron McCallum was the inaugural Chair of the Committee, and a Committee member from 2009 to 2014. Ms Rosemary Kayess was appointed to the CRPD Committee in 2018. She was appointed Vice-Chair in March 2019. In March 2021, she was appointed Chair of the Committee. In March 2023, Ms Kayess moved back into the role of Vice-Chair, and remains in this role at the time of writing.
- 62 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 39 (referring to 'general recommendations', which are sometimes referred to by the CRPD Committee as 'general comments'); see also CRPD Committee, *Rules of procedure*, UN Doc CRPD/C/1/Rev.1 (10 October 2016), rule 47.
- 63 Exhibit 18-020, CTD.9999.0007.0001, at p 5 [17]; Exhibit 18-021, CTD.9999.0030.0001, at p 16 [64].
- 64 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on article 12: equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014); Committee on the Rights of Persons with Disabilities, *General comment no. 2 (2014) Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014); Committee on the Rights of Persons with Disabilities, *General comment no. 3 (2016) on article 6 – women and girls with disabilities*, 9th sess, UN Doc CRPD/C/GC/3 (25 November 2016); Committee on the Rights of Persons with Disabilities, *General comment no. 4 (2016) on article 24: the right to inclusive education*, 14th sess, UN Doc CRPD/C/GC/4 (25 November 2016); Committee on the Rights of Persons with Disabilities, *General comment no. 5 (2017) on article 19: the right to live independently and be included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017); Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018); Committee on the Rights of Persons with Disabilities, *General comment no. 7 (2018) on article 4.3 and 33.3: the participation of persons with disabilities in the implementation and monitoring of the Convention*, 19th sess, UN Doc CRPD/C/GC/7 (9 November 2018); Committee on the Rights of Persons with Disabilities, *General comment no. 8 (2022) on the right of persons with disabilities to work and employment*, UN Doc CRPD/C/GC/8 (7 October 2022).
- 65 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008), art 1.
- 66 The Optional Protocol entered into force for Australia on 20 September 2009. Under the Optional Protocol, Australia recognises the competence of the CRPD Committee to receive and consider communications from, or on behalf of, individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by the Australian Government of CRPD provisions: *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008), art 1.
- 67 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 28 (entered into force 3 May 2008), arts 3, 5, 6, 7.
- 68 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 28 (entered into force 3 May 2008), art 6(4).

- 69 See, for example, 'Complaints mechanisms under human rights treaties: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/complaints-mechanisms-under-human-rights-treaties>
- 70 Committee on the Rights of Persons with Disabilities, *Views: Communication No 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016, adopted 2 September 2016) ('*Noble v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 17/2013*, 22nd sess, UN Doc CRPD/C/22/D/17/2013 (18 October 2019, adopted 30 August 2019) ('*Leo v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 18/2013*, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (17 October 2019, adopted 30 August 2019) ('*Doolan v Australia*').
- 71 Committee on the Rights of Persons with Disabilities, *Views: Communication No 56/2018*, 27th sess, UN Doc CRPD/C/27/D/56/2018 (15 February 2023, adopted 26 August 2022) ('*Henley v Australia*').
- 72 Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (20 December 2018, adopted 31 August 2018) ('*J.H. v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016, adopted 1 April 2016) ('*Lockrey v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016, adopted 1 April 2016) ('*Beasley v Australia*'); Committee on the Rights of Persons with Disabilities, *Decision: Communication No 12/2013*, 13th sess, UN Doc CRPD/C/13/D/12/2013 (29 May 2015, adopted 27 March 2015) ('*A.M. v Australia*') (found inadmissible).
- 73 Committee on the Rights of Persons with Disabilities, *Decision: Communication No 14/2013*, 17th sess, UN Doc CRPD/C/17/D/14/2013 (19 May 2017, adopted 24 March 2017) ('*D.R. v Australia*'); Committee on the Rights of Persons with Disabilities, *Decision: Communication No 15/2013*, 21st sess, UN Doc CRPD/C/21/D/15/2013 (29 April 2019) ('*Kendall v Australia*'). *D.R. v Australia* was found inadmissible due to non-exhaustion of domestic remedies. *Kendall v Australia* was discontinued after Australia made housing available to the complainant. This is similar to an earlier communication that was discontinued by the Committee because the subject matter of the complaint became moot after the author obtained the social support and accommodation he required: Committee on the Rights of Persons with Disabilities, *Decision: Communication No 16/2013*, 18th sess, UN Doc CRPD/C/18/D/16/2013 (5 July 2018) ('*M.R. v Australia*').
- 74 Committee on the Rights of Persons with Disabilities, *Decision: Communication No 15/2013*, 21st sess, UN Doc CRPD/C/21/D/15/2013 (29 April 2019) ('*Kendall v Australia*').
- 75 Committee on the Rights of Persons with Disabilities, *Views: Communication No 20/2014*, 24th sess, UN Doc CRPD/C/24/D/20/2014 (30 April 2021, adopted 19 March 2021) ('*Sherlock v Australia*').
- 76 'Complaints mechanisms under human rights treaties: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/complaints-mechanisms-under-human-rights-treaties>
- 77 'Human Rights Communications', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-communications>
- 78 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 36(1).
- 79 Exhibit 18-020, CTD.9999.0007.0001, at [18].
- 80 Exhibit 18-020, CTD.9999.0007.0001, at pp 4–5 [13–15], 11.
- 81 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 82 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(1).
- 83 Committee on the Rights of Persons with Disabilities, *General comment no. 3 (2016) on article 6 – women and girls with disabilities*, 13th sess, UN Doc CRPD/C/GC/3 (25 November 2016), [31].
- 84 Committee on the Rights of Persons with Disabilities, *General comment no.3 (2016) on article 6 – women and girls with disabilities*, 13th sess, UN Doc CRPD/C/GC/3 (25 November 2016), [31].
- 85 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(1).

- 86 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(2).
- 87 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(2).
- 88 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(4).
- 89 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(4).
- 90 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(5).
- 91 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Gabon*, 14th sess, UN Doc CRPD/C/GAB/CO/1, (2 October 2015), [39].
- 92 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(3).
- 93 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006), art 19(a).
- 94 See, for example, Submissions of Counsel Assisting the Royal Commission following Public hearing 17, 25 January 2023, pp 151–55 [482–90]; Submissions of Counsel Assisting the Royal Commission following Public hearing 24, 21 October 2022, pp 118–22 [313–24], 127–33 [341–57], 193 [547], 206–10 [593–601] 210 [606] [Recommendation 3]; Submissions of Counsel Assisting the Royal Commission following Public hearing 31, 3 February 2023, pp 23–28 [64–87], 92–94 [318–22].
- 95 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [10].
- 96 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [10].
- 97 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [11].
- 98 See Submissions of Counsel Assisting the Royal Commission following Public hearing 24, 21 October 2022, p 120 [318].
- 99 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, pp 177 (Deane and Gaudron JJ), 184–85 (Dawson J); see also Submissions of Counsel Assisting the Royal Commission following Public hearing 31, 3 February 2023, p 25 [74].
- 100 See, for example, Sandra Fredman, 'Substantive equality revisited' (2016), vol 14 (3), *International Journal of Constitutional Law*, pp 713, 718–20.
- 101 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018), [11].
- 102 Exhibit 31-003, 'Statement of Gerard Quinn', 12 December 2022, at p 10.
- 103 Theresia Degener & María Gómez-Carrillo de Castro, 'Toward Inclusive Equality: Ten Years of the Human Rights Model of Disability in the Work of the UN Committee on the Rights of Persons with Disabilities' in F Felder, L Davy & R Kayess (eds), *Disability law and human rights: Theory and policy*, Palgrave Macmillan, Cham, 2002, p 36.
- 104 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [11].
- 105 Theresia Degener & María Gómez-Carrillo de Castro, 'Toward Inclusive Equality: Ten Years of the Human Rights Model of Disability in the Work of the UN Committee on the Rights of Persons with Disabilities' in F Felder, L Davy & R Kayess (eds), *Disability law and human rights: Theory and policy*, Palgrave Macmillan, Cham, 2002, p 37; see also Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, pp 29–30; Sandra Fredman, *Discrimination law*, 2nd edn, Oxford University Press, 2011, pp 29–32.
- 106 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 107 Name changed, private session, 'Khari'.
- 108 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 109 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).

110 The CRPD Committee explained that multiple discrimination ‘is a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated’: Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [19].

111 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 6(1).

112 Transcript, Catherine Dunn, Public hearing 17, 29 March 2022, P-71 [10–12].

113 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [19]; see also Secretariat of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, *Addressing the impact of multiple discrimination on persons with disabilities, and promoting their participation and multi-stakeholders partnerships for achieving the Sustainable Development Goals in line with the Convention*, 10th sess, UN Doc CRPD/CSP/2017/2 (27 March 2017), [2].

114 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [19]; see also Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, pp 34–36.

115 Transcript, Scott Avery, Public hearing 4, 24 February 2020, P-459 [13–15].

116 Transcript, Scott Avery, Public hearing 4, 24 February 2020, P-459 [23–24].

117 See, for example, Theresia Degener, ‘Disability in a human rights context’, *Laws* (2016), vol 5 (35), pp 10, 17; Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, p 34.

118 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), preamble (p); see also Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [9], [19].

119 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [17–22].

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

121 Exhibit 28-002, ‘Statement of Tracy Barrell’, 13 September 2022, at [69].

122 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).

123 See, for example, Scott Avery, ‘Intersections in human rights and public policy for indigenous people with disability’ in F Felder, L Davy & R Kayess (eds), *Disability law and human rights: Theory and policy*, Palgrave Macmillan, Cham, 2002, pp 221–38, 229–30; Transcript, Damian Griffis, Public hearing 18, 8 November 2021, P-58 [19–21].

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

125 Transcript, Damian Griffis, Public hearing 18, 8 November 2021, P-58 [9–21].

126 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

127 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

128 Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Statement, Canberra, 3 April 2009.

129 Some commentators argue that some of the standards enshrined in the *UNDRIP* reflect principles of customary international law (a binding source of law upon States: *Statute of the International Court of Justice* (adopted 26 June 1945), art 38(1)(b)). See, for example, S James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, 9th sess, UN Doc A/HRC/9/9 (11 August 2008), p 13, [41]. Similarly, some legal scholars have argued that aspects of *UNDRIP*, including self-determination; autonomy or

- self-government; cultural rights and identity; land rights; and reparation, redress, and remedies are customary international law: Jackson A Smith & Terry L Mitchell, 'Development of an UNDRIP compliance assessment tool: how a performance framework could improve state compliance' (2020), vol 11 (2), *International Indigenous Policy Journal*, pp 1–2.
- 130 Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Statement, Canberra, 3 April 2009.
- 131 Exhibit 25-84, 'Statement of Patricia Turner', 27 June 2022, at [135].
- 132 S James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, 9th sess, UN Doc A/HRC/9/9 (11 August 2008), p 24, [86].
- 133 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), arts 2, 3, 4, 11, 21, 24.
- 134 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), art 21(1).
- 135 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), art 21(2).
- 136 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), art 22(1).
- 137 United Nations Permanent Forum on Indigenous Issues, *Study on the situation of indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development*, 12th sess, UN Doc E/C.19/2013/6 (5 February 2013), [11].
- 138 Name changed, private session, 'Kat'.
- 139 Name changed, private session, 'Pablo'.
- 140 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, [25]; *Victoria v Commonwealth* (1996) 187 CLR 416, [22–26]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, pp 32–33 [99].
- 141 See for example *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(5); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 50.
- 142 *Commonwealth v Tasmania* (1983) 158 CLR 1; regarding the interpretation of the external affairs power in s 51(xxix) of the *Australian Constitution*, see, for example, [1–26] (Mason J), [43] (Murphy J); see also Matthew Stubbs, Adam Webster & John Williams, *Persons with Disability and the Australian Constitution*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 27–29.
- 143 Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [4].
- 144 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26; see also Dominique François de Stoop, *An outline of international law*, Inspiring Publishers, 2019, p 23 [2.6].
- 145 See Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, p 14 [42].
- 146 Names changed, private session, 'Thea' and 'Heidi'.
- 147 *Australian Constitution* s 51(xxix); see also, for example, *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, [34–38].
- 148 Matthew Stubbs, Adam Webster & John Williams, *Persons with Disability and the Australian Constitution*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 4.
- 149 Under Australian constitutional law, the states have the power to legislate upon any subject matter that has not been specifically listed in the Australian Constitution as being within the exclusive powers of the Australian Parliament. However, where powers are concurrent (shared by the Australian Parliament and the state and territory parliaments), if a state or territory were to make a law that conflicted with a law of the Australian Parliament, the Commonwealth legislation would override the state or territory legislation: *Australian Constitution* s 109. For more detail, see

'Three levels of government: Governing Australia', *Parliamentary Education Office*, web page. <www.peo.gov.au/understand-our-parliament/how-parliament-works/three-levels-of-government/three-levels-of-government-governing-australia/>

- 150 An example is s 10(1) of the *Racial Discrimination Act 1975* (Cth), which gives a degree of protection in Australian law to rights recognised in the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
- 151 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).
- 152 See, for example, National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Australian Government Attorney-General's Department, September 2009, p xxv; George Williams & Daniel Reynolds, *A charter of rights for Australia*, 4th edn, UNSW Press, 2017, p 7, cited in Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 35.
- 153 Names changed, private session, 'Ander' and 'Mikey'.
- 154 *Horta v Commonwealth* (1994) 181 CLR 183, p 195; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, p 384, [97] (Gummow and Hayne JJ) citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, p 204 (Gibbs CJ); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, p 10 [11] (Gleeson CJ), p 71 [201] (Kirby J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, pp 643–44 [462] (Keane J).
- 155 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, pp 287–88, (Mason CJ and Deane J), p 315 (McHugh J).
- 156 *Kruger v Commonwealth* (1997) 190 CLR 1, p 71 (Dawson J); *Coleman v Power* (2004) 220 CLR 1, pp 27–28 [19] (Gleeson CJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, p 287; *Polites v The Commonwealth* (1945) 70 CLR 60, pp 68–69.
- 157 *Jumbunna Coal Mine NL v Victoria Coal Miners' Association* (1908) 6 CLR 309, p 363; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, p 204 (Gibbs CJ); *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, pp 251–53 (Dawson J); *AMS v AIF* (1999) 199 CLR 160, p 180 [50] (Gleeson CJ, McHugh and Gummow JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, p 492, [29] (Gleeson CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, p 234 [247] (Kiefel J).
- 158 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).
- 159 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, p 30 (Brennan J) (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292, p 321 (Brennan J), p 360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, p 288 (Mason CJ and Deane J), p 315 (McHugh J); *Nicholson v Knaggs* [2009] VSC 64, [70]–[75]; *Royal Women's Hospital v Medical Practitioners Board of Australia* (2006) 15 VR 22, [76] (Maxwell P).
- 160 The obligations apply directly to the actions and decisions of public authorities/entities that are required to consider human rights as set out in the respective statutes and to act compatibly with them in their decision making. See *Human Rights Act 2004* (ACT) s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2019* (Qld) s 58.
- 161 Names changed, private session, 'Ezequiel' and 'Aubriella'.
- 162 See, for example, Tara J Melish, 'An eye toward effective enforcement: A technical-comparative approach to the drafting negotiations' in Maya Sabatello & Marianne Schulze (eds), *Human Rights and Disability Advocacy*, University of Pennsylvania Press, 2014, p 81. Melish suggests that during negotiations on the *CRPD*, Disability Rights International advocated for 'broad, open-textured' drafting, 'contoured by the overarching principles of dignity, inclusion, social agency, and participation' to ensure the *CRPD*'s effectiveness over space and time.
- 163 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 31, 32.
- 164 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(1); article 31(2) then elaborates on what 'context' means for the purpose of treaty interpretation.
- 165 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 32 ('Supplementary means of interpretation'); article 32 provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm

- the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’.
- 166 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), preamble (e).
- 167 For example, under the *Statute of the International Court of Justice*, opened for signature 26 June 1945, 33 UNTS 993 (entered into force 24 October 1945), art 38(1)(a)–(c), the International Court of Justice applies treaties, customary international law and general principles of law. Article 38(1) (d) recognises ‘subsidiary means for the determination of rules of law’, which comprise ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’.
- 168 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, pp 67–68 [112], 77–78 [140]; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, pp 242–243 [64]–[66].
- 169 See for example Committee on the Elimination of Racial Discrimination, *General Recommendation no. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009), [5]: ‘The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society.’
- 170 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(b).
- 171 *Maloney v The Queen* (2013) 252 CLR 168, [22]–[23] (French CJ), [61] (Hayne J), [134] (Crennan J), but see also [175]–[176] (Kiefel J), [235] (Bell J) and [326]–[328] (Gageler J).
- 172 Rosemary Kayess & Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, p 30; see also Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia’s level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 11.
- 173 Exhibit 18-020, CTD.9999.0007.0001, p 2 [3]; Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [5], [14].
- 174 Australian Human Rights Commission, *Free and Equal: A Human Rights Act* for Australia, Position paper, December 2022, p 125.
- 175 For example, the Government of the United Kingdom previously expressed the view that ‘[i]t is Parliament and government which must retain the primary responsibility for economic and social policy, an area where the courts lack substantial expertise and have limited institutional authority. This principle must, in our view, condition the scope of any extension of the powers of the courts in relation to economic, social and cultural rights. This does not mean, however, that government action in these spheres should be unaccountable against standards of economic, social and cultural rights, by which the UK has agreed to abide’: Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights* (House of Lords Paper No 183, House of Commons Paper No 1188, Session 2003-04), pp 25–26. See also Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, cases, and materials*, Oxford University Press, 2014, pp 1, 134, 164–66.
- 176 See, for example, Philip Alston, ‘Foreword’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008, p ix; Phillip French & Rosemary Kayess, *Deadly currents beneath calm waters: Persons with disability and the right to life in Australia*, UNSW Law Research Series, 2008, pp 3–6; Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, cases, and materials*, Oxford University Press, 2014, pp 1–2.
- 177 See Committee on Economic, Social and Cultural Rights, *General comment no. 9 (1998) on The domestic application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998), [10]; Australian Human Rights Commission, *Free and Equal: A Human Rights Act* for Australia, Position paper, December 2022, p 127, noting advice from Peter Hanks, Debbie Mortimer, Kristen Walker & Graeme Hill, ‘Proposed Commonwealth Human Rights Act:

Justiciability of Economic and Social Rights', Memorandum of Advice, December 2009, pp 1, 9; see also Pádraig McAuliffe, 'Programmatic Approaches to Realising Socio-Economic Rights: Debates, Definitions and Trends' (2021), vol 22, *Melbourne Journal of International Law*, pp 1, 3.

178 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, UN Doc A/CONF.157/23, [5] endorsed by United Nations General Assembly, *World Conference on Human Rights*, GA Res 48/121, UNGAOR, UN Doc A/48/49 (20 December 1993), [2].

179 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 106.

180 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(2).

181 For example, Committee on Economic, Social and Cultural Rights, *General comment no. 14 (2000) on The right to the highest attainable standard of health (article 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000), [12].

182 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23, (14 December 1990), [9]; United Nations Human Rights Office of the High Commissioner and World Health Organization, *Fact Sheet No. 31: The Right to Health*, June 2008, p 23.

183 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [9].

184 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [1]; see also Transcript, Andrew Byrnes, Public hearing 18, 8 November 2021, P-84 [26–32].

185 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [2].

186 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [2].

187 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [1]; see also Committee on Economic, Social and Cultural Rights, *General comment no. 20 (2009) on Non-discrimination in economic, social and cultural rights (Art. 2, Para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009), [7].

188 Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991 23 (14 December 1990), [9].

189 Exhibit 18-020, CTD.9999.0007.0001, at p 2 [4].

190 Exhibit 31-003, 'Statement of Gerard Quinn', 12 December 2022, at p 9.

191 Exhibit 31-003, 'Statement of Gerard Quinn', 12 December 2022, at pp 9–10.

192 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 5, 14, 15, 22; see also Exhibit 18-021, CTD.9999.0030.0001, p 2 [5–6].

193 Exhibit 18-020, CTD.9999.0007.0001, at p 7 [31].

194 See, for example, United Nations Human Rights Office of the High Commissioner, 'International Human Rights Law', web page. <www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=By%20becoming%20parties%20to%20international,the%20enjoyment%20of%20human%20rights.>

195 Committee on the Rights of Persons with Disabilities, *General comment no. 5 (2017) on living independently and being included in the community*, 18th sess, UN Doc CRPD/C/GC/5 (27 October 2017), [54].

196 See, for example, Committee on Economic, Social and Cultural Rights, *General comment no. 12 (1999) on The right to adequate food (Art. 11)*, 20th sess, UN Doc E/C.12/1999/5 (12 May 1999), [15].

- 197 *Letters Patent* (Cth), 4 April 2019 (as amended), (a).
- 198 Michael Ashley Stein & Ilias Bantekas, 'Including Disability in Business and Human Rights Discourse and Corporate Practice', (2021), vol 6 (3), *Business and Human Rights Journal*, pp 490–513; Transcript, Justine Nolan, Public hearing 18, 9 November 2021, P-123 [4] – P-124 [31].
- 199 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011.
- 200 Transcript, Justine Nolan, Public hearing 18, 9 November 2021, P-120 [29–36].
- 201 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p 3; Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th sess, UN Doc A/HRC/17/31 (21 March 2011), [6].
- 202 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p 4.
- 203 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p 16; Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th sess, UN Doc A/HRC/17/31 (21 March 2011), [6].
- 204 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p 1; Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th sess, UN Doc A/HRC/17/31 (21 March 2011), [6].
- 205 Transcript, Justine Nolan, Public hearing 18, 9 November 2021, P-121 [42–44]; see also Exhibit 18-019, DRC.9999.0087.0001, at p 14 [2.2].
- 206 Transcript, Justine Nolan, Public hearing 18, 9 November 2021, P-124 [28–31].
- 207 For example, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 4(1)(e), 9(2)(b), 21(c), 27(1)(h).
- 208 For example, under the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), obligations relating to accessibility to the physical environment, transportation, information and communications, and facilities and services provided to the public (article 9) cannot practically be achieved without private entities, that control the manner in which the relevant place or service is provided to ensure accessibility, taking steps; obligations relating to living independently and being included in the community (article 19) cannot practically be achieved without, for example, the relevant private enterprises, that provide residential services to people with disability, taking steps; and obligations relating to participation in cultural life, recreation, leisure and sport (article 30) cannot practically be achieved without the relevant private cultural, recreation, leisure and sporting organisations taking steps.
- 209 Submissions of Counsel Assisting the Royal Commission following Public hearing 32, 31 March 2023 (amended 18 May 2023), pp 56–57 [187], 57–58 [192], 58–59 [194].
- 210 Submissions by the Australian Government in response to Counsel Assisting's submissions in Public hearing 32, 28 April 2023, SUBM.0056.0003.0005, p 23.
- 211 For example, the freedom of thought, conscience and religion is a non-derogable right under *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 4(2), 18. However, the right includes an internal limitation that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others' (art 18(3)); see also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966,

- 993 UNTS 3 (entered into force 3 January 1976), art 4; 'Absolute rights: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>
- 212 Examples include freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; freedom from arbitrary arrest and detention; freedom of thought, conscience and religion; and freedom to hold opinions without interference. For further detail, see: 'Absolute rights: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>
- 213 See, for example, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 4, 12(3), 18(3), 19(3), 21, 22(2); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 4.
- 214 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 4.
- 215 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5(3).
- 216 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 2.
- 217 See submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, pp 42–43 [149–51].
- 218 Names changed, private session, 'Graham', 'Edison' and 'Jayda'.
- 219 For example, the right to an effective remedy is contained in *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 14. The concept is also given expression in the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 6.
- 220 Dinah Shelton, 'Reparations in human rights law' in Rachel Murray & Debra Long (eds), *Research handbook on implementation of human rights in practice*, Edward Elgar Publishing, 2022, p 37.
- 221 'Right to an effective remedy: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-effective-remedy> In its fifth periodic report under the *ICCPR*, the Australian Government noted that 'there must be a breach of a right before article 2 [of the *ICCPR*] may be invoked to require a State to provide an effective remedy': Australian Government, *Australia's fifth periodic report under the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/AUS/5 (7 August 2007), p 13.
- 222 'Right to an effective remedy: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-effective-remedy> For example, the Human Rights Committee noted that the right to a remedy can include 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations': Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [16].
- 223 Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [16].
- 224 Kent Roach, *Remedies for human rights violations: A two-track approach to supra-national and national law*, Cambridge University Press, 2021, p 13.

- 225 Kent Roach, *Remedies for human rights violations: A two-track approach to supra-national and national law*, Cambridge University Press, 2021, p 13; see also Dinah Shelton, *Remedies in international human rights law*, 3rd edn, Oxford University Press, 2015, pp 16–19.
- 226 Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [16].
- 227 Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [16].
- 228 Human Rights Committee, *General comment no. 31 (2004) on The nature of the general legal obligation on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [15].
- 229 Gross violations of human rights include ‘the types of violations that affect in qualitative and quantitative terms the core rights of human beings, notably the right to life and the right to physical and moral integrity of the human person’. Theo van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in Carla Ferstman & Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 2nd revised edn, 2020, Brill, p 31. They specifically extend to ‘torture and cruel, inhuman or degrading treatment or punishment ... arbitrary and prolonged detention ... and systematic discrimination’: Theo van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in Carla Ferstman & Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 2nd revised edn, 2020, pp 30–31, citing Theo van Boven, UN Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, ‘General Principles’, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (Final report)*, UN Doc E/CN.4/Sub.2/1993/8 (2 July 1993) [137(2)].
- 230 United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006), [18].
- 231 For example, the Committee on Economic, Social and Cultural Rights indicated it understands the term ‘appropriate means’ in the *ICESCR* to include the provision of judicial or other remedies, where appropriate, as well as ‘financial, education and social measures’: Committee on Economic, Social and Cultural Rights, *General comment no. 3 (1990) on The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990), [5], [7].
- 232 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 233 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 234 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 235 See, for example, Thomas Finegan, ‘Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood’ (2012), vol 37, *Australian Journal of Legal Philosophy*, pp 182–83, cited in Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 106.
- 236 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim report*, October 2020, p 125.
- 237 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 238 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals.
- 239 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(a).
- 240 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 241 Name changed, private session, ‘Edwina’.
- 242 Economic and Social Commission for Asia and the Pacific, *Jakarta declaration on the Asian and Pacific decade of persons with disabilities, 2023–2032*, UN Doc ESCAP/APDDP/2022/L.4 (2 September 2022).

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- 243 Economic and Social Commission for Asia and the Pacific, *Resolution 69/13: Implementation of the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013–2022, and the Incheon Strategy to ‘Make the Right Real’ for Persons with Disabilities in Asia and the Pacific*, APDPD WG, 2nd sess, UN Doc SDD/APDPD(3)/WG(2)/INF/10 (5 February 2015), [1], [Annexure].
- 244 Economic and Social Commission for Asia and the Pacific, *Resolution 69/13: Implementation of the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013–2022, and the Incheon Strategy to ‘Make the Right Real’ for Persons with Disabilities in Asia and the Pacific*, APDPD WG, 2nd sess, UN Doc SDD/APDPD(3)/WG(2)/INF/10 (5 February 2015), [1], [Annexure].

Aarti*

‘Compassionate parents with disability have the right to also be parents, with some support, as much right as everyone else.’

Aarti, a First Nations woman, has intellectual disability and anxiety. She lives independently and is able to care for herself and her home. Aarti told the Royal Commission her disability doesn’t have a ‘huge impact on a daily basis ... besides some problem-solving ability issues and heightened anxiety in certain situations’.

A short time ago, Aarti became pregnant. She said the hospital didn’t have any concerns about her ability to care for her child. But a couple of days after her baby was born, the department of child protection removed him.

‘The department have not been compassionate, to give me the chance to show how capable I really could be as a mother.’

Aarti believes the department is discriminating against her because she has a disability.

‘Nobody has the right to hold a person’s disability against them.’

Aarti is doing everything she can to get her baby back. She now has an advocate and team of support people. An occupational therapist helps her navigate and improve family contact visits. Her speech pathologist helps her with her problem-solving skills.

‘She helps me to see the bigger picture in a situation rather than just noticing the small details in what’s happening around me.’

She also has someone who helps her budget her money. Aarti appreciates the support but they can ‘only assist with the mentioned things and can’t overpower the department’.

‘The department have emotionally abused me, and traumatized me, and this needs to stop,’ she said.

‘There needs to be justice for parents like us, to come into human rights. Then these problems will be fixed. Parents need to be provided a chance, just like everyone else.’

* This is a de-identified narrative of an experience shared with us in a submission or private session. The person who shared their experience was not a witness. They did not give evidence, take an oath or give an affirmation. Nothing in this narrative represents a finding of the Royal Commission and any views expressed are those of the person, not of the Royal Commission.

2. Australia's current implementation of disability rights

Key points

- Measures adopted by Australia to implement the *Convention on the Rights of Persons with Disabilities (CRPD)* are positive, but they have not prevented violence against, and abuse, neglect and exploitation of, people with disability.
- Under current Commonwealth, state and territory laws, there is limited legal protection of the rights recognised in the *CRPD* and a lack of effective remedies when rights are breached.
- While there are some mechanisms intended to align laws with the *CRPD*, none ensure Australian laws are consistent with the *CRPD* in practice.
- *CRPD* rights are not sufficiently incorporated into government policies and practices. There are limited requirements for governments and parliaments to consider the rights of people with disability in decision-making and the development of law and policy.
- People with disability are not sufficiently involved in government decision-making processes and the development of law and policy affecting their rights.
- There is limited awareness and understanding of the rights of people with disability, which contributes to violence, abuse, neglect and exploitation.
- The *CRPD* has not been fully implemented into laws, policies and practices in Australia. The current piecemeal approach is not adequate.
- As a wealthy, developed nation with strong commitments to human rights, Australia is falling behind where it should be in protecting the rights of people with disability.
- Rather than merely modifying existing laws and policies, a new approach is needed to better respect, protect and fulfil the human rights of people with disability in Australia.
- A stronger and more comprehensive legal framework is required to achieve equality and inclusion and advance the rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation.

2.1. Introduction

The *UNCRPD* should become more than just an aspirational exercise but something that is genuinely adhered to in day-to-day life.¹

This chapter considers Australia's current approach to implementation of the *Convention on the Rights of Persons with Disabilities (CRPD)*.² While many different actors play an important role in realising human rights, as discussed in Chapter 1, 'Australia's international human rights obligations regarding people with disability', this chapter largely focuses on the Australian Government as the primary bearer of obligations under the *CRPD*.³

Over time, Australian governments have adopted many positive measures to realise the human rights of people with disability. Prior to ratification of the *CRPD* in 2008, Australian law included some protection of the rights of people with disability, particularly under the *Disability Discrimination Act 1992 (Cth) (DDA)* and state and territory anti-discrimination laws. There has been further positive progress since then, including the creation of national disability strategies and the National Disability Insurance Scheme (NDIS).

However, implementation of the *CRPD* so far is only partial and has occurred through a range of laws, policies and practices, rather than a single piece of legislation setting out the rights of people with disability. While many factors contribute to the extent of violence against, and abuse, neglect and exploitation of, people with disability in Australia, the absence of comprehensive legislation protecting the human rights of people with disability is a significant element.

This chapter provides an overview of the current legal framework for protecting the human rights of people with disability in Australia, including the *DDA*, the *National Disability Insurance Scheme Act 2013 (Cth)* and state and territory human rights laws. It discusses the lack of legal protection of human rights generally and, more specifically, the limited legal protection accorded to the rights of people with disability. It also considers the lack of effective remedies in Australia when rights recognised by the *CRPD* are breached.

The chapter demonstrates that while there are some mechanisms intended to align laws with the *CRPD*, none ensure Australian laws are consistent with the *CRPD* in practice. No recent comprehensive review of Commonwealth laws for this purpose has been undertaken. Parliamentary scrutiny processes, including by the Parliamentary Joint Committee on Human Rights (PJCHR), are not necessarily effective to ensure that new laws comply with the *CRPD*.

The chapter explains that *CRPD* rights⁴ are not sufficiently incorporated into policy and practice in Australia. We refer to Australia's Disability Strategy 2021–2031 (ADS) and note the limited

requirements for governments and parliaments to consider the rights of people with disability in decision-making, law and policy. We identify opportunities to strengthen *CRPD* focal point arrangements and data collection. More detailed consideration of the ADS and data is set out in Volume 5, *Governing for inclusion*, and Volume 12, *Beyond the Royal Commission*.

The chapter refers to evidence demonstrating that limited awareness and understanding of disability rights, coupled with ableist attitudes, are linked to violence against, and abuse, neglect and exploitation of, people with disability. We discuss the essential role of advocacy for enabling many people with disability to exercise their rights. We consider how people with disability are not sufficiently involved in government decision-making processes and the development of law and policy that may impact their human rights.

Legislation over a period of 30 years or more has advanced some but not all of the rights of people with disability in Australia. However, the *CRPD* has not been fully implemented into laws, policies and practices in Australia. Significant opportunities remain to more effectively respect, protect and fulfil the human rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation. A stronger and more comprehensive legal framework is required to achieve equality and inclusion and advance the rights of people with disability.

2.2. Current rights protections have not prevented violence, abuse, neglect and exploitation

Why is it so difficult for people with disability to have the same basic human right as anybody else in this room or in the community? Why is it that we can't have the same basic things?⁵

The establishment of this Royal Commission was a response to significant concerns about violence against, and abuse, neglect and exploitation of, people with disability and failures to protect their human rights.⁶ Many past inquiries and reports also raised these concerns, as summarised in Volume 2, *About the Royal Commission*.

Data and information in Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*, shows that people with disability experience considerably more violence and abuse than people without disability.⁷ Violence and abuse can also be more pronounced for particular groups of people with disability who experience multiple forms of disadvantage, such as First Nations people⁸ and LGBTQA+ people.⁹

The data, information and evidence establish that people with disability:

- have worse health,¹⁰ educational¹¹ and labour force¹² outcomes, compared with people without disability
- come into contact with the justice system at higher rates as victims of crime¹³ and alleged offenders,¹⁴ and are incarcerated at disproportionate rates¹⁵
- can be forced into segregated settings and services, with no meaningful option but to live, work, socialise or study exclusively with other people with disability.¹⁶

The significant impacts and costs of violence, abuse, neglect and exploitation affect individuals as well as Australian society as a whole. In 2021–22, the cost of violence against, and abuse, neglect and exploitation of, people with disability in Australia was conservatively estimated to be \$46 billion.¹⁷ If more gaps in outcomes for people with disability were taken into account, the estimate is as high as \$74.7 billion.¹⁸

While Australia has taken many positive measures to respect, protect and fulfil the human rights of people with disability, current measures too often fail to protect people with disability from breaches of their human rights. This includes their right to live free from violence, abuse, neglect and exploitation.

We set out below a few of the many individual experiences of violence, abuse, neglect and exploitation we heard about across the course of our 33 public hearings, to illustrate the many human rights issues raised.

Box 4.2.1: Violence and abuse of women and girls with disability

Public hearing 17, ‘The experience of women and girls with disability with a particular focus on family, domestic and sexual violence’, examined the distinct experiences of violence and abuse of women and girls with disability and gaps in legal protections.

We heard from ‘Chloe’, who lives with cerebral palsy and uses a wheelchair.¹⁹ Chloe spoke about her support worker manipulating her into trusting him, and subjecting her to physical, sexual and financial abuse in her own home.²⁰ One of the assaults resulted in the loss of a pregnancy.²¹ She said:

He raped me. He put his dick in my vagina and in my bum hole. He would punish me by burning cigarettes around my vagina. He treated me like a dog ...²²

‘Clarisse’ spoke about her daughter ‘Romi’, who lives with tuberous sclerosis, a condition which involves intellectual disability, epilepsy and developmental delays.²³ Romi was subjected to sexual abuse by different carers, students and staff in education and care settings. This included at her primary school,²⁴ her high school²⁵ and a day options centre.²⁶ Clarisse said the impacts of these assaults on Romi’s mental health and behaviour have been significant and long-lasting.²⁷

In Volume 8, *Criminal justice and people with disability*, we propose reforms to better address family, domestic and sexual violence against women and girls with disability.

Box 4.2.2: Violence against and abuse of people with disability in public places

In Public hearing 28, 'Violence against and abuse of people with disability in public places', witnesses with disability told us that abuse is a common occurrence whenever they leave their homes.

Mr Tim Marks told us after he became an amputee, people would refer to him as a 'cripple', 'useless', or an 'inconvenience'.²⁸ Mr David Gearin described being verbally abused while walking with his guide dog, Odin. He was sworn at, called a 'bludger' and spat on.²⁹ Ricki Spencer, a transgender First Nations woman, was forcefully bumped into,³⁰ spat on³¹ and had things thrown at her.³²

Sexualised comments and harassment are frequently directed at women of short stature. Dr Debra Keenahan described two occasions where she was sexually assaulted by strangers on a train.³³ 'Jenni' told us she had been subjected to sexualised comments and abuse since about age 12.³⁴

In Chapter 4, 'Strengthening the Disability Discrimination Act', we recommend reforms to the *DDA* to strengthen protections against discrimination, harassment and vilification on the basis of disability.

Box 4.2.3: Poor conditions and treatment of people with disability in detention

We heard about poor conditions and abuse of people with disability in detention settings. The issues included seclusion, use of physical and chemical restraints, lack of essential medical care and mental health treatment, negative staff attitudes towards detainees and people with disability subjected to indefinite detention.³⁵

In Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', we heard about 'Melanie', a First Nations woman.³⁶ Melanie was found unfit to stand trial and served a limiting term in prison.³⁷ She was then made an involuntary patient and admitted to a forensic hospital,³⁸ where she was held in seclusion almost constantly for at least seven years.³⁹ Sometimes, she spent over 23 hours a day in a cell.⁴⁰ She was frequently restrained in the prone position.⁴¹

In Public hearing 27, 'Conditions in detention in the criminal justice system', we heard about the experiences of children and young people with disability. 'Nathan', a 23 year old Noongar man, described physical abuse by detention centre staff.⁴² He was also subjected to strip searching, use of mechanical restraints, isolation and extended lockdowns.⁴³ He described multiple self-harm attempts⁴⁴ and inadequate mental health care.⁴⁵ After one self-harm attempt, he was left naked on the floor of his cell.⁴⁶ Following that hearing, the State of Western Australia acknowledged the treatment of some young

people in detention in Western Australia, including those with disabilities, did not meet the standards set out in the *CRPD, Convention on the Rights of the Child*⁴⁷ or standards that Australia supports for juvenile detention.⁴⁸

In Volume 8 we recommend reforms to the use of indefinite detention, seclusion and restrictive practices in corrective settings. In Volume 9, *First Nations people with disability*, we make recommendations to improve human rights outcomes for First Nations people with disability.

Box 4.2.4: Equal access to health care for people with cognitive disability

Evidence before our inquiry established that people with cognitive disability have been, and continue to be, subject to systemic neglect in the Australian health system⁴⁹ and that the obligations imposed by the *CRPD* have often not been complied with.⁵⁰

In Public hearing 4, ‘Health care and services for people with cognitive disability’, Ms Jacqueline Mills spoke about her experiences as a mother and an advocate for people with disability. She described how health practitioners can let negative ideas about disability overshadow a diagnosis, leading them to see health issues as something that is ‘part’ of a person or their disability.⁵¹ As a result of these attitudes, health care and treatment for people with disability can be compromised.

Ms Toni Mitchell said her son suffered years of ‘agony and permanent internal damage’, because doctors dismissed his symptoms as part of his Down syndrome.⁵² Ms Kim Creevey described her son Harrison going into hospital for the final time before his death. Ms Creevey and her husband were asked if they wanted to ‘let Harri go’, rather than pursue treatment, because of assumptions made about the value of his life.⁵³ Dr Rebecca Kelly, whose son Ryan lives with Down syndrome, described how new doctors and nurses asked whether she underwent pre-natal testing. She believed they thought Ryan’s life was one that could and should have been ‘avoided’.⁵⁴

We also heard about failures to provide adaptations and supports to reduce distress and trauma when people with disability are receiving health care.⁵⁵

Volume 6, *Enabling autonomy and access*, discusses barriers to health care and identifies reforms to improve access to quality health care for people with disability.

Box 4.2.5: The human rights of First Nations people with disability

Information available to us raised numerous human rights issues facing First Nations people with disability, including:

- over-representation in child protection systems,⁵⁶ out-of-home care⁵⁷ and the criminal justice system⁵⁸
- the need for culturally safe and competent frameworks to support and prevent contact with the justice system⁵⁹
- the lack of accessible and culturally appropriate information about the NDIS in remote and very remote areas⁶⁰
- the cumulative effects of racism and ableism.⁶¹

For example, in Public hearing 3, ‘The experience of living in a group home for people with disability’, we heard from Ms Jane Rosengrave, a Yorta Yorta woman living with intellectual disability.⁶²

Ms Rosengrave lived in Community Residential Units (CRUs), now called group homes, between the ages of 17 and 25.⁶³ She told us she was not given a choice about moving to the CRUs or who she lived with, and had no privacy or access to medical care.⁶⁴ When she had fits, which were associated with her disability, staff would accuse her of trying to get out of her duties and punish her.⁶⁵ She said, ‘I recall feeling that my rights were not considered at all’.⁶⁶

Volume 9 considers the experiences and rights of First Nations people with disability and recommends structural and other reforms.

Box 4.2.6: Access to interpreters and information to realise rights

Lack of access to interpreters and accessible information results in people with disability not being able to understand, exercise or enjoy their human rights.

Ms Rebecca Adam, then Chief Executive Officer of Access Plus, described d/Deaf First Nations clients being arrested and spending days in custody without understanding the charges against them or being able to access a First Nations sign language interpreter.⁶⁷

Ms Catherine Dunn shared her experiences, as a Deaf woman, of receiving limited education about sex or consent.⁶⁸ The Auslan interpreter in her sex education class lacked the signs to translate the content adequately.⁶⁹ Ms Dunn said when she was assaulted, she ‘didn’t have the words or the language to describe what occurred’, and that acted as a barrier to disclosing the assault.⁷⁰

Ms Rosemary Kayess, legal academic and Vice Chairperson of the Committee on the Rights of Persons with Disabilities, said the absence of accessible information for people with disability in the early days of Australia's COVID-19 response 'created significant fear, anxiety and confusion' among people with disability.⁷¹

Volume 6 makes recommendations to promote accessible information and communications. Volume 7, *Inclusive education, employment and housing*, and Volume 8 consider these issues in education and criminal justice settings.

Box 4.2.7: Inappropriate use of psychotropic medication on people with disability

In Public hearing 6, 'Psychotropic medication, behaviour support and behaviours of concern', we heard from representatives of Speaking Up For You (SUFY). Ms Dianne Toohey and Ms Kathy Kendell told us about a client who had experienced trauma, abuse, neglect and sexual assault at a respite centre as a child. From the age of 19, he resided at a locked facility due to his 'challenging behaviours'.⁷² When he became a client of SUFY, he was taking 'a large cocktail of sedative, psychotropic, and anti-depressant medications'.⁷³ Ms Toohey and Ms Kendell said:

Our client would not have the capacity to explain what his experience of behaviour support was. However, our direct observation of the situation was that high doses of poly-pharmaceutical medication was the extent of his 'behaviour support'.⁷⁴

Ms Toohey said chemical restraint is often used as the first option, rather than an option of last resort.⁷⁵ Ms Kendell said 'while there is lip service paid to those [human rights] principles and legislation, often we find that we're up against a standing culture that sometimes reacts very differently'.⁷⁶

We found there is very often a power imbalance between people with cognitive disability and service providers, medical practitioners and others.⁷⁷ This can lead to use of psychotropic medication without the person with disability understanding what is happening or giving informed consent to the administration of the medication.⁷⁸ The use of psychotropic medication in response to behaviours of concern raises questions about Australia's compliance with the *CRPD*.⁷⁹

Volume 6 considers the over prescription and overuse of psychotropic medication and makes recommendations for reform.

The illustrations above are just a few of the experiences of violence against, and abuse, neglect and exploitation of, people with disability that were shared with our inquiry. We heard about many more through public hearings, private sessions and submissions. These experiences spanned many different settings, contexts and life stages. Many other examples are set out in other volumes of this *Final report*.

2.3. Current legal framework

The law shouldn't lean towards one way ... I reckon we need to be treated equally. We're all here, so treat us the same.⁸⁰

As discussed in Chapter 1, rights and obligations in the *CRPD* do not automatically form part of Australian law. Implementing *CRPD* rights requires parliaments to enact domestic laws setting out those rights and imposing legal obligations.

In this part, we do not discuss all the Australian laws that provide rights for people with disability or impose obligations on individuals, organisations or governments to respect the rights of people with disability. This section briefly outlines key Commonwealth laws that recognise or protect human rights of people with disability:

- *Disability Discrimination Act 1992* (Cth) (*DDA*)
- *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*)
- *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*)
- *Disability Services Act 1986* (Cth) (*DSA*).

This section also briefly considers state and territory anti-discrimination legislation and human rights laws. As explained in Chapter 1, the *CRPD* indicates that its provisions extend to all parts of federal States such as Australia 'without any limitations or exceptions'.⁸¹

Laws relevant to the rights of people with disability are also considered in other volumes of this *Final report*. For example:

- Volume 6 considers guardianship laws and supported decision-making, the regulation and use of restrictive practices, and involuntary sterilisation of people with disability.
- Volume 7 considers laws and policies relevant to education, employment and housing for people with disability.
- Volume 8 discusses key issues relating to the rights of people with disability who come into contact with the criminal justice system, both as people accused of a crime or as victims of crimes. It also considers reforms needed to Australian family and domestic violence laws.

There are also laws of general protection, such as laws prohibiting discrimination on the basis of sex, age and race, which apply to everyone including people with disability.⁸² The *Report on the key elements of the legislative framework affecting people with disability* prepared for the Royal Commission provides further detail about state, territory and Commonwealth laws that affect people with disability.⁸³

Disability Discrimination Act 1992 (Cth)

I feel I am being continually discriminated against because of disability. Discrimination is like crushing someone down. I have experienced that for years.⁸⁴

The *DDA* applies nationally and operates concurrently with state and territory anti-discrimination laws.⁸⁵ The Australian Government considers the *DDA* gives effect to its obligations to respect, protect and fulfil the rights of people with disability.⁸⁶ The operation of the *DDA* is considered in detail in Chapter 4.

The *DDA* predates the *CRPD*. The *DDA* was amended in 2009, including to make reference to the *CRPD*.⁸⁷ However, with limited exceptions, the amendments did not seek to incorporate or adapt articles of the *CRPD* into Australian law.

The objects of the *DDA* include the elimination of discrimination on the ground of disability and ensuring people with disability have the same rights to equality before the law as the rest of the community.⁸⁸

The *DDA* prohibits unlawful discrimination in certain areas including employment, education, access to premises, the provision of goods, services and facilities, and the administration of Commonwealth laws and programs.⁸⁹ The prohibition on discrimination on the basis of disability applies to any person, including individuals and organisations operating in those areas in both the public sector (such as all government departments and agencies) and the private sector (such as non-government employers, service providers and educational institutions).⁹⁰

The *DDA* provides for the Minister to formulate disability standards addressing particular issues.⁹¹ At the time of writing, three sets of disability standards have been formulated.⁹²

The *DDA* defines direct discrimination⁹³ and indirect discrimination⁹⁴ on the ground of disability. It also includes an obligation to make 'reasonable adjustments' to avoid direct and indirect discrimination.⁹⁵

If a person believes they have experienced disability discrimination, they can lodge a complaint with the Australian Human Rights Commission (AHRC).⁹⁶ The AHRC will inquire into and attempt to conciliate the complaint.⁹⁷ If conciliation is unsuccessful, the President of the AHRC terminates the complaint and the complainant may start a proceeding in the Federal Court of Australia or the Federal Circuit and Family Court of Australia.⁹⁸ If the claim is successful, the court may make a variety of orders, including an order that the discrimination stop and an order for compensation.⁹⁹

The *DDA* established the role of the Disability Discrimination Commissioner.¹⁰⁰ The Commissioner is responsible for giving effect to the objects of the *DDA* and promoting the human rights of people with disability.¹⁰¹ The *DDA* also allows for, but does not require, the preparation of disability action plans by duty-holders.¹⁰²

Through prohibiting unlawful discrimination and providing a remedy with enforcement mechanisms, the *DDA* advances the right to equality and non-discrimination to a certain extent. However, it only enacts particular elements of the *CRPD* into domestic law and does not give effect to the human rights of people with disability more generally. The AHRC and the Committee on the Rights of Persons with Disabilities (CRPD Committee) have both raised concerns about this issue.¹⁰³

The test for discrimination is complex and can be difficult to apply in practice. The AHRC has recommended simplifying the test.¹⁰⁴

The CRPD Committee recommended strengthening the *DDA* in a number of respects, including by prohibiting systemic, intersectional and multiple forms of discrimination.¹⁰⁵

In Chapter 4, we discuss the operation of the *DDA* and propose reforms to strengthen its ability to protect the human rights of people with disability.

State and territory anti-discrimination laws

All states and territories have enacted anti-discrimination legislation which operates concurrently with Commonwealth anti-discrimination legislation.¹⁰⁶ Legislation enacted by each jurisdiction protects against unlawful discrimination on the basis of 'disability'¹⁰⁷ or 'impairment',¹⁰⁸ but the legislation is not uniform and defines these terms differently.¹⁰⁹

In Victoria, there is also a duty on employers, firms, educational authorities and service providers to make reasonable adjustments for people with disability for particular purposes.¹¹⁰ Victoria also imposes a general positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.¹¹¹

All states and territories largely follow the same process for resolving complaints of disability discrimination. A complaint must be made to the relevant human rights or anti-discrimination body,¹¹² and it is common for most complaints to be resolved by a private and confidential conciliation process.¹¹³ All jurisdictions except Victoria¹¹⁴ require conciliation to be attempted or considered before an action can be brought in a tribunal or court.

Like the *DDA*, state and territory anti-discrimination legislation advances the right of people with disability to equality and non-discrimination, but was not intended to and does not implement *CRPD* rights in full.

Human rights complaints under the *Australian Human Rights Commission Act 1986* (Cth)

The AHRC is an independent statutory body and Australia's national human rights institution. The Australian Government considers the AHRC plays a strong role in promoting, protecting and monitoring the implementation of the *CRPD*.¹¹⁵

If a person believes their human rights have been breached by an act or practice of the Commonwealth, they can lodge a complaint with the AHRC.¹¹⁶ These human rights include the rights in the *CRPD*¹¹⁷ and certain other international instruments relevant to people with disability.¹¹⁸ The AHRC can inquire into an act or practice by the Commonwealth that may be inconsistent with or contrary to human rights¹¹⁹ and conciliate complaints.¹²⁰

The AHRC also has educative functions, including to promote an understanding of human rights.¹²¹ It has the power to report to the Attorney-General on laws that should be made or actions that should be taken on matters relating to the *CRPD*¹²² and to intervene in court proceedings that relate to the *CRPD*.¹²³

Unlike a claim of unlawful discrimination under the *DDA*, if the AHRC cannot conciliate a human rights complaint, the complainant has no ability to bring a court proceeding to obtain a remedy.¹²⁴ As a result, the AHRC considers its ability to address human rights complaints (which include complaints regarding *CRPD* rights) is very limited.¹²⁵ This may be a partial explanation for the consistently low number of complaints about breaches of *CRPD* rights made to the AHRC.¹²⁶

The *CRPD* Committee has stated that the AHRC's human rights complaints process is not an effective remedy as it does not provide an enforceable remedy for rights violations.¹²⁷ The AHRC has recommended that where a human rights complaint cannot be conciliated, the complainant should be able to seek a remedy through a court.¹²⁸

National Disability Insurance Scheme Act 2013 (Cth)

Throughout his time in care services, he attempted to maintain his own personal dignity ... He fought for his life and his rights every day, like going to war ... NDIS services should be about choice, control and respect ...¹²⁹

The *NDIS Act* introduced a national scheme for the delivery of individualised supports and services to eligible people with disability.¹³⁰ The establishment of this scheme was a significant development.

However, we heard evidence in several public hearings about violence against, and abuse, neglect and exploitation of, people with disability in the course of receiving services under the NDIS.¹³¹ Witnesses spoke about physical and sexual assault, intimidation, verbal abuse, unexplained injuries, lack of personal care and cleaning, and the non-consensual recording of intimate images.¹³² These experiences are relevant to a number of rights under the *CRPD*.

This section briefly considers the *NDIS Act* and human rights. Violence, abuse, neglect and exploitation in the provision of disability services, and the operation and regulation of the NDIS, are considered in more detail in Volume 10, *Disability services*.

The Australian Government has described the NDIS as a significant mechanism for implementing the *CRPD*.¹³³ It considers that the NDIS gives effect to various *CRPD* obligations.¹³⁴ It has also described the NDIS Quality and Safeguards Commission (NDIS Commission) as a significant step that improves *CRPD* implementation.¹³⁵

The stated objects of the *NDIS Act* include giving effect to Australia's obligations under the *CRPD* and other core international human rights treaties.¹³⁶ In some circumstances, Australian courts can have regard to obligations under the *CRPD* when interpreting the *NDIS Act*.¹³⁷ However, the *NDIS Act* does not implement all of Australia's obligations under the *CRPD*.

The *NDIS Act* contains general principles for guiding actions under the Act, and guiding the actions of people who may do acts or things on behalf of a person with disability.¹³⁸ The general principles refer to the human rights of people with disability.¹³⁹ The *NDIS Act* requires certain decision-makers, such as the Chief Executive Officer of the National Disability Insurance Agency (NDIA), to have regard to the general principles when exercising their functions.¹⁴⁰

The *NDIS Act* is supported by a number of legislative instruments, in the form of rules, which recognise the rights of people with disability, such as the *NDIS (Provider Registration and Practice Standards) Rules 2018* (Cth) and the *NDIS (Practice Standards – Worker Screening) Rules 2018* (Cth).¹⁴¹ Various NDIS policies, such as the Participant Safeguarding Policy, also recognise human rights.¹⁴²

The NDIS Commissioner, established under the *NDIS Act*, has core functions which include 'to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services'.¹⁴³ The NDIS Commissioner can commence civil penalty proceedings or take a range of administrative actions against a person for relevant contraventions of the *NDIS Act* or rules.¹⁴⁴

The *NDIS Act* recognises some *CRPD* rights. It also creates a mechanism for lodging complaints. However, it does not create enforceable remedies for individual NDIS participants if service providers or others breach the rights recognised in the *CRPD*.

The *NDIS Act* is also limited in its application, in that the vast majority of people with disability in Australia are not NDIS participants.¹⁴⁵ The CRPD Committee has raised concerns about:

[t]he lack of additional oversight, complaint and redress mechanisms needed for persons with disabilities who are not eligible for the [NDIS], older persons with disabilities and, particularly, women with disabilities.¹⁴⁶

In October 2022 the Australian Government announced a review of the NDIS.¹⁴⁷ A final report is due by October 2023.¹⁴⁸

Disability Services Act 1986 (Cth)

I am so fed up with organisations thinking that just because ...
your person's got special needs that they don't deserve the same
rights as anybody else.¹⁴⁹

The *DSA* provides the legislative basis for Commonwealth funding for a range of services for people with disability, including accommodation support, advocacy, and employment.¹⁵⁰ Under the *DSA*, the Minister can make grants of financial assistance to a state, territory or eligible organisation. Grants may be given subject to terms and conditions and must meet certain standards determined by the Minister.¹⁵¹ Terms and conditions can be about the rights of people in relation to service provision.¹⁵²

The objects clause of the *DSA* does not refer to the human rights of people with disability,¹⁵³ and the legislation does not expressly give effect to any *CRPD* rights.

The 2013 National Standards for Disability Services (NSDS) made under the *DSA* do refer to the *CRPD* and human rights. They set out human rights principles,¹⁵⁴ which are said to be 'relevant across all the standards'.¹⁵⁵ While this has symbolic significance, the NSDS do not protect *CRPD* rights or create enforceable remedies when those rights are breached. The NSDS are primarily enforced through contractual arrangements between the Australian Government and service providers.¹⁵⁶ The Australian Government accepted in a consultation paper that under the *DSA* 'clauses in grant agreements are the only means to establish quality and safeguards for funded services'.¹⁵⁷

The *DSA* was enacted in 1986, well before Australia became a party to the *CRPD*, and has not been significantly updated in more than 30 years.¹⁵⁸ The *DSA* also pre-dated the NDIS, the establishment of which affected many of the programs and services originally funded under the *DSA*. The Australian Government has observed that the disability policy landscape has 'changed markedly' since the creation of the *DSA*.¹⁵⁹ It recognises the *DSA* is no longer fit-for-purpose, uses outdated language, and needs to be revised to better align with Australia's commitments under the *CRPD*.¹⁶⁰

In November 2022, the Australian Government announced it was undertaking a review¹⁶¹ to repeal and replace the *DSA*.¹⁶² The review will consider, among other issues, revising the objects of the Act to refer to human rights and the *CRPD*,¹⁶³ and reforming the NSDS and quality and safeguarding arrangements.¹⁶⁴ At the time of writing this report, the review was ongoing.

We welcome the review and the stated commitment by the Australian Government that the new Act will 'affirm Australia's commitment to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for people with disability, as expressed in the UN CRPD'.¹⁶⁵

State and territory disability services and inclusion laws

State and territory disability inclusion legislation recognises, to some extent, the human rights of people with disability.¹⁶⁶

These laws regulate service delivery and quality and safeguarding measures, such as the management of complaints, use of restrictive practices, community visitor schemes and worker screening.¹⁶⁷ However, the introduction of the NDIS has significantly reduced the role of states and territories in the delivery of disability services. Reviews are underway or have recently been completed in several jurisdictions to determine the purpose state and territory laws and policies should serve following the introduction of the NDIS.¹⁶⁸

Most of those laws refer to the rights of people with disability in the objects or principles section,¹⁶⁹ but do not provide a mechanism to enable people with disability to enforce those rights. For example, generally speaking, a person with disability has no recourse to a court if the rights recognised in those laws are breached,¹⁷⁰ or if rights recognised under the *CRPD* more broadly are breached.

Some disability services legislation creates specific mechanisms for complaints about the delivery of disability services run or funded by the state or territory.¹⁷¹ Others establish bodies with responsibilities for upholding the rights of people receiving disability services. For example, the *Disability Act 2006* (Vic) establishes a Disability Services Commissioner¹⁷² and a majority of states and territories have community visitor schemes.¹⁷³ Community visitor schemes are discussed further in Volume 11, *Independent oversight and complaint mechanisms*.

The proposed Victorian Disability Inclusion Bill, which was in exposure draft form at the time of preparing this report, provided a model to enhance recognition and protection of the rights of people with disability in Victoria.¹⁷⁴ For example, it proposed imposing a positive duty on 'defined entities'¹⁷⁵ to promote the inclusion of people with disability, and take necessary and proportionate action towards achieving disability inclusion.¹⁷⁶ However, the positive duty would not give an individual legal rights if the duty was not fulfilled.¹⁷⁷ The exposure draft of the Victorian Disability Inclusion Bill also proposed a new Commissioner for Disability Inclusion to help promote and advance disability inclusion.¹⁷⁸

State and territory human rights laws

As noted in Chapter 1, human rights laws have been enacted in two states and one territory. The absence of a federal human rights law is discussed below in Section 2.4.

In the Australian Capital Territory, the *Human Rights Act 2004* (ACT) (*ACT HRA*) protects civil and political rights¹⁷⁹ and some economic, social and cultural rights, including rights to culture, education and work.¹⁸⁰ In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*) protects civil and political rights,¹⁸¹ and cultural and property rights.¹⁸² In Queensland, the *Human Rights Act 2019* (Qld) (*Qld HRA*) protects civil and political rights,¹⁸³ and some economic, social and cultural rights including the rights to culture, education and health services.¹⁸⁴

Each of those laws makes it unlawful for public authorities or entities to:¹⁸⁵

- act in a way that is incompatible with human rights
- fail to give proper consideration to a relevant human right in making a decision.

Each of those laws also broadly:

- provides for scrutiny of proposed legislation for compatibility with human rights¹⁸⁶
- requires legislation to be interpreted by courts in a manner that is compatible with human rights¹⁸⁷
- creates remedies of various kinds where rights are breached¹⁸⁸
- empowers courts to make a declaration of incompatibility that a law is not consistent with a human right,¹⁸⁹ but state that such a declaration does not affect the validity of the law.¹⁹⁰

In addition, the *Victorian Charter* and *Qld HRA* each allow their respective parliaments, in exceptional circumstances, to declare that an Act, or a provision of an Act, has effect despite being incompatible with one or more of the human rights set out in the human rights legislation (an 'override declaration').¹⁹¹ The member of parliament who introduces a Bill containing an override declaration is obliged to make a statement explaining the exceptional circumstances that justify the inclusion of the override declaration,¹⁹² but a failure to make such a statement does not affect the validity of the law.¹⁹³ Where an override declaration is made, human rights legislation has no application to the extent of that declaration.¹⁹⁴ Courts cannot make a declaration that the provision subject to the override declaration is incompatible with human rights.¹⁹⁵

Under the *Qld HRA*, complaints may be conciliated by the Queensland Human Rights Commission.¹⁹⁶ Complaints cannot be made to the Victorian Equal Opportunity and Human Rights Commission under the *Victorian Charter* and therefore the Commission does not have a conciliation function for human rights complaints.¹⁹⁷ The Victorian Ombudsman has investigative powers to consider human rights but these do not extend to dispute resolution.¹⁹⁸ In October 2022, the Australian Capital Territory announced it would create a pathway for human rights complaints to the ACT Human Rights Commission. Legislation to give effect to this reform will be developed in 2023.¹⁹⁹

In Public hearing 31, ‘Vision for an inclusive Australia’, representatives from the Queensland Government acknowledged the legislative requirement to review the *Qld HRA* as soon as practicable after 1 July 2023, and confirmed the review would consider amendments to address *CRPD* rights.²⁰⁰

The state and territory human rights laws are extremely important steps in protecting human rights in Australia. However, none of them are expressly aimed at recognising or protecting the rights of people with disability. Consequently, these laws do not incorporate a disability perspective in their protection of human rights, nor address disability-specific inequalities or barriers.

Of course, state and territory human rights laws only apply in the jurisdiction which enacted them, meaning that human rights protection in Australia depends on where the breaches occur. Queensland Advocacy Incorporated referred to this unequal coverage as ‘a post-code lottery for people with disability in Australia’.²⁰¹ Importantly, state and territory human rights laws do not apply to or bind the Australian Government, and operate subject to the *Australian Constitution* and valid Commonwealth laws.²⁰²

In submissions to the Royal Commission, the Law Institute of Victoria and the Queensland Office of the Public Guardian, among others, called for a national human rights law to implement the *CRPD*, in addition to existing jurisdictional human rights laws.²⁰³

2.4. *CRPD* rights are not adequately protected under Australian law

We won’t get outcomes by hoping and praying. We actually need implementation of instruments.²⁰⁴

As discussed in Chapter 1, article 4(1) of the *CRPD* requires Australia to adopt ‘all appropriate legislative, administrative and other measures’ for the implementation of the human rights recognised in the *CRPD*.²⁰⁵ Australia has obligations to respect, protect and fulfil human rights, including the right to an effective remedy for breaches of those rights.²⁰⁶

There is no national legal protection of human rights generally

Relying on state and territories to enact human rights legislation means that access to justice and human rights protections is inconsistent and dependent upon a person's location rather than a universally accessible right for all Australians that is consistent with the concept of all human beings being born equal and possessing inalienable rights.²⁰⁷

As noted in Chapter 1, Australia has no national human rights legislation or constitutional bill of rights. The *Australian Constitution* and the common law recognise only a limited number of rights and freedoms.²⁰⁸ Common law protections are fragile because the Australian Parliament, and state and territory parliaments, can enact laws which override common law rights.²⁰⁹

The lack of legislative protection of human rights, and adverse impacts on the rights of people with disability, emerged as a consistent theme in our inquiry. For example, Women With Disabilities Australia said 'there is no federal human rights act in Australia that would enable comprehensive [and] uniform legislative, administrative and judicial human rights protections' for people with disability.²¹⁰

The Australian Lawyers Alliance,²¹¹ Law Council of Australia,²¹² Queensland Human Rights Commission,²¹³ Public Interest Advocacy Centre,²¹⁴ Children and Young People with Disability Australia, Human Rights Law Centre and People with Disability Australia,²¹⁵ among others, told us there is a need for federal human rights legislation to protect the rights of people with disability.

We were told a federal human rights law would provide important protections for people with disability. For example:

- In a joint submission, Children and Young People with Disability, Human Rights Law Centre, and People with Disability Australia considered a charter of rights 'makes a huge difference to the lives of people with disability'. The submission said that, at present, many people with disability are prevented from fully enjoying their rights due to 'a combination of neglect with respect to critical services, or cultural attitudes that lead to discrimination'.²¹⁶
- The Law Council of Australia recommended a federal human rights act to 'improve the experience of people with disability who interact with the criminal justice system' and to more broadly strengthen a 'national culture of respect for the human rights of persons with disability'.²¹⁷

The AHRC argued Australia's laws are not sufficient to provide the human rights protections that all people are entitled to.²¹⁸ It said human rights are not always respected and protected by

governments in Australia,²¹⁹ and failures to protect human rights most often harm people who are already disadvantaged and marginalised.²²⁰

In its position paper *Free and Equal: A Human Rights Act for Australia*, the AHRC has called for the enactment of a federal Human Rights Act.²²¹ It has also recommended reforms to Commonwealth anti-discrimination laws to provide greater protection for human rights.²²²

At the time of preparing this report, the PJCHR was also undertaking an inquiry into the scope and effectiveness of Australia's Human Rights Framework and National Human Rights Action Plan (PJCHR inquiry).²²³

While consideration of a federal Human Rights Act is beyond our terms of reference, human rights and anti-discrimination law reform along the lines proposed by the AHRC has the potential to enhance rights protection for all Australians, including people with disability. However, even with these reforms, more protection of the human rights of people with disability would still be needed.

As discussed in our *Interim report*, people with disability have been subject to discrimination, exclusion and violence for much of Western history, and throughout Australia's postcolonial history. Historically, laws and policies commonly positioned people with disability as passive receivers of protection, rehabilitation or welfare, rather than as rights holders.²²⁴

Although significant advances have been made, rights protections in existing laws have not produced equality of outcomes for people with disability. Many existing laws and complaint systems are generally built by and for people without disability and fail to address the discrimination, marginalisation and exclusion experienced by people with disability. There are also particular features that may heighten the risk of rights violations for people with disability, present barriers to disclosure or reporting, and make monitoring breaches of human rights more challenging.

For example, some people with disability need to navigate a number of different systems to access services and supports. Many people with disability, particularly those with high support needs, rely on disability services to participate fully in the community and realise their human rights.²²⁵ Some people with disability can be forced into segregated settings and services, with no meaningful option but to live, work, socialise or study with other people with disability.

Data and other information available to us also confirmed the unacceptable levels of violence against and abuse of people with disability in Australia, particularly compared with the experiences of people without disability.²²⁶

We consider stronger, more comprehensive and specifically tailored measures are required to effectively protect the human rights of people with disability in Australia. The nature and extent of violence, abuse, neglect and exploitation of people with disability calls for a human rights framework that explicitly addresses the needs of people with disability, actively safeguards rights and seeks to bring about equality of outcomes.

Limited legal protection of disability rights

Australia's history of having a very ad hoc and piecemeal framework around protecting human rights needs to be addressed ... What we have got at the moment is a piecemeal, ad hoc approach that leaves gaping holes for the denial and violations of human rights to occur. So mechanisms that can establish *CRPD* as part of our domestic framework I think are critical.²²⁷

Few *CRPD* rights are part of domestic law

Under Australia's current legal framework, many *CRPD* rights are not incorporated into Australian law and cannot be legally enforced in Australian courts or tribunals. Other rights are reflected in domestic law to a very limited extent, for example rights to education, health, and participation.²²⁸

We acknowledge the legislation identified by the Australian Government implementing Australia's obligations under the *CRPD*.²²⁹ The legislation includes the *DDA*²³⁰ and laws establishing the NDIS, NDIS Commission and the AHRC.²³¹ However in our view these laws, while very important, do not fully implement the *CRPD* and do not go far enough in protecting the human rights of people with disability and providing access to an effective remedy when their rights are breached.

Consistent concerns have been raised with the Royal Commission about the current piecemeal approach to protecting the human rights of people with disability. For example:

- The AHRC said existing Commonwealth, state and territory laws that reference the *CRPD* are not sufficient to implement it.²³²
- The Australian Lawyers Alliance told us 'there is inadequate statutory human rights protection for people with disability and this is a major reason why the rights of people with disability are not adequately respected, promoted or realised'.²³³
- The Law Institute of Victoria stated 'Australian law lacks clear human rights protections to set the standards in the disability sector'.²³⁴
- Inclusion Australia told us 'there is no comprehensive legal framework for the protection of human rights in Australia' and the *CRPD* 'has not been fully incorporated into Australian law'.²³⁵

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- The Queensland Human Rights Commission said existing laws and policies for protecting the human rights of people with disability at the Commonwealth level do not ‘comprehensively fulfil the specific human rights and fundamental freedoms all people, with or without disability, should enjoy’.²³⁶
 - The Australian Federation of Disability Organisations stated ‘the rights of people with disability have not been fully acknowledged or recognised in Australian law or practice to date’.²³⁷

In its 2019 *Concluding observations on the combined second and third periodic reports of Australia* (Concluding Observations), the CRPD Committee stated there was ‘insufficient harmonization’ of Australia’s domestic legal system with the *CRPD*.²³⁸

In a report prepared for the Royal Commission, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia’s level of compliance*,²³⁹ Emeritus Professor Ron McCallum AO considered Australia’s compliance with certain articles of the *CRPD*, including:

- article 5, the right to equality and non-discrimination. The report stated Australia is not fully complying with article 5 because Commonwealth laws do not provide remedies for intersectional discrimination.²⁴⁰ Intersectional discrimination and recommendations for change are considered below. Professor McCallum also stated that the *DDA* ‘does not fully align’ and is narrower in coverage than article 5. Chapters 3 and 4 consider this issue further.
- article 12, the right to equal recognition before the law. In his report, Professor McCallum suggested the Australian Government examine the feasibility of legislating the Commonwealth decision-making model proposed by the Australian Law Reform Commission, which included a set of National Supported Decision-Making Principles.²⁴¹ Professor McCallum also suggested the Australian Government consider revoking its interpretive declaration concerning article 12.²⁴² Volume 6 discusses those issues.
- article 14, the right to liberty and security of the person; article 15, the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment; and article 17, the right to integrity of the person. Professor McCallum observed ‘detention practices run contrary to article 14, while the use of restraints can constitute inhuman and/or degrading behaviour forbidden by article 15’.²⁴³ He recommended:
 - governments review laws regarding involuntary and community treatment orders, to bring them into line with articles 14, 15 and 17²⁴⁴
 - amendment of laws that permit non-therapeutic sterilisation of people with disability without their full and free consent.²⁴⁵

Volume 3 discusses information and data regarding reproductive rights of people with disability. Volume 6 considers involuntarily sterilisation, supported decision-making and guardianship, and the use of restrictive practices, and makes recommendations for reform. Detention of people with disability is considered in Volume 8.

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- article 19, the right to live independently and be included in the community. Professor McCallum suggested governments ‘establish a plan to immediately close any remaining large residential institutions’ and ‘ensure that within a reasonable time, all present and future housing needs and attendant services are available and comply with article 19’.²⁴⁶ Volume 7 considers inclusive homes and living.

Professor McCallum also considered Australia’s compliance with a number of other *CRPD* rights such as article 7 on the rights of children with disability;²⁴⁷ article 29 on the right to participation in political and public life;²⁴⁸ and article 18 on the right to liberty of movement and nationality.²⁴⁹

Professor McCallum concluded as follows:

Australia has taken some important steps to meet its *CRPD* obligations. However, Australia is a wealthy nation, and should be held to a high standard. More than a decade after ratification, there are many rights in the *CRPD* that have not been incorporated into Australian law, and there are still too many Australians with disability who experience discrimination, disadvantage and human rights violations, especially among First Nations peoples.²⁵⁰

Limited protection against intersectional discrimination

... we’re not only oppressed on the basis of our gender, but also on the basis of our disability and, for many of us too, on the basis of our race and many different other parts of our Personhood.²⁵¹

Our terms of reference require us to consider the multi-layered experiences of people with disability, particularly First Nations people with disability and culturally and linguistically diverse people with disability.²⁵²

Under article 5 of the *CRPD*, Australia has obligations to enact comprehensive anti-discrimination legislation accompanied by ‘appropriate and effective legal remedies and sanctions in relation to intersectional discrimination in civil, administrative and criminal proceedings’.²⁵³ As discussed in Chapter 1, intersectional discrimination means discrimination on multiple grounds which are inseparable, exposing individuals to unique types of disadvantage and discrimination.²⁵⁴

At a national level, protection against discrimination is found in four separate Commonwealth anti-discrimination laws. When the Commonwealth has relied on its available heads of power, including the external affairs power (set out in section 51(xxix) of the *Australian Constitution*) to enact a law to give effect to Australia’s international obligations, the result has been separate laws to address race, sex, disability and age discrimination.²⁵⁵

Witnesses gave evidence of experiences of intersectional discrimination. They also told us about the inadequacy of legal protections due to the sometimes inconsistent operation of the four separate Commonwealth laws.

For example, in Public hearing 8, ‘The experiences of First Nations people with disability and their families in contact with child protection systems’, Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, told us First Nations women with disability ‘sit at the intersection of three marginalised population groups and forms of discrimination: racism, sexism and ableism’.²⁵⁶ She said this intersection ‘leaves them highly vulnerable to systemic and intersectional forms of discrimination’.²⁵⁷

In Public hearing 9, ‘Pathways and barriers to open employment for people with disability’, Disability Discrimination Commissioner, Dr Ben Gauntlett, pointed out the *DDA* does not have ‘intersectional operation’.²⁵⁸ He said:

People with disabilities have genders, they have racial backgrounds, they have culturally and linguistically diverse backgrounds and we need to recognise that intersectional basis upon which they live in terms of protecting their rights.²⁵⁹

In Public hearing 29, ‘The experience of violence against, abuse, neglect and exploitation of people with disability from culturally and linguistically diverse communities’, Mr Dominic Hồng Đức Golding, Policy Officer at the National Ethnic Disability Alliance, described his experience as a culturally and linguistically diverse person with disability in rural Australia. He said:

I’m an adopted person. I was raised in regional, rural Australia. Vietnamese identifying, but I do not speak or read Vietnamese. I am a war baby. So, conflict has been a very big thing in my life. I wear a cochlear. I have Katie, the hearing dog, and I’m also an artist who works with children with disability in Vietnam ...

I personally could not learn Auslan. There was ... no one to teach me. I could not socialise, even if I learnt Auslan, in regional Australia. And of course being Chinese, Vietnamese heritage, there is this extra layer of complexity in terms of the fact the Vietnamese Australians as refugees from the 1978 onwards is a marginalised community within the Vietnamese community.²⁶⁰

In Public hearing 29, Race Discrimination Commissioner, Mr Chin Tan, described weaknesses with the AHRC’s anti-discrimination complaints process. Where a complaint raises intersectional discrimination, individual aspects of the complaint must be channelled through each relevant Commonwealth anti-discrimination law. Mr Tan said:

this becomes a very complex unwieldy and difficult and burdensome responsibility on a complainant to have to navigate to different legislations, to find a complaint mechanism that is responsive and capable of looking into their intersectional needs as a person who could be looking at ... [a] complaint based on disability, race, and perhaps even gender.²⁶¹

The Australian Government accepted that existing Commonwealth laws do not facilitate an individual bringing a complaint relating to multiple protected attributes.²⁶² However, it considered its obligation under the *CRPD* is ‘to remove barriers to people being able to bring a claim for other grounds of discrimination, not to address intersectionality’.²⁶³ On that basis, the Australian Government did not accept Australia was not compliant with the *CRPD* when it came to incorporating or implementing protections against intersectional discrimination.²⁶⁴

The AHRC has expressed concern that people with disability are not adequately protected from intersectional discrimination. It told us the effects of intersectional discrimination on First Nations people with disability are ‘particularly pronounced’.²⁶⁵ The AHRC has proposed legislative reforms to protect against discrimination on the basis of a person’s multiple protected attributes.²⁶⁶ The *CRPD* Committee has similarly expressed concern that Australia does not have an effective legislative framework to protect people with disability from systemic, intersectional and multiple forms of discrimination.²⁶⁷

Following Public hearing 29, Counsel Assisting submitted it was open to the Royal Commission to consider recommendations to better promote and protect the rights of people with disability from culturally and linguistically diverse backgrounds,²⁶⁸ including improving legal protections against discrimination based on intersectional identity and experiences.²⁶⁹ In Chapter 3, ‘Strengthening protection through an Australian Disability Rights Act’, we recommend legislative protection of the human rights of people with disability on a combination of protected grounds, to address intersectional discrimination.

No mechanism to ensure Australia’s laws are consistent with the *CRPD*

All policy and regulatory measures capable of impacting on the rights or wellbeing of people with disability should be subject to transparent, public scrutiny, fully incorporating lived experience.²⁷⁰

Article 4(1) of the *CRPD* requires Australia to ensure new laws are consistent with the *CRPD*.²⁷¹ Laws which predate the *CRPD* should be amended or repealed if they are inconsistent with the *CRPD*.²⁷²

As noted above, while there are some mechanisms intended to align laws with the *CRPD*, none ensure Australian laws are consistent with the *CRPD* in practice.

No recent comprehensive review of Commonwealth laws for this purpose has been undertaken, and parliamentary scrutiny processes for new laws are not necessarily effective to ensure new laws comply with Australia’s international human rights obligations. Further, Commonwealth,

state and territory laws that are inconsistent with international human rights law cannot be challenged in, or invalidated by, an Australian court merely because of that inconsistency.²⁷³

Some existing laws are inconsistent with the *CRPD*

During Public hearing 18, ‘The human rights of people with disability and making the *Convention on the Rights of Persons with Disabilities* a reality in Australian law, policies and practices’, we heard from Mr Andrew Walter, First Assistant Secretary of the Integrity and Security Division of the Attorney-General’s Department. Mr Walter gave evidence that a review of Australia’s compliance with the *CRPD* was undertaken more than a decade ago, prior to Australia’s ratification of the *CRPD*.²⁷⁴

Following that review, a National Interest Analysis was prepared which set out ‘[d]etails on how Australia’s legislation, policies and programs implement the [*CRPD*]’.²⁷⁵ In that analysis, the Australian Government considered implementation of immediately realisable rights was in conformity with the *CRPD*.²⁷⁶ It considered implementation of rights requiring progressive realisation was also ‘substantially in conformity’.²⁷⁷ However, the nature and scope of the review undertaken to reach those conclusions at that time is not clear.

Some laws of importance to people with disability have been reviewed since Australia ratified the *CRPD*. For example, in 2014 the Australian Law Reform Commission reviewed laws which denied or diminished equal recognition of people with disability.²⁷⁸ It made recommendations for legislative change,²⁷⁹ but many have not been implemented. States and territories have conducted reviews more recently in relation to guardianship and supported decision-making.²⁸⁰ Those reviews are considered further in Volume 6.

According to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), of which Australia is a member state, countries should undertake comprehensive reviews of existing domestic laws to ensure compliance with the *CRPD*.²⁸¹ UNESCAP explained this should include constitutions, primary legislation and other legal instruments at national, state and local levels.²⁸² The review should be conducted with the meaningful participation of people with disability and their representative organisations.²⁸³ Such reviews should be ‘ongoing and repeated’.²⁸⁴

UNESCAP recently adopted the Jakarta Declaration, which reiterated its members’ commitment to harmonising national legislation with the *CRPD*.²⁸⁵ It released a report about aligning domestic laws with the *CRPD*, which considered measures taken by members and lessons learned.²⁸⁶

Despite the above, submissions to the Royal Commission identified legislation requiring amendment to ensure consistency with the *CRPD*. For example:

- The AHRC recommended Australia adopt uniform legislation prohibiting the administration of contraceptives and abortion procedures without consent, and the sterilisation of adults and children with disability.²⁸⁷

- The Law Council of Australia recommended a review and reform of laws relating to fitness to stand trial.²⁸⁸
- Women With Disabilities Australia recommended the Australian Government review laws ‘that underpin care, treatment and protection frameworks, such as guardianship, mental health and justice diversion’.²⁸⁹

A research report prepared for the Royal Commission argues that some existing legal and regulatory frameworks permit violations of the human rights of people with disability, or heighten the risk of violations occurring.²⁹⁰ For example, under some Australian laws actions that would be considered unlawful assaults or forced medical treatment if applied without consent to a person without disability, may be permitted in relation to people with disability.²⁹¹

We consider legal frameworks that require amendment to align with the *CRPD* in more detail in other volumes of this *Final report*, including Volumes 6, 7 and 8.

Future laws may be inconsistent with the *CRPD*

There are a number of Commonwealth parliamentary committees that scrutinise proposed legislative reforms for consistency with Australia’s international and domestic legal obligations, including consistency with human rights. These include, for example, the PJCHR, the Senate Standing Committees on Legal and Constitutional Affairs²⁹² and the Senate Standing Committee for the Scrutiny of Bills.²⁹³ In addition, the Joint Standing Committee on Treaties inquires into any proposed action on treaties by Australia (such as proposed signing or ratification of a treaty).²⁹⁴ However, in practice, none of these mechanisms ensures that future legislation is consistent with the *CRPD*.

The most relevant of these mechanisms is the PJCHR. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires the PJCHR to scrutinise proposed Commonwealth laws to determine whether they are consistent with human rights, including rights recognised in the *CRPD*.²⁹⁵ The Australian Government’s background paper on the *CRPD* refers to the role of the PJCHR in reporting on whether new and existing legislation is compatible with international human rights standards.²⁹⁶

Every bill introduced to parliament, and certain legislative instruments, must be accompanied by a statement of compatibility assessing whether the bill or instrument is compatible with human rights.²⁹⁷ Statements of compatibility are reviewed by the PJCHR, which reports to both houses of parliament.

The PJCHR process was introduced to help develop a ‘culture of human rights within the public service’²⁹⁸ and to enhance understanding and ‘recognition of human rights issues in legislative and policy development’.²⁹⁹ We welcome these aims. However, any view expressed or recommendation made by the PJCHR is not binding on parliament. There is nothing in the PJCHR model which prohibits or prevents the enactment of laws which infringe *CRPD* rights. The views of the PJCHR might persuade parliament to amend incompatible provisions before they become law, but this does not necessarily occur in any given case.

In Public hearing 18, Emeritus Professor Andrew Byrnes said relatively few immediate changes to Bills have been made in response to criticisms by the PJCHR.³⁰⁰ Professor Byrnes identified timing as part of the problem, explaining that scrutiny comes at a very late stage of the legislative process.³⁰¹

The AHRC has also observed that statements of compatibility are of ‘variable quality’.³⁰² As part of its federal Human Rights Act reform proposal, the AHRC recommended a number of changes to the operation of parliamentary scrutiny laws aimed at:

strengthening the mechanism of accountability for human rights protection provided by the PJCHR, ensuring early consideration of human rights in the development of legislation and embedding human rights in primary legislation against which the scrutiny is conducted.³⁰³

The CRPD Committee has recommended that Australia fully harmonise its domestic legislation with the *CRPD* by carrying out disability rights impact assessments on legislative changes that may affect the rights of people with disability.³⁰⁴

As discussed above, the PJCHR inquiry will consider the adequacy of existing mechanisms to protect human rights, including the remit of the PJCHR.³⁰⁵

In Chapter 3, we recommend that statements of compatibility set out relevant consultation with people with disability, in accordance with the proposed legislative requirement to consult.

Lack of effective remedies

[T]here are people with disabilities who are currently facing significant, substantial and grave human rights violations and we must ... afford them with legal protection to ensure that they can bring forward actions against those who violate their human rights.³⁰⁶

Chapter 1 discusses the right to an effective remedy. The Australian Government has recognised in general terms the ‘obligation on countries to provide remedies and reparation for the victims of human rights violations’.³⁰⁷ However, under current Commonwealth, state and territory laws, there is a lack of effective remedies when the rights recognised in the *CRPD* are breached.

The *DDA* and the *AHRC Act* provide a pathway to a court for a remedy, but only for unlawful discrimination on the ground of disability, rather than all rights recognised in the *CRPD*. There are also issues with the operation of the *DDA*, as we discuss in Chapter 4. The *AHRC Act* and the provisions of the *NDIS Act* and the *DSA* do not create enforceable remedies for breaches of *CRPD* rights.

In certain circumstances in the Australian Capital Territory, Victoria and Queensland, an enforceable remedy is available for a breach of rights under human rights laws.³⁰⁸ But as explained, the protections under those laws are limited to their respective jurisdictions and do not include specific protections for the rights of people with disability. There can also be practical difficulties with seeking remedies under these laws, as noted in Chapter 3.

During our inquiry we heard that, in some cases, people with disability are unable to access effective remedies when they experience violence, abuse, neglect or exploitation. For example, in Public hearing 28, we heard that experiences of violence and abuse in public places are common for some people with disability. However, some types of abuse in public places do not breach the criminal law, and legal protections against sexual harassment and discrimination do not always apply.³⁰⁹ Counsel Assisting submitted the Royal Commission may wish to consider the need for amendments to criminal and civil laws to respond appropriately to violence and abuse targeting people with disability in public places.³¹⁰ In Chapter 4, we recommend amendments to the *DDA* to better implement the *CRPD* and to protect against harassment and vilification of people with disability.

In Public hearing 3, Ms Naomi Anderson, a solicitor at the Villamanta Disability Rights Legal Service, said ‘rights ... don’t really count for much if they’re not legally enforceable. If there is nothing you can do to enforce that right, it actually may as well not exist.’³¹¹

The Australian Law Students’ Association, Australian Medical Students’ Association and National Union of Students told us the availability of legal protections and remedies ‘remains illusory in practice’.³¹² They said this raised significant concerns about the systemic neglect of people with disability and need for urgent legislative reform.³¹³

The existence of effective remedies for breaches of human rights may help to deter or prevent conduct that infringes the rights of people with disability.³¹⁴

A submission jointly provided by the Human Rights Law Centre, People with Disability Australia and Children and Young People with Disability Australia stated:

People with disability need enforceable human rights to help redress the wrongs they face, but more importantly improve government laws and decisions so that they properly consider what people with disability need.³¹⁵

The Law Institute of Victoria described how legislative human rights protections and remedies for breaches can increase accountability and public trust in government:

Enshrined human rights also provide a corrective mechanism for people with disabilities to hold government to account for its human rights responsibilities. Accountability is indispensable in a just and fair legal system. It ensures government takes responsibility for its actions, answers to rights holders affected and provides a remedy where rights are breached. This builds public confidence and trust in government.³¹⁶

As discussed in Chapter 1, once domestic remedies have been exhausted, a person can lodge an individual communication with the CRPD Committee alleging a violation of *CRPD* rights by States Parties.³¹⁷ The CRPD Committee can make findings, comments and recommendations in response to the communication, but their views are not legally binding or enforceable on the state party. The AHRC has expressed concern that limited legislative changes have occurred in response to individual communications to the CRPD Committee about Australia's alleged violations of the *CRPD*.³¹⁸

Chapter 3 considers the right to an effective remedy in more detail. We recommend legislative protection of disability rights and a standalone cause of action to seek a judicial remedy when rights are breached. In Chapter 4 we recommend reforms to mechanisms for enforcing rights under the *DDA*. Volume 10 and Volume 11 consider improved complaint pathways for people with disability.

2.5. *CRPD* rights are insufficiently incorporated in policy and practice

People don't have a choice over their disability. We are here on the planet too. There needs to be space made for people ... people need to be treated with dignity.³¹⁹

The role of administrative and other measures in protecting, respecting and fulfilling the rights of people with disability is particularly important given the absence of laws comprehensively implementing the provisions of the *CRPD* in Australia. This section briefly considers the ADS; the lack of obligations for decision-makers to consider the rights of people with disability; weaknesses in *CRPD* focal point arrangements; and approaches to data collection and analysis. The ADS and *CRPD* focal point arrangements are considered in more detail in Volume 5. More detailed consideration of data collection and analysis is set out in Volume 12.

Opportunities to better align Australia's Disability Strategy with human rights

The ADS is the national disability policy framework agreed to by all governments in Australia.³²⁰ It was released in December 2021 and replaces and builds on the National Disability Strategy 2010–2020. The ADS was signed by the Prime Minister, all state premiers and territory chief ministers, and the President of the Australian Local Government Association.³²¹ It was developed in consultation with people with disability, their families, advocacy organisations, peak bodies and service providers.³²²

The ADS 'Vision and Purpose' refers to the *CRPD*, and the important role of the ADS in 'protecting, promoting and realising the human rights of people with disability'.³²³ The ADS states that it is based on the social model of disability.³²⁴ It is described as a call for 'all Australians to ensure people with disability can participate as equal members of society'.³²⁵

While the ADS is a welcome development, evidence at Public hearing 31 identified opportunities to improve its approach to human rights, inclusion and equality of outcomes for people with disability.³²⁶ For example, as Counsel Assisting submitted, the rights of people with disability recognised in articles 5 to 30 of the *CRPD* are not clearly reflected in the language of the ADS.³²⁷

National disability policy, strategy and governance arrangements, including the ADS, are considered in detail in Volume 5. That volume recommends a review and update of the ADS, in partnership with people with disability and their representative organisations, to ensure it reflects the issues raised and recommendations made by this Royal Commission.

Limited requirements to consider disability rights

My world did not fall apart when I realised that [my son] had a disability. It fell apart when I realised how cruel, intolerant and horrible the world is to people with disability.³²⁸

A human rights approach should be both positive and preventative. This accords with articles 1 and 5 of the *CRPD*, which require positive steps be taken to 'promote, protect and ensure' enjoyment of human rights by people with disability.³²⁹ Article 4(4) of the *CRPD* also provides that States Parties may go further than the obligations in the *CRPD* to realise the rights of people with disability.³³⁰ In Public hearing 31, Mr Gerard Quinn, United Nations Special Rapporteur on the rights of persons with disabilities, described article 4(4) as an 'open invitation toward policy entrepreneurship within states, to thinking differently, and to putting in a dynamic of change that can help keep moving things forward'.³³¹

Legislation protecting human rights in Australia generally operates by providing remedies where a complaint is made about conduct that has already occurred and a breach is established. The *DDA*, for example, provides a pathway to individual remedies after disability discrimination has occurred and is shown to have occurred.³³²

The AHRC has explained how positive duties can prevent harm occurring in the first place:

Positive duties are an emerging feature of discrimination laws in Australia and overseas, reflecting a shift to a preventative focus that is proactive in dealing with discrimination and avoiding harm.³³³

Generally speaking, Commonwealth law does not require a decision-maker to consider or act compatibly with human rights when making a decision. Compliance with the rights recognised in the *CRPD* has largely been driven by other mechanisms, such as education and outreach by public institutions, and individual complaints about discrimination on the ground of disability. The last option is not a practicable alternative for many people with disability because of the barriers to making and substantiating complaints.

In contrast, human rights legislation in Victoria, Queensland and the Australian Capital Territory contain positive duties that require consideration of human rights early in the legislative process and in decision-making.³³⁴ In some circumstances those laws provide an enforceable remedy when this does not occur.³³⁵

As part of its recommendation for a federal Human Rights Act, the AHRC proposed a positive duty on public authorities to give proper consideration to, and act compatibly with, human rights when making decisions.³³⁶ It also recommended introducing a positive duty in the *DDA* to promote substantive equality and eliminate discrimination.³³⁷

Counsel Assisting's submissions following Public hearing 18 considered the *Equality Act 2010* (UK) as another model for timely consideration of human rights.³³⁸ That Act requires public authorities, in the exercise of their functions, to have due regard to advancing equality of opportunity between people with disability and people without disability.³³⁹ There is no such duty at the Commonwealth level in Australia.

In Chapter 3, we recommend a legislative obligation on public authorities to properly consider and act consistently with disability rights. We also recommend a positive duty on Commonwealth entities to have due regard to the need to take necessary and proportionate action to advance equality, inclusion and respect for the dignity of people with disability. In Chapter 4, we recommend a new duty in the *DDA* requiring duty-holders to take reasonable and proportionate measures to eliminate disability discrimination, harassment and victimisation.

Opportunities to strengthen *CRPD* focal point arrangements

As noted in Chapter 1, article 33(1) of the *CRPD* requires Australia to designate one or more 'focal points' within government for matters relating to implementation of the *CRPD*. It also requires Australia to consider establishing or designating a coordination mechanism within government to facilitate action related to *CRPD* implementation.³⁴⁰ The specific structure and role of these mechanisms is not specified in article 33(1). States Parties have the flexibility to take an approach that suits their 'system of organization'.³⁴¹

The Department of Social Services (DSS) and the Attorney-General's Department (AGD) are the designated joint focal points for implementation of the *CRPD* in Australia at the federal level.³⁴² The DSS leads on ADS implementation and coordinates with the states and territories.³⁴³ The AGD acts as the 'central point of engagement' on the *CRPD* and associated United Nations mechanisms.³⁴⁴ The AGD also chairs a Standing National Human Rights Mechanism which works to strengthen Australia's engagement with United Nations human rights reporting processes. It includes a process for consultation with the AHRC and civil society.³⁴⁵

In Public hearing 18, we heard international practice regarding focal points and coordination mechanisms is ‘very varied’.³⁴⁶ While States Parties have flexibility in the approach they take, there is international guidance about the ideal structure and roles of *CRPD* focal points and coordination mechanisms.³⁴⁷ For example, guidance from the Conference of States Parties to the *CRPD* advised there should be *CRPD* focal points at all levels of government.³⁴⁸

In Public hearing 31, state and territory governments were asked whether they have a designated *CRPD* focal point. The Northern Territory was the only jurisdiction that answered in the affirmative.³⁴⁹ In Queensland, there is no standalone person, body, agency or department with responsibility for *CRPD* implementation.³⁵⁰ Rather, responsibilities are discharged by three departments.³⁵¹

In Public hearings 18 and 31, we also heard that existing Commonwealth and state and territory *CRPD* focal points have few staff members with disability.³⁵²

We agree with Counsel Assisting’s submission following Public hearing 18 that opportunities exist to enhance the ability of focal points to co-ordinate consideration of laws, policies and practices to better implement the *CRPD*.³⁵³

In Volume 5, we consider Australian Government leadership arrangements and recommend the creation of a new Department of Disability Equality and Inclusion. We recommend the new department be the *CRPD* focal point, alongside the AGD, at the Australian Government level. We recommend the Australian Government and all state and territory governments ensure a focal point is designated in each jurisdiction. Each focal point should include people with disability in leadership positions.

Opportunities to strengthen data collection and analysis

Data collection and analysis has an important role in realising rights. Under article 31 of the *CRPD*, the Australian Government is required to ‘collect appropriate information, including statistical and research data’ about people with disability, so it can formulate and implement policies to give effect to the *CRPD*.³⁵⁴ It must also disaggregate³⁵⁵ and disseminate³⁵⁶ information and data.

The Australian Government has acknowledged ‘the importance of data collection in driving action and enhancing accountability to ultimately improve outcomes for all people with disability’.³⁵⁷ We have often been told about deficiencies in data collection concerning the experiences of people with disability and the impact of the lack of data on policy formulation and implementation.³⁵⁸

For example, in Public hearing 12, ‘The experiences of people with disability, in the context of the Australian Government’s approach to the COVID-19 vaccine rollout’, evidence revealed the Australian Government Department of Health did not compile data on residents in disability residential accommodation. The failure to compile data contributed to a significant underestimation of numbers to be covered by the vaccine rollout strategy.³⁵⁹

The AHRC told us that '[d]ata gaps impede Australia's capacity to monitor and report on the CRPD and the wellbeing of people with disability'.³⁶⁰ The CRPD Committee has also expressed concern about 'the lack of nationally consistent measures for the collection and public reporting of disaggregated data on the full range of obligations contained in the [CRPD]'³⁶¹ and made a number of recommendations for improved data collection.³⁶²

The importance of data collection, disaggregation and analysis, and recommendations for reform, are considered across this *Final report*, including in:

- Volume 3, which considers available data on violence against, and abuse, neglect and exploitation of, people with disability, and data limitations.
- Volume 10, which includes recommendations to strengthen nationally consistent data collection and reporting and to support oversight and safeguarding practices. It also includes recommendations about strengthening data collected by the NDIS Commission.
- Volume 12, which makes recommendations relating to inclusive data collection and the National Disability Data Asset.

2.6. Awareness of disability rights is limited

I don't think the average person meets someone who is disabled let alone learn[s] about disability rights unless there is a certain life event that happens. To be honest a lot of people I have met don't even know they themselves have rights.³⁶³

A common theme during our inquiry was the link between lack of awareness and understanding of rights, coupled with ableist attitudes, and violence against, and abuse, neglect and exploitation of, people with disability.³⁶⁴

Under article 8 of the *CRPD*, Australia has obligations to adopt immediate, effective and appropriate measures to raise awareness about people with disability; foster respect for their rights and dignity; combat stereotypes, prejudices and harmful practices; and promote awareness of their capabilities and contributions.³⁶⁵

The CRPD Committee has expressed concern about Australia's lack of progress to promote awareness-raising efforts about the rights of people with disability.³⁶⁶ The CRPD Committee pointed to the lack of participation of people with disability in awareness-raising efforts, particularly of women, First Nations, culturally and linguistically diverse, and LGBTIQ+ people with disability.³⁶⁷ It recommended:

training ... at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.³⁶⁸

The CRPD Committee has also recommended Australia ensure training modules on the CRPD 'are incorporated into mandated training programmes for police officers, lawyers, judicial officers, judges and court staff'.³⁶⁹

Past reports and inquiries and submissions to this Royal Commission have identified the problem of inadequate awareness of the rights of people with disability in the community and among people with disability themselves.³⁷⁰ The AHRC, for example, has said more work needs to be done in relation to article 8 to improve community attitudes towards people with disability.³⁷¹

In Public hearing 18, the Australian Government acknowledged the importance of raising awareness about the rights of people with disability, but argued article 8 has been implemented through various measures.³⁷² These included the National Disability Strategy 2010–2020 (the precursor to the ADS);³⁷³ the Information, Linkages and Capacity Building program;³⁷⁴ providing information about the CRPD online and in accessible formats;³⁷⁵ and providing funding to Disability Representative Organisations.³⁷⁶ The Australian Government also emphasised the awareness-raising function of the AHRC, including the role of the Disability Discrimination Commissioner.³⁷⁷

The following section considers what we have heard about limited awareness among many people with disability of their human rights. It also considers how disability rights awareness is limited among those in positions of responsibility. It emphasises that advocacy is essential for some people with disability to understand and exercise their rights and explains how limited rights awareness contributes to violence, abuse, neglect and exploitation.

People with disability often lack awareness of their human rights

One of the things that comes back to [People with Disability Australia] on a regular basis is people are shocked they even had rights, they had no idea.³⁷⁸

During Public hearing 3, advocates expressed concern about people with disability living in group homes lacking understanding of their human rights.³⁷⁹ Ms Sarah Forbes, Advocacy Manager at the Victorian Advocacy League for Individuals with Disability, said:

I think we are constantly both shocked and dismayed as advocates at how little people understand about their rights. They do have rights that they don't know about, and that they don't exercise.³⁸⁰

In Public hearing 18, Ms Kelly Cox, Vice President of People with Disability Australia, said ‘[i]n most cases, people don’t know they have rights, much less where to navigate on the internet to find it in an accessible format’.³⁸¹

In preparation for Public hearing 18, Counsel Assisting met with five young leaders affiliated with Children and Young People with Disability Australia. The young leaders agreed the human rights of people with disability were important, greater awareness and understanding of rights was needed, and upholding of rights should not be tokenistic.³⁸²

In Public hearing 9, Dr Gauntlett said people with disability may not know what their rights are in certain situations but ‘are required to bear the burden of enforcing those rights’.³⁸³

We also heard about particular barriers to rights awareness for people with disability with intersecting identities. For example, Mr Damian Griffis, Chief Executive Officer of the First Peoples Disability Network, observed he ‘could probably count on both hands the number of First Nations people in Australia that actually understand the mechanisms of the *CRPD* and the articles within it’.³⁸⁴ He said, ‘we need to educate and inform our communities so they can start effectively self-advocating’.³⁸⁵

In Public hearing 20, ‘Preventing and responding to violence, abuse, neglect and exploitation in disability services’, Acting Commissioner and Registrar of the NDIS Commission, Ms Samantha Taylor, said the NDIS Commission was working to increase the awareness of NDIS participants of their rights.³⁸⁶

Disability rights awareness is limited among those in positions of responsibility

[A]ll this is prejudice and hate in regards to a person living with a disability ... I try and assert my rights as a person but these ableists see me as having lesser rights than them. It’s like, ‘How dare you challenge us?’ That’s the common theme.³⁸⁷

People in positions of responsibility in both the public and private sector, including the non-government sector, often have little awareness of the human rights of people with disability. These leaders may not have knowledge of the *CRPD*, including specific articles relating to their work and sector. This is particularly concerning in circumstances where people with disability often lack this knowledge themselves and face barriers to accessing information about their rights, and where power imbalances exist between people with disability and decision-makers.

Decision-makers are less likely to uphold the rights of people with disability if they are not aware of or familiar with those rights. Without rights awareness, responses to rights violations are more likely to be inadequate.

In Public hearing 18, Ms Frances Quan Farrant from People with Disability Australia considered that service providers took a tokenistic approach to human rights:

In terms of service providers ... in the last couple of years, perhaps the language of the *CRPD* has been applied in various aspects around policies and procedures, but I would say that it is simply using our language and that it is not more of a tokenistic thing. I do not believe there is any full understanding of what human rights for people with disabilities is really about, apart from ticking a compliance box.³⁸⁸

In Public hearing 19, 'Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability', the Chief Executive Officer of Safe Work Australia, Ms Michelle Baxter, told us she never had occasion to consider the right to work in article 27 of the *CRPD*.³⁸⁹ She stated, 'I'm not familiar with international conventions generally. That's not an area that I have expertise in.'³⁹⁰

In Public hearing 22, 'The experience of people with disability working in Australian Disability Enterprises', Mr Myron Mann, Chief Executive Officer of Bedford, said he did not know whether any of Bedford's board members had training or experience in understanding human rights for people with disability, particularly the *CRPD*.³⁹¹

The Commissioners' *Report of Public hearing 23: Preventing and responding to violence, abuse, neglect and exploitation in disability services (a case study)*, found board directors at Afford did not receive training about the rights of people with disability.³⁹² The composition of the board and executive management was not such as to promote safe, high-quality disability services in a rights-informed manner.³⁹³ Afford accepted these findings.³⁹⁴

In Public hearing 30, 'Guardianship, substituted and supported decision-making', the Public Advocate of Western Australia said new staff undertook a comprehensive induction program, but this did not include training about the *CRPD*.³⁹⁵

In Public hearing 32, 'Service providers revisited', we heard from the Chief Executive Officers of Scope, Melba and Synapse. They all agreed making human rights legally enforceable, building awareness among people with disability and the disability service sector, and increasing the institutional capability of service providers to understand and respect human rights principles, are required.³⁹⁶

Advocacy is essential

Advocacy makes our lives safer and helps us to equally enjoy our human rights.³⁹⁷

This section briefly considers the importance of access to advocacy for people with disability to understand and exercise their human rights. Volume 6 considers self-advocacy, family advocacy, the role of independent advocates and systemic advocacy undertaken by disability representative and advocacy organisations. It explains how different types of advocacy play a key role in enabling people with disability to realise their rights and exercise autonomy.

Advocacy is especially important for many people with disability to understand and exercise their rights. Groups for whom advocacy is particularly important include people with intellectual disability or cognitive impairment;³⁹⁸ people living in supported accommodation;³⁹⁹ people working in segregated settings;⁴⁰⁰ and people from First Nations⁴⁰¹ and culturally and linguistically diverse⁴⁰² backgrounds.

Throughout this inquiry, we have heard that advocates are important for supporting access to information about human rights. For example, JFA Purple Orange said that while people with disability consistently say they want to know more about their rights, ‘it should not be assumed that all people have the resources, skills and ability to search for such information online’.⁴⁰³

In Public hearing 32, Ms Frederikke Jensen of the Victorian Advocacy League for Individuals with Disability told us about her advocacy work in closed settings such as group homes. Ms Jensen said, ‘there are people whose voices are simply not heard unless you actually mandate ... that they should have that kind of advocacy and support for decision-making’.⁴⁰⁴ Ms Jensen agreed legislation or policy could be used to mandate access to advocacy.⁴⁰⁵

Ms Cathy Milne of Side by Side Advocacy spoke about advocating for people who use augmented or informal communication. She said her work is ‘literally asserting their right under the legislation to retain decision-making over their own life’.⁴⁰⁶

Following Public hearing 32, Counsel Assisting submitted the Royal Commission should consider recommending a right to advocacy for people with disability, noting this right should be protected by law and be accompanied by appropriate funding.⁴⁰⁷ The Australian Government in response pointed out it funds independent disability advocacy organisations under the National Disability Advocacy Program and NDIS appeals program, among others, ‘to provide advocacy for people with disability which promotes, protects and ensures their full and equal enjoyment of all human rights’.⁴⁰⁸ The Australian Government did not accept that there is a lack of consistent funding for advocacy services, however it agreed that demand for independent advocacy services remains high.⁴⁰⁹

In Chapter 3, we recommend a legislative right for people with disability to access and use advocacy services in making and participating in decisions, communicating their will and preferences, and developing their decision-making ability. Volume 6 makes complementary recommendations on additional funding for national advocacy programs, improved data collection and reporting, and culturally safe disability advocacy. Volume 7 makes recommendations about access to advocacy support for education and housing issues. Volume 10 makes recommendations about advocacy for people living in supported accommodation.

Limited rights awareness contributes to violence, abuse, neglect and exploitation

[P]eople who do not understand their rights are less equipped to identify rights violations – they may be mistreated without realising that the action was wrong, or may be more inclined to accept mistreatment as the norm for people living with disability.⁴¹⁰

A lack of disability rights awareness can contribute to violence against, and abuse, neglect and exploitation of, people with disability:

- JFA Purple Orange said ‘a lack of understanding of the rights of people living with disability often go to the core of their mistreatment’.⁴¹¹
- The Australian Federation of Disability Organisations said inadequate disability rights awareness leads to a ‘loss of agency and ability to call out rights abuses’.⁴¹²
- The Northern Territory Office of the Public Guardian said responding to violence and abuse in supported accommodation involves ‘the promotion, education and skill development of the whole community about human rights’.⁴¹³
- Family Planning NSW observed limited rights awareness contributes to ‘laws, policies and practices that discriminate against and ignore the experiences of people with disability’.⁴¹⁴ They said poor rights awareness may ‘leave people with disability at higher risk of ongoing sexual violence, abuse and exploitation’.⁴¹⁵
- The Victorian Council of Social Services told us people with disability are at greater risk of experiencing discrimination, exclusion, isolation and violence when their rights are not well known or understood.⁴¹⁶

Many submissions observed that deficits in disability rights awareness can act as a barrier to disclosure of, and adequate responses to, violence, abuse, neglect and exploitation.

For example, the Victorian Council of Social Services said:

Where people with disability and their support network do not know about their rights or how to seek help, abuses of their rights are less likely to be challenged, reported and prosecuted.⁴¹⁷

The Queenslanders with Disability Network told us their members reported feeling ‘in the dark’ about what their rights are and observed this ‘prevent[s] people with disability from speaking up about and being able to escape abuse and access pathways to safety’.⁴¹⁸

In Public hearing 17, Ms Nicole Lee described how her lack of rights awareness impacted her ability to seek help when she experienced family and domestic violence. She said:

I didn’t think I had rights. I didn’t know what to ask for. I didn’t think anything was out there. I didn’t know any other way to live. And this is a failing of our system. This is a failing of our education system, respectful relationships, where we’re talking to women and girls around what is and is not the right thing for a carer to do? You know, what abuse looks like ... You know, what should a carer be doing for you in a shower? Where do you have body autonomy? We’re not given this education.⁴¹⁹

In Public hearing 18, Discrimination, Health Services, Disability and Community Services Commissioner at the ACT Human Rights Commission, Ms Karen Toohey, described how rights awareness can act as a safeguard. She said:

the more we can do to provide vehicles for people to understand that human rights is not out there somewhere in this tower of ideology, it’s actually about day-to-day events, day-to-day barriers that people experience, the more we will be able to create a safe and inclusive community.⁴²⁰

In the same hearing, Ms Natalie Wade, founder and Principal Lawyer of Equality Lawyers, said:

what we really need to be able to do ... is properly explain those concepts that are derived from the human rights legal framework into everyday life so that people with disabilities and their families are able to properly identify what is violence, what is abuse and neglect, what is exploitation, and then be able to actively protect themselves.⁴²¹

The CRPD Committee’s *General comment no. 6 (2018) on equality and non-discrimination* explains how human rights awareness can help prevent rights violations:

Discrimination cannot be combatted without awareness-raising among all sectors of government and society. Thus, any non-discrimination and equality measure must be accompanied by adequate awareness-raising measures and measures to change or abolish compounded pejorative disability stereotypes and negative attitudes.⁴²²

As outlined in *Our vision for an inclusive Australia*, a lack of awareness of the human rights of people with disability can also feed into negative attitudes and ableism.

People with disability should have the opportunity to learn about and understand their human rights and their rights under domestic law. They should appreciate how an understanding of rights can safeguard against violence, abuse, neglect and exploitation. Knowledge of the rights recognised by the *CRPD* should not be the exclusive domain of specialist advocates or government officials.

Following Public hearing 18, Counsel Assisting submitted '[t]here is no doubt a charter of rights or human rights act has symbolic effect and is a means of improving awareness of human rights in the community'.⁴²³ We agree.

Our recommendations focus on efforts to raise awareness and understanding of disability rights, in combination with improved legal protections. In Chapter 3, we recommend that promotion of and education about disability rights be a statutory function of the proposed National Disability Commission. In Volume 10 we recommend a capacity building program to support providers to embed human rights into service design and delivery of disability services.

2.7. Involvement of people with disability in decisions affecting them

If we want to understand disability, if we want to have that presence in the room, if we want to understand what the impact of the views, the understanding of disabled people is, then we need people in the room on an ongoing basis.⁴²⁴

Our terms of reference recognise the importance of making people with disability central:

to processes that inform best practice decision-making on what all Australian Governments and others can do to prevent and respond to violence against, and abuse, neglect and exploitation of, people with disability.⁴²⁵

This language reflects the obligation in article 4(3) of the *CRPD* on States Parties to 'consult with and actively involve' people with disability 'through their representative organizations' in developing legislation and policies to implement the *CRPD*.⁴²⁶ Article 33(3) states that civil society – in particular, people with disability and their representative organisations – must be involved and 'participate fully' in the treaty monitoring process.⁴²⁷

People with disability are often not involved in decisions made by governments about laws, policies and programs relevant to the realisation of *CRPD* rights. This includes decisions about preventing and responding to violence against, and abuse, neglect and exploitation of, people with disability.

The Commissioners' *Report of Public hearing 12: The experiences of people with disability, in the context of the Australian Government's approach to the COVID-19 vaccine rollout*, found the Department of Health did not seek advice or guidance from the disability advisory committee or Disability Representative Organisations to inform its COVID-19 vaccine roll-out in disability residential settings.⁴²⁸ This contributed to the loss of an opportunity to make substantial progress in vaccinating people most at risk.⁴²⁹

Witnesses in Public hearing 17 emphasised that women with disability must be placed at the centre of any policies or programs targeting gender-based violence.⁴³⁰ We agree with Counsel Assisting's submissions following Public hearing 17 that:

Effective implementation of a rights-based approach requires the needs of people with disability to be prioritised in system design, interventions, and service responses. Implementation of this approach should occur across prevention, early intervention, response and recovery, in collaboration with people with disability and the disability services sector. This draws on the principle of 'nothing about us without us', and the requirement to consult and work alongside people with disability.⁴³¹

In Public hearing 18, Australian Government representatives were not aware of a person with disability working in a senior role within the AGD or the DSS.⁴³² Ms Christina Ryan, Chief Executive Officer of the Disability Leadership Institute, explained what occurs if people with disability are not involved in decision-making processes. She said:

we end up with things happening like the lack of pandemic response, the deprioritising of vaccinations, we end up with things happening like the NDIS independent assessments proposal. The minute disabled people saw it, we all went, 'This is not going to work, it just has to stop.' That is the problem with not having disabled people in the decision-making spaces where they need to be.⁴³³

In Public hearing 25, 'The operation of the NDIS for First Nations people with disability in remote and very remote communities', evidence suggested the views of First Nations organisations were not considered in relation to the operation of the NDIS in remote communities.⁴³⁴ This was despite the Australian Government's Plan to Improve Outcomes for Aboriginal and Torres Strait Islander People with Disability, which states consideration of human rights 'is central to the Plan'.⁴³⁵

In Public hearing 31, witnesses spoke about the need for meaningful involvement of people with disability in government decision-making and recognising lived experience of disability. Co-design, co-production, inclusive design, and universal design are some of the models for such involvement.⁴³⁶ Ms Debbie Mitchell PSM, Deputy Secretary, Disability and Carers at the DSS, recorded the Australian Government's 'very big' commitment to co-design.⁴³⁷ Ms Mary O'Hagan, Executive Director of the Lived Experience Branch of the Mental Health & Wellbeing Division in the Victorian Department of Health, explained how lived experience has been embedded into mental health and wellbeing reforms in Victoria.⁴³⁸

In its 2019 Concluding Observations, the CRPD Committee recommended Australia establish formal and permanent mechanisms to ensure the full and effective participation of people with

disability, through their representative organisations, in the development and implementation of legislation and policies to implement the *CRPD*.⁴³⁹ It recommended allocation of adequate resources and support to enable this participation.⁴⁴⁰

Similarly, the AHRC has recommended the Australian Government establish stronger mechanisms for the full and effective engagement of people with disability and their representative organisations in policy development, implementation and monitoring actions relating to the *CRPD*.⁴⁴¹

Professor McCallum observed in his report that Australia had not established a permanent process to consult with representatives of people with disability on measures directly affecting people with disability or significant for giving effect to *CRPD* rights. He considered Australia was therefore not in compliance with the *CRPD*.⁴⁴²

The Australian Government submitted that '[w]hile the CRPD Committee's statement [in its 2019 Concluding Observations] provides guidance about how to interpret Australia's obligations under the *CRPD*, ultimately, it is not binding'.⁴⁴³ It said:

Article 4(3) of the CRPD does not specifically require the establishment of a permanent process to consult with representatives of people with disability on measures concerning people with disability or implementing the CRPD. Rather, Article 4(3) requires close consultation with and active involvement of persons with disabilities ... through their representative organisations in the development and implementation of legislation and policies to implement Australia's obligations under the CRPD.⁴⁴⁴

We acknowledge recent developments associated with the ADS, including establishment of the ADS Advisory Council to provide independent advice to Disability Ministers, the Australian Government and state, territory and local governments.⁴⁴⁵

We also acknowledge that in February 2023, the NDIA announced a new partnership with the First Peoples Disability Network and an intention to establish a First Nations Advisory Council (FNAC).⁴⁴⁶ In a draft letter it provided to the Royal Commission, the NDIA said the purpose of the FNAC is to provide First Nations-led advice on how the NDIA can improve outcomes for First Nations people with disability.⁴⁴⁷ It will also guide the development of the NDIA's First Nations Strategy.⁴⁴⁸ This is a welcome development and is discussed in Volume 9.

Nonetheless, we consider that people with disability are currently not sufficiently involved in government decision-making processes and the development of laws and policies affecting them.

In Chapter 3, we recommend that Commonwealth entities be required to consult with people with disability when developing and evaluating policies, laws and programs, and in planning new initiatives or making major changes to services provided to the public.

In Volume 5, we further consider the importance of leadership by people with disability and embedding lived experience in the work of government. We recommend the establishment of a new Department for Disability Equality and Inclusion. We recommend the department actively recruit people with disability for all types of positions and roles, including leadership positions. Volume 5 emphasises that it is critical for the new department to establish how it will engage and consult with people with disability on issues that impact them. A branch of the department could be led by people with disability, to support the development of co-design and co-production processes. Volume 5 also recommends the establishment of an independent statutory body, the National Disability Commission, which should be chaired by a person with disability and comprise commissioners who are, in majority, people with disability.

2.8. A new approach to strengthen implementation of the *CRPD*

I believe that different is not less than. Any and all Australian citizens inherently deserve to have equal human rights. A right to safety, a right to equal access, to be free from abuse, neglect or exploitation of any type. Whether able bodied, or being a person with disability or being a person with any other health impairment.⁴⁴⁹

The evidence and information referred to in this chapter shows that, while positive measures have been taken in Australia to give effect to *CRPD* rights, a stronger legislative framework is needed to respect, protect and fulfil the human rights of people with disability.

During Public hearing 18, we considered how *CRPD* rights could be better realised to prevent violence against, and abuse, neglect and exploitation of, people with disability. Following that hearing, Counsel Assisting proposed a finding that:

the Australian Government has not fully implemented the *CRPD* into relevant laws, policies and practices. There presently remains gaps in the implementation of the *CRPD* to protect, promote and ensure the *CRPD* rights to prevent violence, abuse, neglect and exploitation of people with disability in Australia.⁴⁵⁰

In response, the Australian Government submitted:

The Australian Government has acknowledged and readily accepts ... that the implementation of the *CRPD* is an ongoing process of continuous improvement – a process to which the Australian Government remains firmly committed, is pursuing, and which remains a substantial work in progress. However, it would be erroneous,

without more, to characterise opportunities for improving upon the ways in which the CRPD has been implemented in Australia either as evidence of a failure fully to implement the CRPD in Australia or as evidence of the existence of ‘gaps’ in its implementation such as to give rise to non-compliance with the CRPD.⁴⁵¹

The Australian Government went on to submit:

Further, it is noted that Counsel Assisting’s Submissions do not identify, with precision, the alleged gaps, nor explain why they ought to be characterised as a failure by the Australian Government fully to implement the CRPD, as opposed to characterising them as potential opportunities for improving upon the ways in which Australia has implemented the CRPD as a matter of policy. It is respectfully submitted that it is plainly open to the Royal Commission to find, in the opinion of the Commissioners, that there are opportunities for the Australian Government to improve upon the ways in which the CRPD has been implemented in Australia, but that it would be inappropriate to go further and make a finding to the effect of the Proposed Finding.⁴⁵²

The Australian Government also stressed the role of states and territories in implementing *CRPD* rights.⁴⁵³ It did not argue that any articles of the *CRPD* are wholly for states and territories to implement,⁴⁵⁴ but said a framework of laws and institutions at both the Commonwealth and state and territory level incorporate and protect *CRPD* rights.⁴⁵⁵ The Australian Government further submitted:

No attempt is made in Counsel Assisting’s Submissions ... to grapple with the extent to which the failure to lead evidence on these matters, or to put to the states and territories any particular allegations of gaps in their respective implementation and afford the states and territories a right to be heard in respect of any such particular allegations, impacts upon the availability of the Proposed Finding.⁴⁵⁶

The Australian Government’s position, therefore, was that it complied with all its obligations under the *CRPD*.⁴⁵⁷ It said the CRPD Committee’s concerns and recommendations did not mean Australia had not implemented the rights recognised in the *CRPD*.⁴⁵⁸

We accept the Australian Government’s view that implementation of the *CRPD* is an ongoing process of continual improvement.⁴⁵⁹ We also accept the *CRPD* is a ‘dynamic document’ containing ‘a set of living commitments that ought to be continuously revised as the understanding of disability develops and as attitudinal and environmental circumstances change’.⁴⁶⁰ As discussed in Chapters 1 and 3, we accept that some rights in the *CRPD* (or components of rights) are progressively realisable,⁴⁶¹ and that some human rights can be permissibly limited.⁴⁶²

However, the Australian Government has acknowledged that it is ‘plainly open’ to conclude that opportunities are available for it to improve upon the ways in which the *CRPD* has been implemented.⁴⁶³ We regard this as an important acknowledgement that Australia has the opportunity to strengthen implementation of *CRPD* rights. Taking advantage of the opportunity involves introducing measures which more effectively respect, protect and fulfil the human rights of people with disability, especially their right to live free from violence, abuse, neglect and exploitation.

We accept the states and territories have significant responsibilities for preventing and addressing violence against, and abuse, neglect and exploitation of, people with disability. However, as discussed in Chapter 1, the Australian Government has responsibility under international law to ensure *CRPD* rights are respected, protected and fulfilled in Australia, and the legislative power to do.⁴⁶⁴ It has responsibility for driving national leadership of *CRPD* implementation. Our recommendations are therefore primarily directed towards the Australian Government.

In our view, the critical question is not whether there are ‘gaps’ in implementing the *CRPD* – although the information and evidence before our inquiry suggests that is the case.⁴⁶⁵ Rather, the question is one of much broader scope and approach. It is clear the current approach is not adequate. As a wealthy, developed nation with strong stated commitments to human rights,⁴⁶⁶ the realisation of the human rights of people with disability in Australia is falling behind where it should be.

It is important to recognise the *CRPD* requires more than measures which create formal equality between people with disability and people without disability. As discussed in Chapter 1, the *CRPD* is underpinned by substantive and inclusive equality. The current approach to rights protection is not achieving equality of opportunities or outcomes for people with disability. As discussed in Section 2.2 above, people with disability experience violence and abuse at higher rates than people without disability, and also have worse health, education, labour force and justice outcomes.

The Australian Government accepted that ‘equality’ relates both to equality of treatment and equality of outcomes.⁴⁶⁷ It accepted achieving equality may require ‘positive measures that address differences between people’.⁴⁶⁸ As discussed in Chapter 1, it also accepted that some rights, including the rights to non-discrimination and equality, liberty and security of person, and freedom from torture and cruel, inhuman or degrading treatment or punishment, are ‘rights of immediate effect’.⁴⁶⁹

In Public hearing 31 we considered the role of the *CRPD* in building a vision for an inclusive Australia. Following that hearing, Counsel Assisting submitted it was open to the Royal Commission to make a recommendation directed at the Australian Government, and the states and territories, to enhance the effectiveness of the ADS including to:

(a) [prioritise] the involvement, leadership, direction and co-design of people with disability

(b) [provide] people with disability with opportunities that move beyond consultation and towards meaningful co-design and decision-making

...

(g) [amend] existing legislation or [introduce] new legislation to better recognise the rights of people with disability to all forms of equality and non-discrimination and better protect their rights under the *CRPD*.⁴⁷⁰

In response, the Australian Government stated it did not ‘currently accept or reject’ the proposed recommendation.⁴⁷¹ It submitted that legislative amendment or new laws to better recognise and protect the human rights of people with disability ‘are matters for the Parliament and Executive government’.⁴⁷² The NSW Government submitted it remained to be convinced that available evidence supported the breadth of change recommended.⁴⁷³

Views differ about how best to implement the *CRPD* in Australia and there is no one ‘right’ answer. However, the underlying thread must be a human rights approach which positions people with disability as active rights holders, rather than as passive receivers of protection, rehabilitation or welfare.

Merely modifying existing piecemeal laws and policies will not be sufficient. A stronger, more comprehensive, transformative legal framework is required to achieve equality and inclusion and advance the rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation. The framework should include legislation protecting human rights, imposing positive duties preventing breaches of human rights and providing effective and accessible remedies when rights are breached.

Legal reforms to strengthen protection of *CRPD* rights will shape the approach of governments and other private actors to policies, programs and services. When compared with policy commitments, which can more easily be ignored or discounted, legal obligations are binding. They can influence how resources are deployed and how human rights are given effect in practice. Laws can also drive behavioural change in society and, over time, achieve broader positive cultural and attitudinal change.

Legal reform to strengthen rights protection for people with disability would also allow Australia to play a strong leadership role, in our region and globally, by modelling best practice.

Development and implementation of any revised legislative framework should meaningfully involve people with disability as active participants in the process. We discuss our proposed reforms in detail in the following chapters.

2.9. Conclusion

[A]s a tool for implementing change, the *UNCRPD* can potentially improve the lives of all people with disability using [a] human rights framework. This framework, consistently put into practice, would be of great assistance in guarding against abuse, violence and exploitation.⁴⁷⁴

In the following chapters we consider how to reform Australia's legal framework to strengthen implementation of the *CRPD*, promote inclusion, and better prevent and address violence against, and abuse, neglect and exploitation of, people with disability.

In Chapter 3, we recommend the Australian Government commit to the enactment of a Disability Rights Act (DRA) to translate *CRPD* rights into the domestic legal context. We propose a set of initial rights and duties for inclusion in a DRA, and a process of consultation with people with disability. We also recommend states and territories enact legislation complementary or equivalent to the proposed DRA, taking into account their own legal frameworks.

In Chapter 4, we recommend reforms to strengthen the ability of the *DDA* to meet the needs of, and protect the rights of, people with disability. This includes simplifying the definitions of discrimination, introducing a standalone duty to make adjustments and introducing a positive duty to eliminate disability discrimination, harassment and victimisation.

A strong disability rights protection framework needs to be part of a broader package of reforms aimed at achieving equality of outcomes, creating a more inclusive society and addressing key drivers of violence, abuse, neglect and exploitation. A number of other volumes in this report also set out relevant analysis and recommendations. These volumes, and their links to human rights, are set out in the Summary of this volume.

Endnotes

- 1 'Milana', Submission, 15 March 2021.
- 2 Relevant rights under other human rights treaties to which Australia is a party are considered to a limited degree; for example, the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). For a more detailed discussion of other human rights treaties relevant to the rights of people with disability, see Chapter 1 of this volume.
- 3 The responsibility of non-government entities to respect the human rights of people with disability is discussed in more detail in Chapters 1, 3 and 4; see also Volume 7, *Inclusive education, employment and housing* and Volume 10, *Disability services*.
- 4 Throughout this chapter, 'CRPD rights' refers to the human rights recognised in the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
- 5 Transcript, Colin Hiscoe, Public hearing 3, 5 December 2019, P-352 [23–25].
- 6 The Royal Commission was established in response to extensive campaigning by people with disability, their families, supporters, Disability Representative Organisations and others. See, for example, *Agents of our own destiny: Activism and the road to the Disability Royal Commission*, Research report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, November 2021, pp 24–28.
- 7 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab by whether has a disability; whether experienced violence since age 15; age group 18–64. People with disability also experience more of every kind of violence, and experience violence more frequently: Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab by whether has a disability; whether experienced physical violence; whether experienced sexual violence; whether experienced emotional abuse; whether experienced stalking; whether experienced partner violence; age group 18–64; Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab by whether experienced violence more than once; whether has a disability; age group 18–64.
- 8 First Nations people with disability experience high rates of interpersonal violence and abuse compared with First Nations people without disability: 'Disability and Violence – In Focus: Crime and Justice Statistics', *Australian Bureau of Statistics*, web page, 13 April 2021, Table 11.1. <www.abs.gov.au/statistics/people/crime-and-justice/focus-crime-and-justice-statistics/latest-release#data-download> (See Data downloads.)
- 9 LGBTQA+ people with disability experience higher rates of violence and abuse than the rest of the LGBTQA+ community: Adam O. Hill, Natalie Amos, Adam Bourne, Matthew Parsons, Christine Bigby, Marina Carman & Anthony Lyons, Australian Research Centre in Sex, Health and Society & Living with Disability Research Centre, La Trobe University, *Violence, abuse, neglect and exploitation of LGBTQA+ people with disability: A secondary analysis of data from two national surveys*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, November 2022, p 223. We note that in this *Final report*, we generally use the term 'LGBTIQA+'; however, this data source does not include data on intersex people, and accordingly the 'I' has been omitted.
- 10 People with disability have worse health outcomes and lower life expectancy compared with people without disability: Exhibit 4-9, 'Statement of Professor Julian Trollor', 11 February 2020, at [160]–[188]; James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi, Nancy Richards, Taylor Fry, Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, *The economic cost of violence, abuse, neglect and exploitation for people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, pp 77, 80; National Disability Data Asset, *Services and supports used by people with disability and mental health issues*, Summary of NDDA pilot findings, December 2021, at pp 9, 13–14.
- 11 People with disability have lower rates of school completion compared with people without disability: Centre of Research Excellence in Disability and Health, *Disability and wellbeing monitoring framework: Baseline indicator data for Australians aged 18-64 years*, Report,

- 23 June 2022, pp 37–38; Australian Institute of Health and Welfare, *People with disability in Australia 2022*, Report, Catalogue number DIS 72, 2022, pp 284–90; National Disability Data Asset, *NDDA Pilot – South Australian Test Case: Education to Employment*, Summary of findings, December 2021, p 1.
- 12 People with disability have lower labour force participation compared with people without disability: Australian Institute of Health and Welfare, *People with disability in Australia 2022*, Report, Catalogue number DIS 72, 2022, pp 312–19. ‘Disability, Ageing and Carers, Australia: Summary of Findings’, *Australian Bureau of Statistics*, web page, 24 October 2019, Table 2.1 (Labour Force Participation). <[Volume 4: Realising the human rights of people with disability](http://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#:~:text=In%202018%20there%20were%204.4,years%20and%20over%20had%20disability>”:text=In%202018%20there%20were%204.4,years%20and%20over%20had%20disability>” (See Data downloads.) People with disability also have higher rates of underemployment compared with people without disability: Australian Institute of Health and Welfare, <i>People with disability in Australia 2022</i>, Report, Catalogue number DIS 72, 2022, pp 332–35; James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi, Nancy Richards, Taylor Fry, Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, <i>The economic cost of violence, abuse, neglect and exploitation for people with disability</i>, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, pp 323–24. People with disability also experience higher rates of employment discrimination: Centre of Research Excellence in Disability and Health, <i>Disability and wellbeing monitoring framework: Baseline indicator data for Australians aged 18-64 years</i>, Web report, June 2022, pp 33–36; Australian Institute of Health and Welfare, <i>People with disability in Australia 2022</i>, Report, Catalogue number DIS 72, 2022, p 347–48; Australian Human Rights Commission, <i>2019-20 Complaint statistics</i>, Report, 2020, p 2.</p>
<p>13 National Disability Data Asset, <i>Interaction of people with disability and the justice system in NSW</i>, Summary of findings, December 2021, p 5; Clare Ringland, Stewart Boiteux & Suzanne Poynton, NSW Bureau of Crime Statistics and Research, <i>Trends in rates of victimisation and offending for people with disability in NSW</i>, Crime and Justice Statistics Bureau Brief, Number 163, September, 2022, pp 5–7.</p>
<p>14 Clare Ringland, Stewart Boiteux & Suzanne Poynton, NSW Bureau of Crime Statistics and Research, <i>Trends in rates of victimisation and offending for people with disability in NSW</i>, Crime and Justice Statistics Bureau Brief, Number 163, September, 2022, pp 7–10; National Disability Data Asset, <i>Interaction of people with disability and the justice system in NSW</i>, Summary of findings, December 2021, pp 7–9.</p>
<p>15 Exhibit 11-12.1, ‘Statement of Eileen Baldry’, 22 October 2020, at [42]; Exhibit 11-12.11, DRC.1000.0006.8771, at p 62; National Disability Data Asset, <i>Interaction of people with disability and the justice system in NSW</i>, Summary of NDDA pilot findings, December 2021, pp 10–11.</p>
<p>16 For example, for some people with disability, opportunities to work are limited to the option of working in Australian Disability Enterprises. Volume 7, <i>Inclusive education, employment and housing</i>, considers this issue in detail and makes recommendations to enhance choice and control in employment. Volume 3, <i>Nature and extent of violence, abuse, neglect and exploitation of people with disability</i>, sets out information about the nature and extent of violence against, and abuse, neglect and exploitation of, people with disability in segregated settings and services.</p>
<p>17 James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi, Nansi Richards, Taylor Fry, Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, <i>The economic cost of violence, abuse, neglect and exploitation for people with disability</i>, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, p 73.</p>
<p>18 James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi, Nansi Richards, Taylor Fry, Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, <i>The economic cost of violence, abuse, neglect and exploitation for people with disability</i>, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, p 3.</p>
<p>19 Name changed to protect identity.</p>
<p>20 Exhibit 17-10.1, ‘Statement of “Chloe”’, 14 March 2022.</p>
<p>21 Exhibit 17-10.1, ‘Statement of “Chloe”’, 14 March 2022, at [20].</p>
<p>22 Exhibit 17-10.1, ‘Statement of “Chloe”’, 14 March 2022, at [16].</p>
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Names changed to protect identities.

Exhibit 17-016.01, 'Video recording of "Clarisse"', 9 July 2021; Exhibit 17-16.02, 'Transcript of video recording of Clarisse (a pseudonym)', 9 July 2021, P-4 [12] – P-5 [37].

Exhibit 17-016.01, 'Video recording of "Clarisse"', 9 July 2021; Exhibit 17-16.02, 'Transcript of video recording of Clarisse (a pseudonym)', 9 July 2021, P-6 [6–12].

Exhibit 17-016.01, 'Video recording of "Clarisse"', 9 July 2021; Exhibit 17-16.02, 'Transcript of video recording of Clarisse (a pseudonym)', 9 July 2021, P- 8 [39] – P- 9 [40].

Exhibit 17-016.01, 'Video recording of "Clarisse"', 9 July 2021; Exhibit 17-16.02, 'Transcript of video recording of Clarisse (a pseudonym)', 9 July 2021, P-12 [17–24], P-14 [16–23], P-15 [29–40], P-17 [17–19].

Transcript, Tim Marks, Public hearing 28, 12 October 2022, P-186 [39–45], P-187 [1–2], P-188 [6].

Exhibit 28-3, 'Statement of David Gearin', 26 August 2022, at [39–43].

Exhibit 28-15, 'Statement of Ricki Spencer', 30 August 2022, at [23].

Exhibit 28-15, 'Statement of Ricki Spencer', 30 August 2022, at [36–37].

Exhibit 28-15, 'Statement of Ricki Spencer', 30 August 2022, at [30].

Exhibit 28-1, 'Statement of Dr Debra Keenahan', 12 September 2022, at [38–39].

Name changed to protect identity; see Exhibit 28-5, 'Statement of "Jenni"', 12 September 2022, at [12].

For example, evidence in Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system' and Public hearing 27, 'Conditions in detention in the criminal justice system'.

Name changed to protect identity.

Exhibit 11-5.1, 'Statement of Helen Seares', 14 January 2021, p 7 [34].

Exhibit 11-2.1, 'Statement of Megan Osborne', 8 December 2020, at [21–22]; Exhibit 11-5.1, 'Statement of Helen Seares', 14 January 2021, p 7 [34].

Exhibit 11-2.1, 'Statement of Megan Osborne', 8 December 2020, at [22–24]; Exhibit 11-5.1, 'Statement of Helen Seares', 14 January 2021, p 3 [14]; Transcript, Helen Seares, 17 February 2021, at P-88 [5] – P-89 [38]; Exhibit 11-1.1, 'Pre-recorded audio statement of Melanie', 18 November 2020; Exhibit 11-1.2, 'Transcript of pre-recorded audio statement of Melanie', 18 November 2020, p 1; Exhibit 11-5.2, 'Statement of Helen Seares (No. 2)', 19 February 2021, pp 4–5 [20–23].

Exhibit 11-5.1, 'Statement of Helen Seares', 14 January 2021, pp 8 [38], 9 [44–45]; Transcript, Megan Osborne, Public hearing 11, 16 February 2021, P-40 [22–27], P-42 [40–44], P-43 [10–18], P-48 [41] – P-49 [10].

Exhibit 11-5.1, 'Statement of Helen Seares', 14 January 2021, p 3 [14]; Transcript, Helen Seares, 17 February 2021, P-90 [21] – P-91 [25].

Name changed to protect identity; see Exhibit 27-9, 'Statement of "Nathan"', 14 September 2022, at [18], [65–69].

Exhibit 27-9, 'Statement of "Nathan"', 14 September 2022, at [34–41], [46–54], [70–76], [81–84], [85–89].

Exhibit 27-9, 'Statement of "Nathan"', 14 September 2022, at [103–10].

Exhibit 27-9, 'Statement of "Nathan"', 14 September 2022, at [93–98], [109].

Exhibit 27-9, 'Statement of "Nathan"', 14 September 2022, at [64].

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

Submissions by the State of Western Australia in response to Counsel Assisting's submissions following Public hearing 27, 26 November 2022, SUBM.0054.0001.0006, p 5 [30].

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 4: Health care and services for people with cognitive disability*, October 2020, p 55 [182].

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 4: Health care and services for people with cognitive disability*, October 2020, p 55 [182].

Exhibit 4-19, 'Statement of Jaqueline Terri Mills', 12 February 2020, at [85].

Exhibit 4-6, 'Statement of Toni Mitchell', 10 February 2020 at [82].

Exhibit 4-13, 'Statement of Kim Letitia Creevey', 7 February 2020, at [29], [32].

- 54 Exhibit 4-4, 'Statement of Dr Rebecca Anne Kelly', 9 February 2020, at [210].
- 55 For example, Transcript, Tara Elliffe, Public hearing 4, 21 February 2020, P-344 [1]; Transcript, Margot Elliffe, Public hearing 4, 28 February 2020, P-860 [22–36]; Exhibit 4-15, 'Statement of Sabrina Monaghan', 12 February 2020, p 31 [161]; Exhibit 4-5, 'Statement of Rachel Browne', 2 February 2020, at [35], [140]; Transcript, Rachel Browne, Public hearing 4, 19 February 2020, P-92 [18] – P-93 [4].
- 56 Terri Libesman, Paul Gray, Eloise Chandler, Linda Briskman, Aminath Didi & Scott Avery, *Parents with disability and their experiences of child protection systems*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2023.
- 57 See, for example, Australian Institute of Health and Welfare, *Child protection Australia 2019–20*, Report, Child Welfare Series, No. 74, 2021, pp 47, 54–58; Susan Baidawi, Rubini Ball, Lena Turnbull, Rosemary Sheehan, Jade Purtell, Scott Avery, Robyn Newitt & Gauatri Kembhavi-Tam, *Care criminalisation of children with disability in child protection systems*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 4 May 2023, pp 152–53.
- 58 Australian Bureau of Statistics, *Prisoners in Australia, 2022*, Catalogue number 4517.0, 24 February 2023, table: Aboriginal and Torres Strait Islander Prisoners.
- 59 See, for example, Exhibit 11.21.1, 'Statement of Cheryl Axleby', 5 February 2021, at [88–89]; Transcript, Peter Collins, Public hearing 27, 23 September 2022, P-261 [24–46]; Exhibit 11.24.1, 'Statement of Debbie Kilroy', 12 September 2022, p 19 [87–90].
- 60 For example, Exhibit 25-19, 'Joint statement of Kunmanara (Margaret) Smith and Kim McRae', 21 June 2022, at [151]; Transcript, Kunmanara (Margaret) Smith, Public hearing 25, 12 July 2022, P-124 [10–12], [29–30]; see also submissions of Counsel Assisting the Royal Commission following Public hearing 25, 11 November 2022, p 97 [327–28].
- 61 See, for example, Exhibit 4-18, 'Statement of Dr Scott Avery', 14 February 2020, p 11 [35–36]; Exhibit 28-2, 'Statement of Tracy Barrell', 13 September, p 12 [69].
- 62 Exhibit 3-20, 'Statement of Jane Rosengrave', 28 November 2019, p 1 [3–4].
- 63 Exhibit 3-20, 'Statement of Jane Rosengrave', 28 November 2019, p 2 [7], [9].
- 64 Exhibit 3-20, 'Statement of Jane Rosengrave', 28 November 2019, pp 2 [10], 3 [14], 4 [18].
- 65 Exhibit 3-20, 'Statement of Jane Rosengrave', 28 November 2019, p 4 [19].
- 66 Exhibit 3-20, 'Statement of Jane Rosengrave', 28 November 2019, p 3 [13].
- 67 Transcript, Rebecca Adam, Public hearing 29, 25 October 2022, P-165 [44] – P-166 [9].
- 68 Transcript, Catherine Dunn, Public hearing 17 (Part 2), 29 March 2022, P-70 [26] – P-71 [32], P-73 [1–26].
- 69 Transcript, Catherine Dunn, Public hearing 17 (Part 2), 29 March 2022, P-73 [19–21].
- 70 Transcript, Catherine Dunn, Public hearing 17 (Part 2), 29 March 2022, P-69 [4–8].
- 71 Exhibit 5-19, 'Statement of Rosemary Kayess', 13 August 2020, at [25], [35].
- 72 Exhibit 6-9, SUFY.9999.0001.0001, p 21.
- 73 Exhibit 6-9, SUFY.9999.0001.0001, p 22.
- 74 Exhibit 6-9, SUFY.9999.0001.0001, p 23.
- 75 Transcript, Dianne Toohey, Public hearing 6, 23 September 2020, P-148 [27–34].
- 76 Transcript, Kathy Kendell, Public hearing 6, 23 September 2020, P-145 [14–16].
- 77 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 6: Psychotropic medication, behaviour support and behaviours of concern*, June 2021, p 136.
- 78 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 6: Psychotropic medication, behaviour support and behaviours of concern*, June 2021, p 136.
- 79 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 6: Psychotropic medication, behaviour support and behaviours of concern*, June 2021, p 5 [14].
- 80 Name changed, private session, 'Creed'.
- 81 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(5).
- 82 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth).

83 Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020.

84 Name changed, private session, 'Ricardo'.

85 *Disability Discrimination Act 1992* (Cth) s 13.

86 In its combined second and third periodic report to the CRPD Committee for the purpose of its 2019 review, the Australian Government explained the ways in which the CRPD has been explicitly incorporated in Commonwealth, state and territory legislation, including the DDA. See Committee on the Rights of Persons with Disabilities, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2-3, (7 September 2018), p 3 [13].

87 *Disability Discrimination Act 1992* (Cth) ss 4(1), 12(8). Section 12(8) now reads 'provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions give effect to the Disabilities Convention', inserted by *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 items 4 and 20.

88 *Disability Discrimination Act 1992* (Cth) s 3.

89 *Disability Discrimination Act 1992* (Cth) ss 15, 22–24, 29.

90 *Disability Discrimination Act 1992* (Cth) pt 2.

91 *Disability Discrimination Act 1992* (Cth) s 31.

92 *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability (Access to Premises – Buildings) Standards 2010* (Cth); *Disability Standards for Education 2005* (Cth). See the analysis of these standards in Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, pp 302–06 [228–52].

93 *Disability Discrimination Act 1992* (Cth) s 5.

94 *Disability Discrimination Act 1992* (Cth) s 6.

95 *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2).

96 *Australian Human Rights Commission Act 1986* (Cth) s 46P.

97 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(aa); conciliation is an informal approach to resolving complaints through an independent third party.

98 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).

99 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

100 *Disability Discrimination Act 1992* (Cth) s 113.

101 Exhibit 9-24, 'Statement of Dr Ben Gauntlett', 3 December 2020, p 4 [9].

102 *Disability Discrimination Act 1992* (Cth) s 60.

103 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, pp 16–17 [4.2]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013), [14–15]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the second and third combined reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [9–10].

104 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, pp 338–40.

105 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [10].

106 *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (Vic), *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1998* (Tas).

107 *Discrimination Act 1991* (ACT) s 7(1)(e); *Anti-Discrimination Act 1997* (NSW) ss 49A, 49B; *Equal Opportunity Act 1984* (SA) s 66; *Anti-Discrimination Act 1998* (Tas) s 16(k); *Equal Opportunity Act 2010* (Vic) s 6(e).

108 *Anti-Discrimination Act 1992* (NT) s 19(1)(j); *Anti-Discrimination Act 1991* (Qld) s 7(h); *Equal Opportunity Act 1984* (WA) s 66A.

- 109 Neil Rees, Simon Rice & Dominique Allen, *Australian anti-discrimination & equal opportunity law*, 3rd edn, Federation Press, 2018, p 348 [7.5.1]; Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, pp 268–72 [72–74].
- 110 *Equal Opportunity Act 2010* (Vic) ss 20, 33, 40, 45.
- 111 *Equal Opportunity Act 2010* (Vic) s 15(2).
- 112 Relevant human rights or anti-discrimination bodies include *Victorian Equal Opportunity and Human Rights Commission*; *Queensland Human Rights Commission*; *ACT Human Rights Commission*; *Tasmanian Anti-Discrimination Commissioner*; *Anti-Discrimination New South Wales*; *Equal Opportunity SA*; *Northern Territory Anti-Discrimination Commission*; *Equal Opportunity Commission Western Australia*.
- 113 *Anti-Discrimination Act 1977* (NSW) ss 89–91C; *Equal Opportunity Act 2010* (Vic) ss 113–16; *Equal Opportunity Act 1984* (SA) ss 93, 95; *Equal Opportunity Act 1984* (WA) ss 83, 87; *Anti-Discrimination Act 1991* (Qld) ss 134–36, 158; *Human Rights Commission Act 2005* (ACT) ss 40, 42–43, 45, 47, 51; *Anti-Discrimination Act 1992* (NT) ss 60, 64, 78–79; *Anti-Discrimination Act 1998* (Tas) ss 60, 62, 74–75.
- 114 *Equal Opportunity Act 2010* (Vic) s 122.
- 115 Exhibit 18-021, CTD.9999.0030.0001, p 67 [363].
- 116 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20(1)(b). The AHRC’s human rights complaints jurisdiction under the *Australian Human Rights Commission Act 1986* (Cth) is in addition to the complaints mechanism and pathway to federal courts through the four Commonwealth anti-discrimination Acts, including the *DDA*.
- 117 *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth).
- 118 *Australian Human Rights Commission Act 1986* (Cth) sch 4, 5.
- 119 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f)(i), 20(1)(b).
- 120 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f)(ii), 20(1).
- 121 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g)–(h).
- 122 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(j).
- 123 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o).
- 124 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 11.
- 125 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 11.
- 126 In 2020–21, out of a total of 824 complaints received under the *AHRC Act*, only 10 complaints were made in relation to the *CRPD*: Australian Human Rights Commission, *2020-21 Complaint statistics*, pp 31–32 [Table 34]. In contrast, 1,163 complaints were received under the *DDA*: Australian Human Rights Commission, *2020-21 Complaint statistics*, p 13 [Table 13]. In 2021–22, out of a total of 517 complaints received under the *AHRC Act*, 17 complaints were made in relation to the *CRPD*: Australian Human Rights Commission, *2021-22 Complaint statistics*, pp 32–33 [Table 34]. In contrast, 1,960 complaints were received under the *DDA*: Australian Human Rights Commission, *2021-22 Complaint statistics*, p 14 [Table 13].
- 127 Committee on the Rights of Persons with Disabilities, *Decision adopted by the Committee under article 2 of the Optional Protocol, concerning communication No. 14/2013*, CRPD/C/17/D/14/2013 (19 May 2017), [6.3].
- 128 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 29.
- 129 Name changed, private session, ‘Hadassah’.
- 130 Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, p 11 [1–2].
- 131 For example, Public hearing 13, ‘Preventing and responding to violence, abuse, neglect and exploitation in disability services (a case study)’; Public hearing 14, ‘Preventing and responding to violence, abuse, neglect and exploitation in disability services (South Australia)’; Public hearing 20, ‘Preventing and responding to violence, abuse, neglect and exploitation in disability services (two case studies)’; Public hearing 23, ‘Preventing and responding to violence, abuse, neglect and exploitation in disability services (a case study)’; Public hearing 32, ‘Service providers revisited’.

132 See, for example, Exhibit 23-1, 'Statement of 'Sally'', 6 July 2022 p 25 [80]; see also submissions
of Counsel Assisting the Royal Commission following Public hearing 32, 31 March 2023
(amended 18 May 2023), pp 22–25 [52–66].

133 Exhibit 18-21, CTD.9999.0030.0001, pp 17 [70], 19–20 [76–83].

134 These include the rights of children with disability (article 7); equal recognition before the law
(article 12); living independently and being included in the community (article 19); the right to
health (article 25); and the right to habilitation and rehabilitation (article 26). See Exhibit 18-021,
CTD.9999.0030.0001, pp 19–20 [76–83], 23–24 [108–12], 30–31 [153–55], 38 [202–03], 44–45
[250–55]. See also Statement of Compatibility with Human Rights appended to Explanatory
Memorandum, National Disability Insurance Scheme Bill 2012 (Cth).

135 Submissions by the Australian Government in response to Counsel Assisting's submissions
following Public hearing 18, 15 February 2022, SUBM.0022.0001.0001, pp 8 [22], 10 [30].

136 *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a), (i).

137 The Full Court of the Federal Court held that it is permissible to consider the *CRPD* in interpreting
the *National Disability Insurance Scheme Act 2013* (Cth): *National Disability Insurance Agency
v WRMF* [2020] FCAFC 79, [175]. See also, for example, *Ryan v Commissioner of Police, NSW
Police Force (No 2)* [2021] FCA 106, [119]; *PNFK and National Disability Insurance Agency* [2018]
AATA 692, [21]–[22], [105] (in which the AAT had regard to the *CRPD* in construing s 34(1) of
the *National Disability Insurance Scheme Act 2013* (Cth)). Chapter 1 also discusses how human
rights treaties can inform the interpretation of Australian law.

138 *National Disability Insurance Scheme Act 2013* (Cth) ss 4–5.

139 *National Disability Insurance Scheme Act 2013* (Cth) s 4(6).

140 See, for example, *National Disability Insurance Scheme Act 2013* (Cth) s 17A(4).

141 For example, see Australian Government Department of Social Services, NDIS Quality and
Safeguarding Framework, December 2016, p 11 [1.4].

142 For example, see Australian Government Department of Social Services, NDIS Quality and
Safeguarding Framework, December 2016, p 11 [1.4].

143 *National Disability Insurance Scheme Act 2013* (Cth) s 181E(a).

144 *National Disability Insurance Scheme Act 2013* (Cth) pt 3A div 8.

145 In 2018, there were approximately 2.4 million people aged 0 to 64 years with disability in Australia:
Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia, 2018*, Results accessed using
Australian Bureau of Statistics TableBuilder, age in single years up to 100 years and over; by whether
has a disability. The total number of people with disability in Australia was 4.4 million. However, the
NDIS is only available to those under 65 years of age. As at 31 December 2022, approximately
573,342 people with disability in Australia were NDIS participants: National Disability Insurance
Agency, *NDIS Quarterly report to disability ministers*, Q2 2022–23 report, December 2022, p 17.

146 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined
second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3
(15 October 2019), [31(a)].

147 Australian Government, 'About the NDIS Review', *NDIS Review*, web page. <www.ndisreview.gov.au/about>

148 Australian Government NDIS Review, Terms of Reference: Building a strong, effective NDIS,
October 2022, p 5.

149 Name changed, private session, 'Frida'.

150 *Disability Services Act 1986* (Cth) s 10.

151 See, for example, *Disability Services Act 1986* (Cth) ss 5, 5A, 10(3)–(3A), 12(3), 12AD(2), (5),
12AE(2)(c), 13(2), 14(2)(c).

152 *Disability Services Act 1986* (Cth) s 10(5)(c).

153 *Disability Services Act 1986* (Cth) s 3.

154 Australian Government Department of Social Services, National Standards for Disability Services,
December 2013, p 9.

155 Australian Government Department of Social Services, National Standards for Disability Services,
December 2013, p 11.

156 Exhibit 21-7, 'Statement of Debbie Mitchell', 31 January 2022, pp 2–3 [12–13]; Australian
Government Department of Social Services, Disability Employment Services Grant Agreement:
Effective 1 July 2018, Updated to reflect direction 8 issued on 1 July 2021, pp 66 [79.1(a)],
150–51 [155.2(c)(i)]; Exhibit 21-20, CTD.9999.0046.0001, pp 66 [79.1(a)], 150–51 [155.2(c)(i)].

- 157 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, p 7.
- 158 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, p 1.
- 159 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, p 2.
- 160 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, pp 1–2; Minister for Social Services, Amanda Rishworth, Consultation opens on a modernised Disability Services Act, media release, 8 November 2022.
- 161 ‘A New Act to Replace the Disability Services Act (1986)’, *Australian Government Department of Social Services*, web page, 2023. <engage.dss.gov.au/a-new-act-to-replace-the-disability-services-act-1986>; Minister for Social Services, Amanda Rishworth, Consultation opens on a modernised Disability Services Act, media release, 8 November 2022.
- 162 Submissions by the Australian Government in response to Counsel Assisting’s submissions in Public hearing 31, 9 March 2023, SUBM.0055.0001, p 12 [41].
- 163 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, pp 1–2, 4.
- 164 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, pp 2, 7.
- 165 Australian Government Department of Social Services, *A New Act to Replace the Disability Services Act 1986*, Consultation paper, November 2022, p 4.
- 166 Key laws include *Disability Services Act 1991* (ACT), *Disability Inclusion Act 2014* (NSW), *Disability Services Act 1993* (NT), *Disability Services Act 2006* (Qld), *Disability Inclusion Act 2018* (SA), *Disability Services Act 2011* (Tas), *Disability Act 2006* (Vic), and *Disability Services Act 1993* (WA).
- 167 See discussion in Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, pp 59–71 [23–107].
- 168 See, for example, ‘Review of the Disability Inclusion Act 2018 – South Australia’, *Inclusion South Australia*, web page, 2022. <inclusive.sa.gov.au/have-your-say/review-disability-inclusion-act>; Department of Communities Tasmania, *2021 Review of the Disability Services Act 2011*, Consultation outcomes report, September 2022. Victoria and South Australia are also developing proposed legislative reforms. See Victoria Department of Families, Fairness and Housing, ‘Disability Inclusion Bill Exposure Draft’, *Engage Victoria*, web page. <engage.vic.gov.au/disability-act>; Government of South Australia, ‘Consultation on the proposed Disability Inclusion (Review Recommendations) Amendment Bill 2022’, *yourSAy*, web page. <yoursay.sa.gov.au/disabilityinclusionamendmentbill2022>. At the time of writing, the Victorian Exposure Draft had not been progressed to a Bill.
- 169 Except for the *Disability Services Act 2011* (Tas); See *Disability Inclusion Act 2014* (NSW) ss 3(a), (e), 4(2)–(10); *Disability Act 2006* (Vic) s 4(d); *Disability Services Act 2006* (Qld) ss 6(1)(a), 18; *Disability Inclusion Act 2018* (SA) ss 7, 8(a), 9(1)(a)–(k); *Disability Services Act 1993* (WA) sch 1; *Disability Services Act 1991* (ACT) sch 1; *Disability Services Act 1993* (NT) sch 2.
- 170 In Queensland, no provisions within the *Disability Services Act 2006* (Qld) create a civil cause of action based on a contravention of the provision: *Disability Services Act 2006* (Qld) s 4. The same is true for South Australia and Western Australia: *Disability Inclusion Act 2018* (SA) s 6; *Disability Services Act 1993* (WA) s 4(1). The relevant laws in Tasmania, Victoria, Western Australia and the Australian Capital Territory do not contain equivalent provisions: *Disability Services Act 2011* (Tas); *Disability Act 2006* (Vic); *Disability Services Act 1993* (WA); *Disability Services Act 1991* (ACT).
- 171 *Disability Services Act 2006* (Qld) ss 32A–35; *Disability Services Act 1993* (WA) ss 32–39; *Disability Services Act 1993* (NT) ss 45–49. Equivalent complaints mechanisms in other jurisdictions may be administrative rather than legislative.
- 172 *Disability Act 2006* (Vic) ss 14–17.
- 173 See, for example, *Disability Act 2006* (Vic) ss 28–36.
- 174 Disability Inclusion Bill (Exposure Draft) 2022 (Vic). See also the proposed Disability Inclusion (Review Recommendations) Amendment Bill 2022 (SA), which, at the time of writing, aimed to

implement recommendations from an independent review of the *Disability Inclusion Act 2018* (SA). At the time of writing this report, the Exposure Draft had not been progressed to a Bill.

175 Which, at the time of writing, was defined as an entity that had 50 or more employees and was
a public service body, public entity, special body, council, Court Services Victoria, university or
prescribed entity: *Disability Inclusion Bill (Exposure Draft) 2022* (Vic) s 5. At the time of writing, the
Exposure Draft had not been progressed to a Bill.

176 *Disability Inclusion Bill (Exposure Draft) 2022* (Vic) s 9. At the time of writing, the Exposure Draft
had not been progressed to a Bill.

177 *Disability Inclusion Bill (Exposure Draft) 2022* (Vic) s 10. At the time of writing, the Exposure Draft
had not been progressed to a Bill.

178 *Disability Inclusion Bill (Exposure Draft) 2022* (Vic) ss 32–39. At the time of writing, the Exposure
Draft had not been progressed to a Bill.

179 *Human Rights Act 2004* (ACT) ss 8–27.

180 *Human Rights Act 2004* (ACT) ss 27, 27A, 27B.

181 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8–27.

182 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 19–20.

183 *Human Rights Act 2019* (Qld) ss 15–35.

184 *Human Rights Act 2019* (Qld) ss 27–28, 36, 37.

185 *Human Rights Act 2019* (Qld) s 58 (1); *Charter of Human Rights and Responsibilities Act 2006*
(Vic) s 38(1); *Human Rights Act 2004* (ACT) s 40B(1).

186 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28; *Human Rights Act 2004* (ACT)
ss 37–39; *Human Rights Act 2019* (Qld) ss 38–41.

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

188 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2019* (Qld)
s 59; *Human Rights Act 2004* (ACT) s 40C.

189 *Human Rights Act 2004* (ACT) s 32; *Human Rights Act 2019* (Qld) s 53; *Charter of Human Rights*
and Responsibilities Act 2006 (Vic) s 36.

190 *Human Rights Act 2019* (Qld) s 54; *Charter of Human Rights and Responsibilities Act 2006* (Vic)
s 36(5); *Human Rights Act 2004* (ACT) s 32(3).

191 *Human Rights Act 2019* (Qld) s 43; *Charter of Human Rights and Responsibilities Act 2006*
(Vic) s 31. Under s 37(3)(b) of the *Human Rights Act 2004* (ACT), the Attorney-General must
state whether a bill is consistent with human rights, and if it is not, how it is inconsistent with
human rights. It does not make provision for an override declaration that otherwise displaces the
operation of the Human Rights Act.

192 *Human Rights Act 2019* (Qld) s 44; *Charter of Human Rights and Responsibilities Act 2006* (Vic)
s 31(3), (5).

193 *Human Rights Act 2019* (Qld) s 47; *Charter of Human Rights and Responsibilities Act 2006* (Vic)
s 31(9).

194 *Human Rights Act 2019* (Qld) s 45(1); *Charter of Human Rights and Responsibilities Act 2006*
(Vic) s 31(6). For example, the rule of interpretation mentioned would not apply to a provision
subject to an override declaration: *Human Rights Act 2019* (Qld) s 48(5); *Charter of Human Rights*
and Responsibilities Act 2006 (Vic) ss 31(6) and 32(1).

195 *Human Rights Act 2019* (Qld) s 53(4); *Charter of Human Rights and Responsibilities Act 2006*
(Vic) s 36(2).

196 *Human Rights Act 2019* (Qld) ss 79–87.

197 The 2015 Review of the Victorian Charter recommended that the Victorian Equal Opportunity
and Human Rights Commission be given the mandate to offer dispute resolution of Charter
complaints: Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter*
of Human Rights and Responsibilities Act 2006, September 2015, pp 97–105.

198 *Ombudsman Act 1973* (Vic) s 13.

199 Australian Capital Territory Government, *New human rights complaint pathway for ACT*, media
release, Canberra, 20 October 2022.

200 Transcript, Kathy Parton, Public hearing 31, 15 December 2022, P-287 [6–26]; see also Exhibit
31-015, QLD.0020.0051.0001, p 5 [7b].

201 Queensland Advocacy Incorporated, Submission in response to *Restrictive practices issues*
paper, 9 December 2020, SUB.100.01080, p 17.

- 202 *Australian Constitution* cl 5, s 109; see also *Momcilovic v The Queen* (2011) 245 CLR 1, p 66 [93] (French CJ), pp 84 [146], 92 [171] (Gummow J), 132 [310–11] (Hayne J); *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; *Burns v Corbett* (2018) 265 CLR 304. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).
- 203 Law Institute of Victoria, Submission, 9 March 2021, SUB.100.01267, pp 4–6 [4.2–4.3]; Queensland Office of the Public Guardian, Submission in response to *Rights and attitudes issues paper*, 21 September 2020, ISS.001.00455, p 5.
- 204 Transcript, Christina Ryan, Public hearing 18, 9 November 2021, P-147 [24–26].
- 205 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(a).
- 206 The right to an effective remedy is an essential component of human rights under the *International Covenant on Civil and Political Rights* and is consistently referred to in the core human rights treaties; See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 14; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), art 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 6. The right to an effective remedy is also implicitly recognised in the *CRPD*: see *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 3, 4.
- 207 Queensland Advocacy for Inclusion, Submission, 21 December 2022, SUB.001.03134, p 26.
- 208 For example, the *Australian Constitution* protects the right to vote (s 41), the right to trial by jury (s 80) and freedom of religion (s 116); See also Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 11 [1.1(a)], 52 [2.3(b)].
- 209 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 11 [1.1(a)]; Australian Law Reform Commission, *Traditional rights and freedoms – Encroachments by Commonwealth laws*, Final report, ALRC Report 129, December 2015. This report identifies examples of common law rights that have been encroached on by legislation, including freedom of speech, freedom of religion, freedom of association and assembly, and freedom of movement. See pp 14–16, 90–126, 141–59, 171–88, 196–218.
- 210 Women with Disabilities Australia, Submission in response to *Rights and attitudes issues paper*, 5 July 2021, SUB.100.01449, p 50 [8.10].
- 211 Australian Lawyers Alliance, Submission in response to *Rights and attitudes issues paper*, 22 July 2020, ISS.001.00288, pp 6–7 [4].
- 212 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, pp 78–79 [250].
- 213 Queensland Human Rights Commission, Submission, 19 March 2020, SUB.100.00611, p 5 [11].
- 214 Public Interest Advocacy Centre, Submission, 23 December 2022, SUB.001.03246, p 12 [Recommendation 7].
- 215 Children and Young People with Disability Australia, Human Rights Law Centre and People with Disability Australia, Submission, 20 December 2022, SUB.100.02845, [2.1–2.3].
- 216 Children and Young People with Disability Australia, Human Rights Law Centre and People with Disability Australia, Submission, 20 December 2022, SUB.100.02845, [2.3].
- 217 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, pp 78–79 [250].
- 218 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 8.
- 219 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 35.
- 220 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 15.
- 221 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 67–337; Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, pp 17–18.

- 222 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021.
- 223 Letter from the Attorney-General, Mark Dreyfus, to the Chair of the Parliamentary Joint Committee on Human Rights, Josh Burns, 15 March 2023.
- 224 See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim report*, October 2020, p 51; Lorna Hallahan & Flinders University, *Disability in Australia: Shadows, struggles and successes: A usable socio-cultural history of disability in Australia*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, November 2021, p 60.
- 225 For example, Exhibit 13-3, 'Statement of Sophia', 29 April 2021, at [61]; Exhibit 20-0064, 'Statement of Paul', 17 November 2021, at [158]; Exhibit 23-026, 'Statement of Suzie', 28 April 2022, at [100–02].
- 226 See data and discussion in Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*.
- 227 Transcript, Rosemary Kayess, Public hearing 18, 8 November 2021, P-30 [16–26].
- 228 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 46. The right to education is reflected in, for example, *Human Rights Act 2004* (ACT) s 27A and *Human Rights Act 2019* (Qld) s 36. The right to health is reflected in, for example, *Human Rights Act 2019* (Qld) s 37. The right to participate is reflected in, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(1).
- 229 See, for example, Exhibit 18-21, CTD.9999.0030.0001, pp 18 [77–79], 19–22 [76–97], 26–28 [129–38], 30 [151–52], 31 [159–60], 32–33 [169–72], 40 [215], [217], 41–42 [223–24], [228–29], 43 [236], [243], 45 [256–57], 47 [270–72], 50–51 [288–90].
- 230 Exhibit 18-20, CTD.9999.0030.0001, pp 20 [88] – 21 [94].
- 231 Exhibit 18-21, CTD.9999.0030.0001, pp 19–20 [76–87]. We also acknowledge the actions said to be responsive to particular articles of the CRPD identified by the Australian Government in correspondence to the Royal Commission, for example Exhibit 18-21, CTD.9999.0030.0001, pp 20 [88], 53 [307].
- 232 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, p 18.
- 233 Australian Lawyers Alliance, Submission in response to *Rights and attitudes issues paper*, 22 July 2020, ISS.001.00288, p 6 [4].
- 234 Law Institute of Victoria, Submission, 9 March 2021, SUB.100.01267, p 1 [1.2].
- 235 Inclusion Australia, Submission in response to *Criminal justice system issues paper*, June 2021, ISS.001.00682, p 5.
- 236 Queensland Human Rights Commission, Submission, 19 March 2020, SUB.100.00611, p 5 [9].
- 237 Australian Federation of Disability Organisations, Submission in response to *Rights and attitudes issues paper*, June 2021, ISS.001.00693, p 7.
- 238 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [5(a)].
- 239 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020.
- 240 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 21.
- 241 See Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 51–52, 54–55; Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, ALRC Report 124, August 2014, pp 11–13 [Recommendation 3].
- 242 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 54.
- 243 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 80.

- 244 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 81.
- 245 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 82.
- 246 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 99.
- 247 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 26–30.
- 248 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 140–46.
- 249 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 83–90.
- 250 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 13.
- 251 Transcript, Vanamali (Mali) Hermans, Public hearing 17, 31 March 2022, P-270 [47] – P-271 [2].
- 252 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 253 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), p 6 [22].
- 254 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), p 5 [19].
- 255 *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth).
- 256 Exhibit 8-3, 'Statement of June Oscar AO', 17 November 2020, p 24 [100].
- 257 Exhibit 8-3, 'Statement of June Oscar AO', 17 November 2020, p 24 [100].
- 258 Transcript, Dr Ben Gauntlett, Public hearing 9, 11 December 2020, P-403 [21–22].
- 259 Transcript, Dr Ben Gauntlett, Public hearing 9, 11 December 2020, P-403 [23–25].
- 260 Transcript, Dominic Golding, Public hearing 29, 26 October 2022, P-185 [36] – P-186 [18].
- 261 Transcript, Chin Tan, Public hearing 29, 27 October 2022, P-267 [16–21].
- 262 Exhibit 18-21, CTD.9999.0030.0001, p 11 [42].
- 263 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-177 [27–29].
- 264 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-177 [12–29].
- 265 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, p 17.
- 266 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 301; Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, p 17.
- 267 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [10].
- 268 Submissions of Counsel Assisting the Royal Commission following Public hearing 29, 21 December 2022, p 84 [279] [Recommendation 10].
- 269 Submissions of Counsel Assisting the Royal Commission following Public hearing 29, 21 December 2022, p 84 [279] [Recommendation 10].
- 270 Darwin Community Legal Service, Submission, 31 December 2022, SUB.100.03168, p 23.
- 271 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(a).
- 272 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1)(b).

- 273 *Horta v Commonwealth* (1994) 181 CLR 183, p 195; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, p 384, [97] (Gummow and Hayne JJ) citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, p 204 (Gibbs CJ); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, pp 10 [11] (Gleeson CJ), 71 [201] (Kirby J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, pp 643–44 [462] (Keane J).
- 274 Submissions by the Australian Government in response to Counsel Assisting’s submissions in Public hearing 18, 15 February 2022, SUBM.0022.0001.0001, p 8 [21]; Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-161 [29–33].
- 275 Exhibit 18-23, CTD.9800.0002.0001, p 7 [33].
- 276 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-161 [37–44]; Exhibit 18-23, CTD.9800.0002.0001, p 2 [5].
- 277 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-161 [45–46]; Exhibit 18-23, CTD.9800.0002.0001, p 2 [5].
- 278 Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, Final report, ALRC Report 124, August 2014, p 5.
- 279 Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, Final report, ALRC Report 124, August 2014, pp 11–21.
- 280 Victorian Law Reform Commission, *Guardianship*, Final report 24, April 2012; Queensland Law Reform Commission, *A review of Queensland’s guardianship laws*, Report 67, September 2010; The Public Advocate (Qld), *Public accountability, private lives: Reconsidering the Queensland guardianship system’s confidentiality requirements*, August 2022; ACT Law Reform Advisory Council, *Guardianship report*, July 2016; Department of the Attorney General (WA), *Statutory review of the Guardianship and Administration Act 1990*, November 2015; Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute decision-making for people lacking capacity*, Report 43, February 2010; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145, May 2018; Tasmanian Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)*, December 2018.
- 281 Economic and Social Commission for Asia and the Pacific, *Harmonization of National laws with the Convention on the Rights of Persons with Disabilities: Overview of Trends in Asia and the Pacific*, ST/ESCAP/3047, 2022, p 16.
- 282 Economic and Social Commission for Asia and the Pacific, *Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities: Overview of Trends in Asia and the Pacific*, ST/ESCAP/3047, 2022, p 16.
- 283 Economic and Social Commission for Asia and the Pacific, *Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities: Overview of Trends in Asia and the Pacific*, ST/ESCAP/3047, 2022, p 16.
- 284 Economic and Social Commission for Asia and the Pacific, *Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities: Overview of Trends in Asia and the Pacific*, ST/ESCAP/3047, 2022, p 16.
- 285 Economic and Social Council for Asia and the Pacific, *Jakarta Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2023–2032*, UN Doc ESCAP/APDDP/2022/L.4 (2 September 2022), [16(a)].
- 286 Economic and Social Commission for Asia and the Pacific, *Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities: Overview of Trends in Asia and the Pacific*, ST/ESCAP/3047, 2022.
- 287 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, p 30 [Recommendation 23].
- 288 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, pp 7 [11], 11 [Recommendation 17], 76 [241].
- 289 Women with Disabilities Australia, Submission in response to *Rights and attitudes issues paper*, June 2021, SUB.100.01449, p 9 [1.4].
- 290 In their research report for the Royal Commission, Rosemary Kayess and Therese Sands considered ‘there has been little to no recognition that law, policy and practice frameworks allow for forms of violence against people with disability, which legitimises acts of violence as care, treatment and protection’: Rosemary Kayess & Therese Sands, UNSW Social Policy Research Centre, *Convention on the Rights of Persons with Disabilities: Shining a light on social*

- transformation*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020, p 3.
- 291 For example, as discussed earlier in this chapter, in his report Professor McCallum expressed concerns about Australia's compliance with articles 14, 15 and 17 of the *CRPD* among others: Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 65–82. The use and regulation of restrictive practices, including in health settings, is considered in more detail in Volume 6, *Enabling autonomy and access*. This volume sets out recommendations for the reduction and elimination of use of restrictive practices against people with disability. It also considers involuntary sterilisation and makes recommendations for reform.
- 292 The Senate Legal and Constitutional Affairs Legislation Committee's purpose is to 'deal with bills referred by the Senate, the Estimates process and oversee the performance of departments'. The Senate Legal and Constitutional Affairs References Committee deals with 'all other matters referred by the Senate: 'Senate Standing Committees on Legal and Constitutional Affairs: Role of the Committee', *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Role_of_the_Committee>; Parliament of Australia, 'Standing and select committees' in *Standing orders and other orders of the senate*, [25].
- 293 The Scrutiny of Bills Committee assesses bills against 'a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny'. Among other things, the Committee must scrutinise each bill introduced into the Parliament in relation to whether it 'unduly trespasses on personal rights and liberties'. See 'Senate Standing Committee for the Scrutiny of Bills: About the Committee', *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/About_the_committee#:~:text=The%20Scrutiny%20of%20Bills%20Committee,obligations%2C%20and%20on%20parliamentary%20scrutiny>; Parliament of Australia, 'Standing and select committees' in *Standing orders and other orders of the senate*, [24].
- 294 The Joint Standing Committee on Treaties has been appointed by the Commonwealth Parliament to 'review and report on all treaty actions proposed by the Government before action which binds Australia to the terms of the treaty is taken': 'Joint Standing Committee on Treaties: Role of the Committee', *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee> The Committee 'provides regular updates to state and territory governments on current and likely future Commonwealth treaty action', which 'may include ... reporting on Australia's compliance with our human rights treaty obligations': 'International policy', *Australian Government Department of the Prime Minister and Cabinet*, web page. <www.pmc.gov.au/international-policy-and-national-security/international-policy>
- 295 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.
- 296 Exhibit 18-20, CTD.9999.0007.0001, p 9 [45].
- 297 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(1)–(3), 9(1)–(2).
- 298 Transcript, Andrew Byrnes, Public hearing 18, 8 November 2021, P-78 [43–44].
- 299 Charlotte Fletcher & Anita Coles, 'Reflections on the 10th anniversary of the Parliamentary Joint Committee on Human Rights', Senate lecture series, August 2022, p 2.
- 300 Transcript, Andrew Byrnes, Public hearing 18, 8 November 2021, P-86 [7–5].
- 301 Transcript, Andrew Byrnes, Public hearing 18, 8 November 2021, P-86 [9–12].
- 302 Australian Human Rights Commission, Submission to the Committee Against Torture, October 2022, p 6 [16].
- 303 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 295.
- 304 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [6(a)].
- 305 'Parliamentary Business: Inquiry into Australia's Human Rights Framework', *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>
- 306 Transcript, Natalie Wade, Public hearing 18, 8 November 2021, P-50 [4–7].

307 'Right to an effective remedy: Public sector guidance sheet', *Australian Government Attorney-General's Department*, web page. <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-effective-remedy>

308 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2004* (ACT) s 40C; *Human Rights Act 2019* (Qld) s 59.

309 See, for example, Exhibit 28-014, 'Statement of Professor Nicole Asquith', 23 September 2022, pp 4–6 [16–21], 8–11 [31–40].

310 Submissions of Counsel Assisting the Royal Commission following Public hearing 28, 9 December 2022, p 78 [290].

311 Transcript, Naomi Anderson, Public hearing 3, 5 December 2019, P-348 [6–8].

312 The National Union of Students, the Australian Law Students' Association and the Australian Medical Students' Association, Material supplementary to submission SUB.100.02602, 30 November 2022, SUB.999.07841, p 12.

313 The National Union of Students, the Australian Law Students' Association and the Australian Medical Students' Association, Material supplementary to submission SUB.100.02602, 30 November 2022, SUB.999.07841, p 6.

314 Chapter 1 notes the 'twin goals' of remedies are to redress past harms of violations and minimise future rights violations. See, for example, Kent Roach, *Remedies for human rights violations: A two-track approach to supra-national and national law*, Cambridge University Press, 2021, pp 13–14.

315 Children and Young People with Disability Australia, Human Rights Law Centre and People with Disability Australia, Submission, 16 December 2022, SUB.100.02845, [2.3].

316 Law Institute of Victoria, Submission, 9 March 2021, SUB.100.01267, p 5.

317 Under the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2017, 2518 UNTS 283 (entered into force 3 May 2008).

318 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203, p 13.

319 Name changed, private session, 'Dayanara'.

320 Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021, p 4.

321 Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021, pp 2–3.

322 Exhibit 31-17, 'Statement of Debbie Mitchell', 23 November 2022, at [41].

323 Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021, p 5.

324 Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021, p 6.

325 Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021, p 1. The Australian Government described the National Disability Strategy, being the precursor to the ADS, as one of the 'significant Australian Government mechanisms for implementing the CRPD': Exhibit 18-21, CTD.9999.0030.0001, pp 17 [70] – 18 [75]. In later submissions it stated that the ADS 'is not the primary mechanism for implementing the CRPD' but plays an 'important role in protecting, promoting, and realising the human rights of people with disability by contributing to Australia's reporting obligations under the CRPD': Submissions by the Australian Government in response to Counsel Assisting's submissions in Public hearing 31, 9 March 2023, SUBM.0055.0001.0005, pp 20–21 [64].

326 See, for example, Transcript, Debbie Mitchell, Public hearing 31, 16 December 2022, P-312 [14–19].

327 Submissions of Counsel Assisting the Royal Commission following Public hearing 31, 3 February 2023, p 91 [313].

328 Name changed, private session, 'Vero'.

329 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 1, 5.

330 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(4).

331 Transcript, Gerard Quinn, Public hearing 31, 12 December 2022, P-48 [45–47].

332 *Disability Discrimination Act 1992* (Cth) pt 2.

333 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 56.

- 334 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2004* (ACT) s 40B(1); *Human Rights Act 2019* (Qld) s 58(1).
- 335 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2004* (ACT) s 40C; *Human Rights Act 2019* (Qld) s 59.
- 336 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 20–21.
- 337 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 34 [143] [Recommendation 5].
- 338 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, pp 112–13 [411–13].
- 339 *Equality Act 2010* (UK) ss 6, 149(1)(b).
- 340 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 33(1).
- 341 Valentin Aichele, ‘Art.33 National Implementation and Monitoring’, in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, 2021, pp 987–88; Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia’s level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2020, p 157.
- 342 Exhibit 18-21, CTD.9999.0030.0001, pp 65–66 [358].
- 343 Transcript, Luke Mansfield, Public hearing 18, 9 November 2021, P-182 [44] – P-183 [9].
- 344 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-182 [14–39].
- 345 Exhibit 18-21, CTD.9999.0030.0001, p 57 [323–25].]
- 346 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-184 [7].
- 347 See, for example, United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and Inter-Parliamentary Union, *From Exclusion to Equality: Realising the rights of persons with disabilities*, UN Doc HR/PUB/07/60 (2007), pp 93–96. Further detail is included in Human Rights Council, *Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities*, 13th sess, UN Doc A/HRC/13/29 (22 December 2009); Conference of States parties to the Convention on the Rights of Persons with Disabilities, *National implementation and monitoring: Note by the Secretariat*, 7th sess, UN Doc CRPD/CSP/2014/3 (1 April 2014).
- 348 Conference of States parties to the Convention on the Rights of Persons with Disabilities, *National implementation and monitoring: Note by the Secretariat*, 7th sess, UN Doc CRPD/CSP/2014/3 (1 April 2014), p 4 [13]. This aligns with the CRPD Committee’s concluding observations that expressed concern about federal states that do not have focal points at the sub-central level: Valentin Aichele, ‘Art.33 National Implementation and Monitoring’, in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, 2021, p 989.
- 349 Exhibit 31-20, NTT.9999.0020.0001, p 6.
- 350 Transcript, Kathy Parton, Public hearing 31, 15 December 2022, P-274 [1–6]; Exhibit 31-15, QLD.0020.0051.0001, p 5.
- 351 Transcript, Kathy Parton, Public hearing 31, 15 December 2022, P-274 [16–21]; Exhibit 31-15, QLD.0020.0051.0001, p 5.
- 352 Transcript, Andrew Walter, Public hearing 18, 9 November 2021, P-184 [29] – P-185 [1]; Transcript, Luke Mansfield, Public hearing 18, 9 November 2021, P-185 [14–17]; Exhibit 31-20, NTT.9999.0020.0001, p 7.
- 353 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, p 103 [369].
- 354 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 31(1).
- 355 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 31(2).
- 356 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 31(3).
- 357 Exhibit 18-21, CTD.9999.0030.0001, p 52 [302].

358 See the discussion of issues with data collection and analysis, and recommendations for reform,
in Volume 12, *Beyond the Royal Commission*.

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- 470 Submissions of Counsel Assisting the Royal Commission following Public hearing 31, 3 February 2023, pp 98–99 [341].
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- 473 Submissions by the State of New South Wales in response to Counsel Assisting’s submissions in Public hearing 31, 2 March 2023, SUBM.0055.0001.0001, p 4 [15].
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Glenys*

Glenys is in her 40s. She is autistic and lives with dyslexia and a work-related injury. A couple of years ago, she turned to a service provider for help.

'I went there for counselling, nothing more, but somehow I ended up in the public trustee system,' Glenys told the Royal Commission.

The provider was the 'driving force' behind the move to have the public trustee appointed as her financial guardian. Glenys had no say in the matter and no-one informed her of the grounds for the decision. She said the government agency ignored her human rights and unfairly presumed she was 'incapacitated' because of her disability.

'They never approached my family or friends about my capacity, or my doctors. They just made the decisions on a paper hearing without even a face-to-face meeting with me. Originally when the public trustee got control, they wanted to sell my assets including my house and put me into a group home. And then take over everything and my family wouldn't have any say on anything either.'

She'd spent years trying to 'overcome' her disability with education and training.

'Not to be put in mental, financial or psychological prisons ... This goes back to people's prejudice and internal values, not what's legally right for me.'

But the public trustee threw a spanner in the works there too.

'They decided on my behalf to put me on disability benefit and the NDIS, when I wanted paid employment. They took me off further study plans that I had.'

The agency didn't pay her bills on time, incurring extra costs. Staff demonstrated 'coercive, controlling behaviours and unethical behaviour', Glenys said. There was no duty of care, 'extremely poor communication, a lack of transparency and no internal complaints system'.

Recently, she succeeded in having the trustee removed as financial administrator. Initially it refused to relinquish control.

'I was flabbergasted when it sought a second and even a third order despite the evidence I had presented to the courts that I was capable of looking after all my own affairs.'

Glenys still has 'ongoing problems with the public trustee'. The agency is 'holding on' to her mortgage and banking details and is still on all Glenys's bills.

'It looks like I'm not capable, so banks won't deal with me directly. They just tell me to go away.'

Until the trustee hands back her files, she is unable to engage with a disability employment provider.

'It's not their right to choose if I'm employable or not, but they've made those decisions and now I can't re-enter the paid employment market and I'm stuck on volunteering. It's turned my life upside down and I'd like to forget it altogether, but unfortunately, I'm still caught up in it. And there doesn't seem to be any way out because no-one's taking responsibility or accountability.'

Glenys wants to see 'a conflict resolution system' set up within public trustees. 'So that court is not the only option. And an oversight body to keep public trustee systems honest and fair.'

Meanwhile, the service provider has never apologised for the harm and hardship it inflicted.

'So I presume they just don't care. They should reflect on what the client's needs really are and what is the person's wishes and goals.'

Instead of empowering her, Glenys said the provider used 'suppressive tactics' to take her choices away. It gave evidence to a tribunal and excluded her 'mentally, socially and emotionally' from decisions concerning her.

**‘The decision-making power needs to be given back to us.
It's about what we need and what we want, not what the
institution thinks we want.’**

* This is a de-identified narrative of an experience shared with us in a submission or private session. The person who shared their experience was not a witness. They did not give evidence, take an oath or give an affirmation. Nothing in this narrative represents a finding of the Royal Commission and any views expressed are those of the person, not of the Royal Commission.

3. Strengthening protection through an Australian Disability Rights Act

Key points

- The current system of rights protection in Australia is failing to protect the rights of many people with disability and has not prevented violence against, and abuse, neglect and exploitation of, people with disability. A stronger and more comprehensive legal framework is needed.
- After consulting with people with disability and other key stakeholders, the Australian Government should commit to the enactment of an Australian Disability Rights Act (DRA). This Act should clearly articulate the human rights of people with disability in Commonwealth law.
- Disability rights should inform Commonwealth laws, policies, programs, services and structures so these rights can be actively and systemically protected and promoted.
- The burden of enforcing the law when rights are breached should shift away from individuals with disability. The new National Disability Commission (recommended in Volume 5, *Governing for inclusion*) should support implementation of, and compliance with, the DRA.
- The National Disability Commission should also be responsible for promoting disability rights and delivering educational and training programs to build understanding of the rights and duties under the DRA.
- Given the states and territories have responsibilities that affect the rights of people with disability, each jurisdiction should enact legislation complementary or equivalent to the DRA, taking into account their own legal frameworks.
- The DRA would be complementary to the improvements to the *Disability Discrimination Act 1992* (Cth) outlined in Chapter 4 of this volume.

3.1. Introduction

In this chapter, we recommend the Australian Government commit to the enactment of a Disability Rights Act (DRA) and take the necessary steps to introduce the legislation into Parliament and support its enactment. Enactment of the DRA would respond to the need for a new approach to translate the international human rights of people with disability into the Australian legal context.

The terms of reference for the Royal Commission require us to inquire into ‘what governments, institutions and the community should do to prevent, and better protect, people with disability from experiencing violence, abuse, neglect and exploitation’,¹ and ‘what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation’.²

Notably, our terms of reference identify the importance of human rights and recognise that Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability. These include obligations to protect people with disability from all forms of exploitation, violence and abuse under the *Convention on the Rights of Persons with Disabilities (CRPD)*.³

Chapter 2, ‘Australia’s current implementation of disability rights’, shows that, while Australia has adopted many positive measures to implement the *CRPD*, implementation is only partial and current measures have not prevented violence against, and abuse, neglect and exploitation of, people with disability. Current Australian domestic laws give limited legal protection for rights recognised in the *CRPD* and do not provide effective remedies when *CRPD* rights are breached. There are limited requirements for governments and parliaments to consider the rights of people with disability in decision-making and in the development of law and policy.

A stronger and more comprehensive legal framework is required to advance equality, inclusion and the human rights of people with disability. The new legal framework should:

- clearly articulate the human rights of people with disability
- require governments and public authorities to take active steps to prevent violence against, and abuse, neglect and exploitation of, people with disability
- reform the ways in which people with disability can access complaints processes and effective remedies when their rights are breached.

We recommend the DRA be enacted after consultation with people with disability and other key stakeholders on the content of the Act. In doing so, we take into account that article 4(3) of the *CRPD* requires that ‘[i]n the development and implementation of legislation and policies to implement the present Convention ... States Parties shall closely consult with and actively involve persons with disabilities’.⁴ Close consultation reflects the principle of ‘nothing about us without us’, which calls for the full participation of people with disability in the development and implementation of laws, policies and practices that affect people with disability.⁵

The rights and duties we propose for inclusion in the DRA translate and implement international human rights, specifically rights recognised in the *CRPD*, in a manner that is practicable, workable and capable of effective enforcement in the Australian legal context.

The objective of the DRA should be to respect, protect and fulfil all rights in the *CRPD*, as well as the rights of First Nations people with disability not specifically articulated in the *CRPD*. These rights should be adapted to be appropriate for the Australian legal context and to ensure they are both practically enforceable and accessible for people with disability.

Together with the proposed changes to the *Disability Discrimination Act 1992* (Cth) (*DDA*) set out in Chapter 4, ‘Strengthening the Disability Discrimination Act’, these reforms aim to strengthen the Australian Government’s ability to respect, protect and fulfil the human rights of people with disability, including their right to live free from violence, abuse, neglect and exploitation.

3.2. Overview of the Disability Rights Act

Box 4.3.1: Overview of the Disability Rights Act

Section 3.3 recommends the Australian Government commit to the enactment of a DRA, after consulting with people with disability, disability representative organisations and other key stakeholders.

Section 3.4 sets out rights that should be protected under the DRA, noting that through consultation, the Australian Government may decide to include additional human rights of people with disability. It describes the proposed rights of people with disability to:

- non-discrimination and equality before the law
- equal recognition before the law
- access and use supports, including advocacy services, in making decisions, communicating their will and preferences, and developing their decision-making ability
- live free from exploitation, violence and abuse
- liberty and security of person
- equitable access to health services.

Section 3.5 sets out duties to be imposed on primary duty-holders. These are:

- a general public authority obligation to consider and act consistently with disability rights
- consultation with people with disability
- a positive duty to promote disability equality and inclusion

-
- a duty to provide an interpreter
 - a duty to provide accessible information
 - duties supporting compliance with the DRA.

The primary duty-holders under the DRA would be the Commonwealth public sector. We also recommend that other types of entities be permitted to voluntarily opt into obligations under the DRA. This is an initial list of duty-holders with further expansion to be considered in the future, as discussed in Section 3.5.

Section 3.6 sets out key considerations when adapting international human rights obligations into domestic law. We consider the role of statutory interpretation, a framework for when and how rights may be limited, and the progressive realisation of economic, social and cultural rights in the domestic law context.

Section 3.7 addresses remedies and enforcement under the DRA. We recommend the new National Disability Commission (recommended in Volume 5, *Governing for inclusion*) be given the following capacity-building functions: research, the publication of formal guidelines, the provision of advice through voluntary compliance reviews, complaint-handling, and interventions in relevant court proceedings. In addition, we recommend the National Disability Commission be given the following functions to address non-compliance with the DRA: conducting inquiries, entering into enforceable undertakings, issuing compliance notices, and seeking injunctions to stop or prevent breaches of the DRA.

Individuals and representative bodies should be able to make complaints about breaches of the DRA to the National Disability Commission, and commence a proceeding in the Federal Court of Australia or the Federal Circuit and Family Court of Australia, including to seek damages in appropriate cases. We also note that judicial review would be available in certain circumstances based on the existing law.

In **Section 3.8** we make recommendations to strengthen awareness of disability rights and for the provision of guidance materials and training to support implementation of the DRA.

We conclude in **Section 3.9** by noting state and territory responsibilities relevant to the violence, abuse, neglect and exploitation experienced by people with disability. We recommend each state and territory enact, within its jurisdiction, protections equivalent to those in the DRA.

Prevention is key to respect for, and protection of, rights

A key aim of the proposed DRA is to take a preventative approach, so that people with disability do not experience violence, abuse, neglect and exploitation – or other breaches of their human rights – in the first place.

A general principle of international human rights law emphasises the importance of States acting to prevent breaches of human rights. Prevention requires States to identify where and how the rights of persons subject to their jurisdiction may be at risk and act to eliminate those risks.⁶

Further, '[a]ction to address violence, abuse, neglect and exploitation has the potential to save significant costs for people with disability and wider Australian society'.⁷ As noted in Chapter 2, the estimated cost of violence against, and abuse, neglect and exploitation of, people with disability was at least \$46 billion in 2021–22.⁸

The Australian Human Rights Commission (AHRC) has observed:

Social policies that are compliant with human rights can improve equality of access and quality of service, for example to health services and social security, in turn reducing longer-term costs. Improved access to education and employment can aid workforce participation and economic growth. By considering the human rights impacts of a proposed law or policy upfront, there is also a reduced likelihood that decisions will breach human rights and therefore the risk and costs of court action are avoided. There may be initial upfront costs, but long-term savings to individuals, to government and to the court system.⁹

The economic, social and human costs of not taking action to prevent breaches of the human rights of people with disability are much too high.

Reform context

We recognise our recommendations for a DRA are being made in a dynamic context of wider policy, legislative and institutional review and reform in Australia.

As discussed in Chapter 2, at the time of writing, the Australian Government was reviewing the *Disability Services Act 1986* (Cth) (DSA).¹⁰ In addition, numerous stakeholders have called for the enactment of a Human Rights Act at the national level, and on 7 March 2023 the AHRC launched its *Free and Equal: A Human Rights Act for Australia* position paper outlining a proposal for a Commonwealth Human Rights Act.¹¹

On 22 March 2023, the Attorney-General asked the Parliamentary Joint Committee on Human Rights (PJCHR) to conduct a review of the effectiveness of Australia's Human Rights Framework.¹² The PJCHR invited submissions, including on whether the Australian Parliament should enact a Commonwealth Human Rights Act.¹³ The rights of people with disability were not specifically mentioned as part of the scope of the inquiry. The inquiry report is due by 31 March 2024.¹⁴

While a recommendation about a Commonwealth Human Rights Act is beyond our terms of reference, a Commonwealth Human Rights Act and reforms to anti-discrimination laws in the general terms proposed by the AHRC have the potential to enhance human rights protection for all Australians, including people with disability.¹⁵

Regardless of whether a Commonwealth Human Rights Act is ultimately enacted, we consider more specific and tailored protections are required for people with disability through the enactment of a DRA. Specific provisions tailored to the rights of people with disability are required to address the decades of disadvantage and mistreatment people with disability in Australia have experienced.

3.3. An Australian law to recognise the human rights of people with disability

Establish the DRA

The Australian Government should introduce a Bill into Parliament for the enactment of the DRA as soon as possible, following a process involving close consultation with people with disability, disability representative organisations and other key stakeholders. That process should commence with consulting about the rights and duties we propose for inclusion in the DRA, but the process may lead to our proposals being modified or expanded.

Recommendation 4.1 Establish a Disability Rights Act

The Australian Government should commit to the enactment of a Disability Rights Act and take the necessary steps to introduce the legislation into Parliament and support its enactment. The necessary steps should include consultation with people with disability, disability representative organisations and other key stakeholders.

Objects of the DRA

An objects clause is a provision at the beginning of legislation that gives readers a general understanding of its purpose, or sets out general aims or principles to help readers interpret its detailed provisions. The DRA should have a clear statement of its objects and purpose.

According to the *Acts Interpretation Act 1901* (Cth), the interpretation that would best achieve the purpose or object of the Act is to be preferred to any other interpretation (whether or not that purpose or object is expressly stated in the Act).¹⁶ An objects clause provides clarity and guidance to the public on the purpose of legislation, assists the courts in interpreting the legislation, and can be used to resolve uncertainty and ambiguity in the substantive provisions contained in the legislation.

The objects and principles of the DRA should be drafted with regard to the objects and general principles of the *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*),¹⁷ to ensure the DRA takes a consistent approach as needed.

The objects of the DRA should be expressed to give effect to Australia's obligations under the *CRPD* and the general principles set out in article 3 of the *CRPD*. These principles are:¹⁸

- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The objects clause in the DRA should also refer to:

- the human rights of people with disability (referred to in this context as 'disability rights')
- the object and purpose of improving understanding of disability rights in the Australian community
- the intention to require duty-holders to consider and act compatibly with disability rights
- the importance of complaints processes designed with and for people with disability
- the need to provide accessible and effective remedies to people with disability whose rights have been infringed.

Recommendation 4.2 Objects of the Disability Rights Act

The objects of the Disability Rights Act should include giving effect to Australia's obligations under, and the general principles set out in, the *Convention on the Rights of Persons with Disabilities*.

Principles to underpin the DRA

The DRA should include a set of guiding principles and an express recognition that those principles should guide a person's actions or decisions under the DRA. The principles should express the key ideas underpinning the DRA in a way that is easy to understand and communicate.

The principles should be drafted in light of Australia's international legal obligations and best-practice examples in domestic legislation.¹⁹ However, it should be noted that in some domestic legislation detailed lists of principles have been included instead of the protection of substantive rights.²⁰ The DRA model is different in this respect. In the DRA, the guiding principles should operate at a higher-level and not seek to reproduce the rights and duties set out in the Act.

The exact content of the principles should be determined in consultation with people with disability. Potential examples of such guiding principles for the DRA are set out below:

- People with disability have the same right as other members of Australian society to respect for their worth and dignity, and to realise their potential for physical, social and emotional development.
- People with disability should be supported to fully participate in and contribute to public, social and economic life.
- People with disability should be supported to exercise choice, including in relation to taking risks.
- People with disability have the same right as other members of Australian society to pursue grievances.
- People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives.
- People with disability should be involved in the development and design of laws, policies, programs, services and structures that affect people with disability.
- Laws, policies, programs, services and structures should take into account the different ways that people with disability interact with their environments and be sensitive and responsive to the different needs and experiences of people with disability, due to one or more attributes such as: sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socioeconomic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma.²¹
- People with disability are entitled to recognition and support of their specific cultural and linguistic identity, including Auslan and First Nations sign languages and Deaf culture.
- First Nations people, as indigenous people, are entitled to all human rights without discrimination and possess collective and cultural rights that are indispensable for their existence, wellbeing and integral development as peoples, as recognised in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.²²

Recommendation 4.3 Principles in the Disability Rights Act

The Disability Rights Act should include a set of guiding principles designed to promote and advance the rights of people with disability in Australia. The Disability Rights Act should require that a person or entity exercising functions under the Act have regard to the principles.

Future review

A review of the DRA should be undertaken in consultation with people with disability within five years of the commencement of the legislation. The review should include consideration of matters including whether and how the duties in the Act (discussed in detail in Section 3.5 below) should be extended or applied to additional persons or entities, including private sector providers under the National Disability Insurance Scheme (NDIS). The review of the DRA should consider these changes in light of changes made to the *NDIS Act* and NDIS framework following the NDIS review (due to report in October 2023)²³ and the recommendations of this Royal Commission.

These reforms would be in addition to measures focused on disability service providers detailed in Volume 10, *Disability services*, and Volume 11, *Independent oversight and complaint mechanisms*.

Commissioners Bennett, Galbally and McEwin alternatively recommend that, rather than considering this question at the five-year review, the Australian Government should examine, as a priority, how to expand the duty-holders under the DRA to include private sector providers delivering services through the NDIS from the outset. They consider such an approach would be consistent with the *Human Rights Act 2019* (Qld) (*Qld HRA*).²⁴

These Commissioners have formed the view that people with disability who live in group homes and attend day programs and disability enterprises run and managed by NDIS providers are particularly vulnerable to violence, abuse, neglect and exploitation. They have concluded that the rights of people with disability in these settings should be protected through the DRA from the commencement of the Act.

These Commissioners note the *Qld HRA* designates which entities are ‘public entities’ in Queensland for the purpose of the Act. A ‘public entity’ includes a registered provider of supports or a registered NDIS provider under the *NDIS Act*, when the provider is performing functions of a public nature in Queensland.²⁵ The *Qld HRA* makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights or in making a decision, to fail to give proper consideration to a human right relevant to the decision.²⁶

These Commissioners consider that, in circumstances where registered NDIS providers are subject to the *Qld HRA*, which includes the types of human rights to be included in the DRA, it would be sensible and appropriate for such obligations to apply to registered NDIS providers

nationally. For large providers who operate nationally, the obligations applying to them in Queensland would then extend to their national operations. As noted in Chapter 2, there should be no ‘post-code lottery’ as to whether the rights of people with disability are protected when seeking or receiving services from registered NDIS providers. These providers are subject to and have duties under the *DDA* not to discriminate against people with disability in the areas of employment of people with disability; the provision of goods, services and facilities; accommodation; access to premises; and the administration of Commonwealth programs. These Commissioners consider the extension of the *DRA* to such providers should not be a significant or onerous measure. If the Queensland model was adopted, it would not be complex or difficult from a legal or policy perspective. It would, however, be a significant development in protecting the rights of people with disability.

The Chair and Commissioners Mason and Ryan do not have an objection in principle to extending some duties under the *DRA* to private sector service providers. However, work undertaken within the Royal Commission in the course of compiling this *Final report* indicates the proposal raises issues of considerable complexity, both from a legal and policy perspective. The extension of the *DRA* to private sector service providers is not a simple matter of adopting provisions of the *Qld HRA*.

The Chair and these Commissioners point out that the *Qld HRA*, on its proper interpretation, does not apply to registered NDIS service providers when providing services to individual NDIS participants. In particular, the *Qld HRA* is directed at ‘public entities’ providing services as part of or on behalf of government.²⁷ It applies to registered NDIS service providers in so far as they are deemed to be public entities because they are performing ‘functions of a public nature’.²⁸ It is therefore not intended to apply to registered NDIS service providers operating group homes, day programs or Australian Disability Enterprises. Moreover, the *Qld HRA* does not apply at all to unregistered NDIS service providers, who are responsible for a significant proportion of services received by NDIS participants. The *Qld HRA* is therefore not a useful precedent for extending the *DRA* to private NDIS service providers.

Additional issues would need to be considered if duties under the *DRA* are to apply to private NDIS service providers. For example, how would the proposed requirement to consult people with disability (for which there is no equivalent in the *Qld HRA*) apply to private service providers? In what circumstances, if any, would a private service provider be required to provide an interpreter to a client? Would an aggrieved person be entitled to damages if a private service provider breached the *DRA*? If so, for what breaches and in what circumstances? Integrating rights such as those set out in this chapter into a statutory scheme applying to private service providers would require further consideration and consultation with parties potentially affected by the proposal.

In the view of the Chair and these Commissioners, it would be unfortunate if enactment of the *DRA* were to be postponed in order to investigate this proposal. Any delay would work to the serious disadvantage of people with disability.

Recommendation 4.4 Future review of the Disability Rights Act

- a. The Australian Government should ensure that a review of the Disability Rights Act is undertaken in consultation with people with disability within five years of the commencement of the Act. The review should include consideration of:
 - how the Act should be improved
 - the effectiveness of compliance mechanisms
 - the availability of appropriate remedies that meet the needs of people with disability
 - whether and how duties in the Act should be extended or applied to additional persons or entities, including private sector providers under the National Disability Insurance Scheme (NDIS).
- b. Commissioners Bennett, Galbally and McEwin alternatively recommend the final point above be considered by the Australian Government as a priority and that these additional duty-holders be included from the commencement of the Act.

3.4. Protecting disability rights through the DRA

This section sets out the human rights the DRA should protect. Each of these rights has a basis in the *CRPD* and has been adapted so as to be capable of practical implementation and enforcement in the Australian legal context.

As noted above, through consultation with people with disability and other key stakeholders, the Australian Government may decide to include additional human rights.

The right to non-discrimination and equality before the law

As discussed in Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*, our inquiry has heard that people with disability often experience higher rates of violence and abuse than people without disability. In addition, many people with disability experience discrimination and lack of appropriate access to the resources, services, community facilities and supports needed to realise their full potential and live a life with dignity. These experiences engage the right to equality and non-discrimination recognised by the *CRPD* and other international human rights treaties.

International law context

Equality has been described as ‘the most important principle imbuing and inspiring the concept of human rights’.²⁹ Achieving equality and non-discrimination has also been considered ‘the dominant and recurring theme of international human rights law’.³⁰ Rights to equality and

non-discrimination are included in a range of international human rights treaties³¹ and other instruments³² in addition to the *CRPD*.

The concepts of ‘equality’ and ‘non-discrimination’ are distinct but related. Equality is described as a ‘state of being’, while non-discrimination refers to ‘a corresponding ban on prejudicial or unfair treatment that produces inequality’.³³ These concepts are embedded in the guiding principles of the *CRPD*.³⁴ More specifically, the right to equality and non-discrimination is set out in article 5 of the *CRPD*.³⁵

Commentators have noted the concept of equality can be interpreted to mean many different things, such as ‘consistent treatment; equality of opportunity; equality of outcomes; transformative equality; or equality as a structural principle’.³⁶

As discussed in Chapter 1, ‘Australia’s international human rights obligations regarding people with disability’, the *CRPD* builds on substantive equality approaches and can be understood broadly as striving for practical and systemic changes for people with disability. It will take more than formal equality – addressing discrimination and treating everyone in the same way – to achieve the aims of preventing violence against, and abuse, neglect and exploitation of, people with disability. There needs to be a greater focus on delivering substantive equality and equality of outcomes in practice.

Protecting the right to non-discrimination and equality before the law in the DRA

We recommend the DRA include a right to non-discrimination and equality before the law, as follows.

Recommendation 4.5 The right to non-discrimination and equality before the law

The Disability Rights Act should recognise all human beings are equal in worth and dignity and every person with disability:

- a. has the right to enjoy their human rights without discrimination (on the ground of disability or on a combination of protected grounds where one of those grounds is disability)
- b. is equal before the law, is entitled to the equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination.

Explanatory notes

The **first part** of the right to non-discrimination and equality before the law recommended for inclusion in the DRA is the right of people with disability to enjoy human rights without discrimination.

The **second part** states every person with disability 'is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination'. This has three limbs:

- The first limb is equality before the law. This aspect of the right is about the general application, administration and enforcement of the law and the equal treatment of all persons who come before the law. It requires public authorities, courts and tribunals to treat all people equally when applying the law. It requires them not to apply the law in a discriminatory or arbitrary way, or in a manner that has no objective justification.³⁷
- The other two limbs – the right to equal protection of the law without discrimination and equal and effective protection against discrimination – mean that people with disability may need to be treated differently to ensure they have equal protection under the law.³⁸ When considering these rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*),³⁹ courts have found this right to impose procedural requirements on courts and tribunals. For example, a court is:

required to make such adjustments and accommodations as may be reasonably necessary and available to ensure the effective participation of the individual despite their disability, subject to the fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.⁴⁰

These limbs of the right are adapted from the *CRPD*⁴¹ and from the rights to equality and non-discrimination protected under domestic law in Victoria, Queensland and the Australian Capital Territory.⁴² The AHRC has also proposed that the rights to recognition and equality before the law, and freedom from discrimination, be included in a Commonwealth Human Rights Act.⁴³

In the provision recognising the right to non-discrimination and equality before the law in the DRA:

- The expression 'human rights' should include rights recognised in the DRA in addition to 'human rights' as defined in the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*).
- 'Discrimination' should be defined by reference to the *DDA* and therefore should include all forms of discrimination, including direct and indirect discrimination, the failure to make adjustments, harassment and vilification (see Chapter 4 for further detail).⁴⁴

In addition, we recommend the DRA protect against discrimination on a combination of protected grounds, in order to address intersectional discrimination. Under the DRA,

'protected grounds' should include any grounds protected under the *DDA*, the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*), the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*) and the *Age Discrimination Act 2004* (Cth).

As discussed in Chapter 2, Emeritus Professor Ron McCallum AO noted in his research report for the Royal Commission that, '[i]t is clear that the laws of the Australian Parliament do not provide remedies for intersectional discrimination'.⁴⁵ The Committee on the Rights of Persons with Disabilities (CRPD Committee) has also expressed concern about the lack of an effective legislative framework in Australia to protect people with disability from systemic, intersectional and multiple forms of discrimination.⁴⁶

The right to equality and non-discrimination has special importance for First Nations people with disability. The right of indigenous peoples to enjoy their human rights without discrimination is reflected in the *UNDRIP*.⁴⁷

The right to equal recognition before the law

Everyone has the right to make decisions and people with disability are no exception. Often a person with disability will need a support person to facilitate decision-making. This support can come in many forms ...⁴⁸

Historically, many people with disability have not been able to make decisions and take risks in their own lives. As discussed in Volume 6, *Enabling autonomy and access*, people with disability have the right to make decisions, control their lives and exercise choice. Volume 6 also discusses how providing appropriate support can enable people with disability to maximise their autonomy and independence.

International law context

The first general principle in article 3 of the *CRPD* is '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.⁴⁹

The right to equal recognition before the law

The right of people with disability to equal recognition before the law is set out in article 12(1) of the *CRPD*. This is based on article 6 of the *Universal Declaration of Human Rights* and article 16 of the *International Covenant on Civil and Political Rights (ICCPR)*.⁵⁰ The CRPD Committee has observed that '[e]quality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights'.⁵¹

The right to equal recognition before the law is related to the right to equality and non-discrimination, but is a separate right. The right to equality and non-discrimination is about the right of everyone to be treated equally with others, while the right to equal recognition before the law is about the right to be recognised as a person within the legal system. That is, equal recognition as a person before the law guarantees the right of every human being to have legal personality and come within the purview and protection of the law.⁵² The right to equal recognition before the law addresses the historical injustices under which some people were not recognised as a ‘person’ with rights under the law. At various times this included First Nations people, women, and some people with disability.

The United Nations (UN) High Commissioner for Human Rights has said article 12 of the *CRPD* means that a person cannot lose legal capacity to act because of disability.⁵³ The *CRPD* Committee has stated:

The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. ... The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.⁵⁴

The right to recognition before the law (based on article 16 of the *ICCPR*) has been incorporated into Victorian, Queensland and Australian Capital Territory human rights legislation.⁵⁵ It is also recognised by section 10 of the *Racial Discrimination Act*.⁵⁶ The AHRC has also proposed the right to recognition before the law be included in a Commonwealth Human Rights Act.⁵⁷

Support to exercise legal capacity and to communicate one’s will and preferences

As discussed in Volume 6, article 12(3) of the *CRPD* recognises that people with disability may require support to exercise their legal capacity. Specifically, it obliges States Parties to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’.⁵⁸

The *CRPD* Committee has described support as ‘a broad term that encompasses both informal and formal support arrangements, of varying types and intensity’.⁵⁹ The form this support should take is not specified in article 12; however, the *CRPD* Committee has provided some guidance, including that support must respect the will and preferences of people with disability.⁶⁰

Supported decision-making is a key mechanism to assist people with disability to make decisions that reflect their ‘will and preferences’ and to support them in exercising their legal capacity.⁶¹

The former UN Special Rapporteur on the rights of persons with disabilities, Ms Catalina Devandas Aguilar, has described these supports as providing ‘a very broad range of support to individuals, including access to information, support for communication, empowerment, building self-confidence, relationship building, personal planning, independent living assistance and administrative support’.⁶²

Support can be informal, where family members, friends and other networks give their support, or formal, most often in matters involving legal or other formal proceedings. All forms of support must incorporate a human rights-based approach and should respect people’s dignity, autonomy and independence.⁶³

Compliance with article 12 therefore requires States Parties to establish flexible support mechanisms to assist persons with disabilities to make decisions in accordance with their will and preferences.⁶⁴

Protecting the right to equal recognition before the law in the DRA

We recommend the DRA include the right of people with disability to recognition as a person before the law. This right should recognise that people with disability have the same rights as other members of the community to make decisions that affect their lives to the full extent of their ability to do so.⁶⁵

We also recommend the DRA clearly establish a right of people with disability to access and use supports, including advocacy services, in making and participating in decisions affecting them, communicating their will and preferences, and developing their decision-making ability.

Recommendation 4.6 The right to equal recognition before the law

- a. The Disability Rights Act should recognise that people with disability have the right to recognition as a person before the law. Accordingly, they have the same rights as other members of the community to make decisions that affect their lives to the full extent of their ability to do so.
- b. The Disability Rights Act should recognise:
 - the right of people with disability to access and use supports in making and participating in decisions that affect them, communicating their will and preferences, and developing their decision-making ability
 - the right of people with disability to access and use advocacy services in making and participating in decisions, communicating their will and preferences, and developing their decision-making ability.
- c. The Disability Rights Act should define ‘supports’ broadly.

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- d. The Disability Rights Act should require supports for people with disability from First Nations communities and culturally and linguistically diverse backgrounds to be provided in a way that:
 - recognises that cultural, language and other differences may create barriers to providing the supports
 - addresses those barriers and the needs of those people with disability
 - is informed by consultation with their communities.
 - e. The definition of ‘advocacy service’ in section 7 of the *Disability Services Act 1986* (Cth) should be amended to include a reference to a service that seeks to support people with disability to exercise their rights and freedoms under domestic law, including under the Disability Rights Act. This would be in addition to the existing reference to rights and freedoms under the ‘Disabilities Convention’.

Explanatory notes

‘Supports’ may be understood generally as meaning any actions, practices, strategies or resources that promote participation and inclusion of a person or people with disability in society. In the specific context being considered here, ‘supports’ may be understood as any actions, practices, strategies or resources that may be considered helpful to persons with disability in making decisions, expressing their will and preferences and developing their decision-making and self-advocacy ability.

Supports include both informal and formal support arrangements. Examples of supports include support persons; support networks; peer support; advocacy; assistance with communication; access to an interpreter (for example, an Auslan interpreter); measures relating to universal design and accessibility; and development and recognition of diverse and non-conventional methods of communication.

As noted in Volume 6, there are additional barriers to persons with disability from First Nations communities and culturally and linguistically diverse backgrounds accessing advocacy and other supports that meet their needs. We therefore recommend that the DRA require specific consideration of these barriers and needs.

The definition of ‘advocacy service’ under the *DSA* should be broadened to include a service that seeks to support people with disability to exercise their rights and freedoms under domestic law, including under the DRA, in addition to those under the ‘Disabilities Convention’ (which is how the *CRPD* is referred to in the *DSA*).⁶⁶

The right to access and use supports and advocacy services would help to give legislative effect to principle 5 in the recommended supported decision-making principles outlined in Volume 6. This principle is that people who may require supported decision-making should be

provided with equitable access to appropriate support to enable the person, as far as practicable in the circumstances, to: make and participate in decisions affecting them; communicate their will and preferences; and develop their decision-making ability.

The proposed rights in the DRA would be ones of access to and use of supports, including advocacy services.

We do not propose the DRA impose a positive duty on public authorities to provide those supports because, under the reforms proposed in Chapter 4, the *DDA* would impose a standalone duty on duty-holders under the *DDA* to provide adjustments for people with disability. Adjustments required to avoid a person being discriminated against under the *DDA* can include, for example, individual adjustments for communication supports, an interpreter, a support person, advocacy support, communication aids, changes to processes or the way things are communicated, the time allowed for consideration of issues, and adjustments to the sensory environment.

Box 4.3.2: What could the right to access and use supports achieve in practice?

Under the proposed DRA, it would be unlawful for public authorities to act in a manner incompatible with the right to access and use supports, including advocacy services, or fail to give proper consideration to the right when making a relevant decision.

This means that public authorities (such as Centrelink, the National Disability Insurance Agency, the Australian Federal Police and the Australian Tax Office, amongst others) would need to consider the right of people with disability to access and use supports, including advocacy assistance, in their day-to-day work.

These duties could mean, for example, that the public authority may need to give notice of a proposed discussion to allow time for such supports to be put in place. They may need to adjust their process to enable an advocate to participate. They may need to train their staff in how to engage with someone using communication aids. There are a variety of ways that public authorities might need to adapt their policies and practices to act compatibly with this right.

This right would be supported by the standalone duty to make adjustments under the *DDA*, as recommended in Chapter 4. Adjustments under the *DDA* can include the provision of supports to enable the participation of a person with disability.

‘Advocacy’ may constitute a form of support to enable a person to exercise their right to supported decision-making. However, ‘advocacy’ should not be automatically equated with supported decision-making.⁶⁷

The realisation of the right of people with disability to equality before the law will be supported

by recommendations made elsewhere in this *Final report*. These include recommendations in Volume 6 that:

- supported decision-making principles be included in state and territory guardianship and administration legislation and guide reform of other laws concerning individual decision-making
- additional funding be provided for national advocacy programs.

The right to live free from exploitation, violence, and abuse

Across the course of our inquiry we have heard from many people with disability about their experiences of exploitation, violence and abuse in different settings and contexts. As discussed in Volume 3, we have heard that people with disability often experience higher rates of violence and abuse than people without disability. It is clear that stronger legal measures are needed to address this.

International law context

As outlined in Chapter 1, article 16 of the *CRPD* recognises the right of people with disability to freedom from exploitation, violence and abuse.⁶⁸ It imposes separate but linked obligations of prevention of and protection against harm.⁶⁹

Internationally, it has been recognised that because the experiences of people with disability of exploitation, violence and abuse are so significant, ‘the framing of the issue as a specific human right with detailed attendant obligations is important’.⁷⁰ The CRPD Committee has called for States Parties to report on ‘legislative, administrative, social, educational and other measures taken to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence, and abuse’.⁷¹

Article 16 includes several references to the specific needs of women and children.⁷² The CRPD Committee has identified extensive examples of exploitation, violence and abuse of women with disability in its *General comment no. 3 (2016) on women and girls with disabilities*.⁷³ Gender has also been a significant focus of the CRPD Committee’s Concluding Observations on a number of countries’ periodic reports in relation to article 16,⁷⁴ including in relation to Australia. For example, in its Concluding Observations on Australia’s initial periodic report under the *CRPD*, the CRPD Committee indicated it was ‘concerned at high rates of violence perpetrated against women and girls living in institutions and other segregated settings’.⁷⁵ In its Concluding Observations on Australia’s combined second and third periodic reports, the CRPD Committee expressed a number of further concerns about violence against women and girls with disabilities.⁷⁶

With respect to children, article 23 of the *Convention on the Rights of the Child* and the Committee on the Rights of the Child in its *General comment no. 7 (2005) on implementing child rights in early childhood* expressly recognise the particular interests of children with disability. The Committee said:

Discrimination against children with disabilities reduces survival prospects and quality of life. These children are entitled to the care, nutrition, nurturance and encouragement offered other children. They may also require additional, special assistance in order to ensure their integration and the realization of their rights.⁷⁷

Article 16 imposes obligations on States Parties to ‘ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities’.⁷⁸ It also requires States Parties to ensure instances of exploitation, violence and abuse are ‘identified, investigated and, where appropriate, prosecuted’.⁷⁹

Protecting the right to live free from exploitation, violence and abuse in the DRA

We recommend the DRA include a right of people with disability to live free from all forms of exploitation, violence and abuse, including the right to freedom from gender-based violence and abuse.⁸⁰

Recommendation 4.7 The right to live free from exploitation, violence and abuse

The Disability Rights Act should recognise:

- a. people with disability have the right to live free from all forms of exploitation, violence and abuse, including the right to freedom from gender-based violence and abuse
- b. people with disability have the right to accessible information and education on how to avoid, recognise and report exploitation, violence and abuse
- c. people with disability who are victims of any form of exploitation, violence or abuse have the right to:
 - access protection services that promote the health, welfare, dignity and autonomy of such persons
 - access protection services that are sensitive and responsive to the different needs and experiences of people with disability, due to one or more attributes such as sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socio-economic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma
 - report allegations of exploitation, violence and abuse, with protection from victimisation for making a report.

Explanatory notes

‘Exploitation’, ‘violence’ and ‘abuse’ are defined in Volume 3 at a high-level as follows:

- ‘Exploitation’ involves ‘taking or attempting to take improper advantage of a person or group of people with disability for benefit, advantage or gratification, including taking physical, sexual, financial or economic advantage of a person with disability’.
- ‘Violence’ is ‘the use or threatened use of force or the unjust use of power that causes or is likely to cause harm or fear of harm to a person or group of people with disability’.
- ‘Abuse’ consists of ‘acts or omissions causing or likely to cause direct or indirect harm to a person or group of people with disability’. Abuse can occur as a single incident or repeated incidents or a pattern of behaviour over a period of time.

We recommend these definitions apply for the purposes of the DRA.

The DRA should provide that people with disability who are victims of any form of exploitation, violence or abuse have the right to access protection services that are sensitive and responsive to the diversity of needs, experiences and characteristics of people with disability. ‘Protection services’ should include services whose functions include prevention, monitoring, response, rehabilitation or recovery in relation to the violence against, and abuse, neglect and exploitation of, people with disability. This includes disability-specific services and mainstream services such as health, education, other human services, justice services and functions, and services that respond to family, domestic and sexual violence.

As set out in Volume 3, the Royal Commission has defined ‘neglect’ in broad terms.⁸¹ ‘Neglect’ has not been included in the recommendation above, as we recognise its inclusion, particularly in such broad terms, could generate uncertainty as to the nature of the legal obligations imposed and questions about the legal enforceability of the obligation.

We also note the role of the DRA in protecting human rights is just one part of a suite of systemic responses needed to reduce and prevent violence, abuse, neglect and exploitation. Our recommendations across this *Final report* aim to work together to deliver these responses. Of particular relevance, Volume 11 sets out recommendations to strengthen monitoring and oversight mechanisms.

Commissioners Bennett, Galbally and McEwin recommend that ‘neglect’ be included and defined in the proposed right in the DRA. These Commissioners are of the view this would be consistent with the Royal Commission’s terms of reference, which require an examination of each of the four terms of ‘violence’, ‘abuse’, ‘neglect’ and ‘exploitation’. They also consider it would align with increasing awareness and research that neglect is a different concept to violence and abuse. This inquiry has heard much about the neglect of people with disability. They consider the inclusion of neglect in the DRA would provide policy-makers with a foundation to develop laws, policies and practices that recognise neglect as a distinct concept with its own legal and social connotations.

The Chair and Commissioners Mason and Ryan are of the view that a proposal to include 'neglect' in the right to live free from exploitation, violence and abuse is not straightforward. During the life of the Royal Commission, consideration was given to such a proposal, but it became clear the proposal raised complex questions requiring further consideration. The questions include the following. If 'neglect' is to be defined broadly, who is to be subject to the duty and how is it to be enforced? If remedies are to be available under the DRA in respect of a breach of the duty, how will they differ, if at all, from remedies available under state and territory laws? How will the remedies available under the DRA interact with those laws, including the common law of negligence (as modified by statute in the various jurisdictions)? Should the definition of 'neglect' be narrowed? If so, how? Which entities will be affected by the inclusion of 'neglect' in the rights identified in Recommendation 4.7? What consultations with those entities should take place before any legislation is drafted and presented to Parliament? In their view, these questions and others require close consideration before neglect can be added to Recommendation 4.7.

The right to liberty and security of person

Limitations on the right of people with disability to liberty and security of person have been a significant theme in this inquiry. In particular, we note systemic failures that contribute to the use of restrictive practices. These failures are in areas such as policy, funding, workforce skills and training, data collection and analysis, and oversight and regulation. Evidence of restrictive practices is set out in detail in Volume 3 and Volume 6. Restrictive practices and other rights-related issues in justice settings are examined in Volume 8, *Criminal justice and people with disability*, including issues relating to indefinite detention, conditions of detention, and use of seclusion and solitary confinement.

The failure in Australia to adequately protect the right of people with disability to liberty and security of person demonstrates the entrenched inequity of people with disability in our legal system. Such restrictions have been permitted and normalised for too long.

International law context

The right to liberty and security of person has foundations in common law and is recognised in major international human rights instruments,⁸² including article 14 of the *CRPD*.

Article 14⁸³ sets out the fundamental right to liberty and security of the person, and then notes the conditions under which this right may be restricted. Article 14 seeks to ensure that any deprivation of liberty is lawful and non-discriminatory. The right to liberty and security of the person in article 14 of the *CRPD* has been described by the CRPD Committee as 'one of the most precious rights to which everyone is entitled'.⁸⁴

In the context of the same right that is protected under article 9 of the *ICCPR*, the Human Rights Committee has acknowledged that the protection of liberty is not confined to imprisonment or police custody but includes a wide range of other circumstances in which a person may be deprived of their liberty. These circumstances include the institutional custody of children and the use of physical restraining devices.⁸⁵

Protecting the right to liberty and security of person in the DRA

We recommend the DRA include the right of people with disability to liberty and security of person, as follows.

Recommendation 4.8 The right to liberty and security of person

The Disability Rights Act should recognise every person with disability has the right to liberty and security of person. In particular, no person with disability may be arbitrarily arrested or detained. No person with disability may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Explanatory notes

A similar right is included in Victorian, Queensland and Australian Capital Territory human rights legislation.⁸⁶ The AHRC has also proposed that a right to liberty and security of person be included in a Commonwealth Human Rights Act.⁸⁷

Requiring public authorities to consider the rights of people with disability to liberty and security of the person when making decisions can help to ensure that attention is paid to these issues early, and consistently, in the cycle of policy and service design.

Further, requiring public authorities to consider the right to liberty and security of person can help to build a culture within the public sector that positions people with disability as rights holders. This is particularly important in the context of restrictive practices, which we discuss in detail in Volume 6. Considering people with disability as rights holders shifts the lens through which policies and frameworks for the use and oversight of restrictive practices are considered and developed. It also influences decisions about whether such policies and frameworks are developed at all.

The right to equitable access to health services

We have considered a broad range of issues in relation to the health of people with disability across the course of our inquiry. Discrimination, the failure of service providers to make adjustments, and the lack of quality health services that meet the needs of people with disability have been major themes.

In Chapter 2 we set out examples arising out of Public hearing 4 concerning access to health care and services for people with cognitive disability. We noted in our *Report of Public hearing 4: Health care and services for people with cognitive disability*, that while some witnesses described positive experiences in the health system, there was also a substantial body of evidence that ‘suggests that the standards set out in the *CRPD* have often not been met’.⁸⁸ Based on the evidence before us, we found ‘people with cognitive disability have been and continue to be subject to systemic neglect in the Australian health system’.⁸⁹ These issues are discussed in detail in Volume 6.

International law context

Article 25 of the *CRPD* requires States Parties recognise that people with disability have the right to enjoy ‘the highest attainable standard of health without discrimination on the basis of the disability’.⁹⁰

In the context of the right to health under article 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the obligation to provide the ‘highest attainable standard of health without discrimination’ has been interpreted as an expansive right, encompassing ‘a wide range of socio-economic factors that promote conditions in which people can lead a healthy life’.⁹¹

Article 25 of the *CRPD* also requires States Parties to ‘take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation’.⁹² It then sets out a series of six obligations on States Parties, which concern access to health care services for people with disability.⁹³ The concept of ‘access ... to health services’ is interpreted as an ‘expansive right to the non-discriminatory inclusion of people with disabilities in health and mental health systems’.⁹⁴

The goal of article 25 has been understood as being:

to dismantle the discriminatory approach to health and health care that has dominated the disability sector. In its place, principles of inclusion and access frame the objective of enabling people with disabilities to engage with health and health care in a way that is commensurate with their health needs.⁹⁵

The Australian Government has agreed to ‘take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of’ economic, social and cultural rights under the *CRPD*.⁹⁶ The Australian Government’s view is that the right to health in article 25 of the *CRPD* is progressively realisable.⁹⁷

The position under international law is more nuanced. While the overall right to health is meant to be achieved through progressive realisation, certain components of the right are obligations of immediate effect. This includes the obligation of non-discrimination in relation to health facilities, goods and services.⁹⁸ This obligation presently exists under section 24 of the *DDA* to all health service providers, public and private. This position is reinforced by article 25(c) of the *ICCPR*, which enshrines the right of every citizen to have access, on general terms of equality, to public services in his or her country.⁹⁹ It is also reinforced by article 9 of the *CRPD*, which requires the identification and elimination of barriers to facilities or services open or provided to the public.¹⁰⁰ Another element that may be immediately realisable is the duty of reasonable accommodation in article 5(3) of the *CRPD*.¹⁰¹

This more nuanced approach is consistent with the approach taken by Australian jurisdictions when implementing economic, social and cultural rights in domestic law.¹⁰²

Protecting the right to equitable access to health services in the DRA

Our analysis of the immediately realisable aspects of the right to health has informed our recommendation to include in the DRA the right of people with disability to equitable access to health services.

Recommendation 4.9 The right to equitable access to health services

The Disability Rights Act should recognise the right of people with disability to equitable access to health services. This right should include:

- a. the right to the same range, quality and standard of free and affordable health care and programs as people without disability
- b. the right to exercise choice about healthcare options and between available services
- c. the right to access and receive quality health services appropriately adapted or specifically designed to meet the needs of the person with disability
- d. the presumption of legal capacity and provision for supported decision-making
- e. the right to adjustments required to access services and to receive treatment and care (to the extent that a duty-holder is required to provide adjustments in accordance with the *Disability Discrimination Act 1992* (Cth))
- f. the right to accessible information
- g. the right of First Nations people with disability to receive health care that is culturally safe and recognises the importance of their personal connection to community and Country
- h. the right to access health services that are safe, sensitive and responsive to the intersectional needs and experiences of the person with disability, noting that intersectional needs and experiences may be due to a variety of attributes, including sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socio-economic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma
- i. the right to voice opinions and to make complaints about health services.

Explanatory notes

The focus of our recommendation on the right to 'equitable access' shifts the emphasis from formal equality to substantive equality.

The right should also provide some detail about what ‘equitable access’ requires, so people with disability know what they have a right to expect and duty-holders know what is required with some specificity. Relevantly here, the Royal Commission into Aged Care Quality and Safety recommended that the *Aged Care Act 1997* (Cth) be replaced with a new Act that includes ‘the right to equitable access to care services’.¹⁰³ The Australian Government has accepted this recommendation.¹⁰⁴

A legislated right to equitable access to health services is just one measure that would help to address the health-related issues considered by this inquiry. The legal framework in the DRA would be supported by, for example, recommendations for strengthening national health standards, health professional education and training reforms, health navigator services, provisions for adjustments and support, strengthened advocacy support, and the implementation of supported decision-making in state and territory law. These issues are discussed in Volume 6.

3.5. Duties under the DRA

In this section, we set out the duties that should be included in the DRA to give life to the rights articulated above, and to any other rights that may be incorporated into the DRA following consultation with people with disability or future review of the Act.

The general public authority obligation to consider and act consistently with disability rights

The DRA should include an obligation for ‘public authorities’ to act compatibly with the rights in the DRA and to give proper consideration to human rights when making a decision. Such a duty would reflect the existing public authority obligations under human rights legislation in Victoria, Queensland and the Australian Capital Territory. This approach would have the benefit of introducing duties with a history of implementation and interpretation in Australia.¹⁰⁵ This approach is also consistent with the public authority obligations recommended by the AHRC in its position paper on a Commonwealth Human Rights Act.¹⁰⁶

International law context

As discussed in Chapter 1, the *CRPD* places obligations on States Parties to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.¹⁰⁷

The recommended duty

Recommendation 4.10 Public authority conduct

- a. The Disability Rights Act should make it unlawful for a 'public authority' to:
 - act in a way that is incompatible with a right in the Disability Rights Act
 - fail to give proper consideration to a right where relevant to the decision being made.
- b. 'Public authority' should be defined to include:
 - a minister of the Australian Government when exercising a statutory power or authority
 - a Commonwealth entity defined in the *Public Governance, Performance and Accountability Act 2013* (Cth)
 - an official of a Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth)
 - an individual who is employed by, or engaged in assisting, a Commonwealth entity or a staff member of a Commonwealth entity on behalf of the entity or the Commonwealth
 - a contracted service provider for the Commonwealth when providing goods or services under a Commonwealth contract, as well as an officer or employee of the contracted service provider for the contract, and someone who provides goods and services for the purposes of the contract
 - an individual who is appointed or engaged as an officer or employee of a federal court or tribunal when acting in an administrative capacity
 - other entities prescribed by regulations as public authorities for the purposes of the Disability Rights Act.
- c. The Disability Rights Act should provide for a mechanism through which a non-Commonwealth entity could ask the minister to declare that the entity is subject to the obligations of a public authority under the Act and for a register of such entities to be published.

Explanatory notes

There are several components to the general public authority obligation recommended. We provide further explanation about each of them below.

The definition of ‘public authority’

The definition of ‘public authority’ would include a broad range of entities. For example:

- A ‘Commonwealth entity’ draws on the definition in the *Public Governance, Performance and Accountability Act 2013* (Cth) (*Public Governance Act*).¹⁰⁸ ‘Commonwealth entities’ can be either corporate or non-corporate.¹⁰⁹ Corporate entities include a range of statutory entities including the National Disability Insurance Agency (NDIA).¹¹⁰ Non-corporate entities include Commonwealth government departments¹¹¹ and ‘listed entities’¹¹² such as the Australian Federal Police.¹¹³ The proposed National Disability Commission (recommended in Volume 5) would also be a Commonwealth entity.¹¹⁴
- A ‘contracted service provider’ would include a wide range of entities, including a private company contracted to run an immigration detention facility, a mental health service contracted by the Commonwealth or an Aboriginal Community Controlled Health Organisation contracted by the Commonwealth to provide community health services:
 - The definition of ‘contracted service provider’ would not include public hospitals that receive Commonwealth funding through state and territory governments. Public hospitals would be covered by the equivalent state and territory laws we recommend in Section 3.9 below.
 - The definition of a ‘contracted service provider’ would not include General Practitioners (GPs) in private practice. Medicare funding is provided as a rebate to the individual community member, not to GPs under a Commonwealth contract. GPs (individually and via corporate entities that run some GP clinics) would have the choice to opt into obligations under the DRA on a voluntary basis, as discussed below.
 - The definition of a ‘contracted service provider’ would include aged care services contracted to deliver a Commonwealth program, but not private aged care services. Private aged care services would have the choice to opt into obligations under the DRA on a voluntary basis, as discussed below.

There is no intention for the DRA to apply to the exercise of judicial power, having regard to Chapter III of the *Australian Constitution*.

The duty to consider and act compatibly with rights in the DRA

The proposed obligation on public authorities has two limbs: a procedural limb and a substantive limb.

The procedural limb would require public authorities to consider disability rights when they are making decisions. This part of the obligation specifies a process.

When introducing a similar requirement under the *Victorian Charter*, the then Victorian Attorney-General said this obligation:

seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts ... In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.¹¹⁵

Requiring public authorities to consider the rights of people with disability in administrative practice and policymaking would direct the attention of authorities to information and issues they might otherwise overlook.

Experience under human rights legislation in other jurisdictions indicates similar duties can help to provide public sector workers with a framework for making decisions that are consistent with rights. For example, in the eight-year review of the *Victorian Charter* in 2015, Michael Brett Young noted, '[t]he Charter provides the public sector with a framework, or a fairness radar, through which it can look at legislation, policies, practices and service delivery, and consider the impact on individuals'.¹¹⁶ Similarly, the Equality and Human Rights Commission (EHRC) for England, Scotland and Wales noted in 2009 that key benefits of public authorities engaging with human rights included:

establishing some non-negotiable service standards that apply to everyone; providing a framework for making better decisions; strengthening advocacy; helping to re-energise staff and re-connect them with core public service values managing organisational risk; and enhancing organisational reputation and distinctiveness.¹¹⁷

The substantive limb of the duty would require public authorities to act compatibly with the rights in the DRA. An 'act' should be defined to also include a failure to act and a proposal to act.

The duty should not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Combined with consultation requirements, discussed below (through which entities would receive views directly from people with disability), the public authority obligations outlined above aim to ensure that attention is paid to the rights of people with disability early in the policy cycle. A range of policy and service delivery choices in the past have overlooked the needs of people with disability. These choices have included planning for the coronavirus disease (COVID-19) vaccine rollout and the lack of medical oversight when psychotropic drugs are being prescribed to people with disability.¹¹⁸

The general public authority obligation would also make a difference in individual interactions with Commonwealth services and functions, as the example below illustrates.

Box 4.3.3: Example – Disability rights considered in the way a Centrelink review is conducted

An Authorised Review Officer of Centrelink is reviewing the Centrelink payments of a young man living with a mental health condition under the *Social Security Act 1991* (Cth). The Authorised Review Officer considers the man's rights under the DRA when deciding how to conduct the review. Under the DRA, the man has rights to non-discrimination and equality before the law and to access and use supports and advocacy services in making decisions and expressing his will and preferences.

The Authorised Review Officer talks to the young man about the review and what would support his participation.

They agree Centrelink will send an email in advance, giving notice of phone calls so that an advocate can be arranged to participate.

In the future under the DRA, Centrelink and its staff would have an obligation to consider rights in the DRA when they make a decision under the *Social Security Act 1991* (Cth) and it would be unlawful for them to act incompatibly with those rights.

Complaints and enforcement

We recommend that a failure to comply with the general public authority obligation should be the subject of complaints or reports to the National Disability Commission (recommended in Volume 5) and the use of the Commission's compliance functions. A breach of the general public authority duty should be a ground for a civil cause of action. These mechanisms and the role of the National Disability Commission are discussed in Section 3.7 below.

Provision for other entities to voluntarily choose to be subject to the general public authority obligation

As discussed in Chapter 1, the private sector includes many non-government actors at the front line of service delivery, where conduct can enhance or impair the human rights of people with disability.

The roles of disability service providers, and recommendations for reform, are discussed in detail in Volume 10 and Volume 11. As discussed there, we have heard evidence from people with disability and their family members about abuse and neglect occurring in, or in connection with, NDIS funded services and supports. To provide safe, high-quality disability services, providers must take measures to prevent violence, abuse, neglect and exploitation, and to respond effectively when incidents occur. Respecting the human rights of people with disability should be central to the operation of service providers. As Counsel Assisting submitted following Public hearing 32, 'Service providers revisited', '[s]ervice providers need to apply a human rights lens to all aspects of their operations'.¹¹⁹

In Section 3.3 above, we recommend a future review of the DRA (within five years of commencement) include consideration of whether and how the duties in the DRA should be extended or applied to additional persons or entities.¹²⁰ In addition, from commencement, the DRA should provide a mechanism so private and community sector entities can voluntarily ‘opt in’ to having obligations under the DRA from the outset of its implementation and for there to be a public register of entities that have chosen to do so. This measure would recognise the impact and responsibility of businesses and community service organisations for the human rights of people with disability, as discussed in Chapter 1 and detailed across this *Final report*.

The *Human Rights Act 2004* (ACT) (*ACT HRA*), for example, permits any entity to ask the Attorney-General to declare it to be a public authority.¹²¹ The eight-year review of the *Victorian Charter* noted unpublished academic research from Louis Schetzer which showed:

entities choose to be public authorities in the [Australian Capital Territory] for reasons including: to make a public statement of the organisation’s support for human rights; human rights are already a strong part of the organisation’s values and principles, and the choice sets an example for other non-government agencies in advocacy work.¹²²

An opt-in provision was recommended in the eight-year review of the *Victorian Charter* in 2015 (which had not been implemented by the Victorian Government at the time of writing), and a similar provision was recommended by the AHRC in its 2023 position paper on a Commonwealth Human Rights Act.¹²³

While we recognise the uptake of this option may not be large, an opt-in mechanism would allow some entities to choose to act ahead of the future review of the DRA which will consider the potential expansion of duties under the DRA, including to other sectors. It would also provide an opportunity for organisations that are more advanced in their human rights approach to demonstrate leadership within their sector and it would give them a clearer set of duties to measure themselves against and be held accountable to (when compared with the obligations States Parties have under the *CRPD*).

In Public hearing 32, for example, Ms Hayley Dean, CEO of Melba told us that Melba applies the *Victorian Charter* as a set of principles even though it does not consider itself to be a public authority under the law.¹²⁴

In the private sector, it also creates opportunities for peer pressure, market competition and performance evaluation. This is akin to how environmental, social and corporate governance (ESG) operates currently in the private sector. Markets use ESG to evaluate organisations and determine future performance. If promoted well, being on a public register of organisations that have opted into having obligations under the DRA could potentially become an important public indicator of an organisation’s commitment to disability rights and socially responsible business.

Consultation with people with disability

All policy and regulatory measures capable of impacting on the rights or wellbeing of people with disability should be subject to transparent, public scrutiny, fully incorporating lived experience.¹²⁵

Governments frequently make decisions that have impacts on people with disability. However, as discussed in Chapter 2, people with disability are not always involved in decisions that may affect their human rights. We have considered the significant negative consequences that can flow from a failure to consult with people with disability and their representative organisations when decisions are made that may impact their human rights.

The legal context

From a domestic legal perspective, we have considered recent judicial decisions and relevant common law principles, noting a consultation requirement could be considered as an aspect of the common law duty to afford procedural fairness to persons affected by the exercise of public power, before a decision that affects them is made.¹²⁶

In addition to the domestic legal context, we have considered Australia's international human rights obligations in forming our recommendations.

At the international level, article 4(3) of the *CRPD* has been understood as requiring 'countries to consult with [Disabled Person's Organisations] ... on measures concerning persons with disabilities or on implementing the *CRPD*'.¹²⁷ The preamble to the *CRPD* affirms that 'persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them'.¹²⁸ This is also supported in the general principles of the *CRPD*, which include 'full and effective participation and inclusion in society'.¹²⁹

The *CRPD* Committee considers that for States Parties to implement their obligations under article 4(3), they should 'consider consultations with and the involvement of persons with disabilities as a mandatory step prior to the approval of laws, regulations and policies'.¹³⁰

The former UN Special Rapporteur on the rights of persons with disabilities considered:

- 'States must consult and engage with representative organizations or persons with disabilities in good faith'¹³¹ and that 'good faith should be a foundation stone of all State actions during processes of dialogue and consultation with representative organizations of persons with disabilities, and should permeate States' interpretations of their own rules for participation in public decisions'¹³²

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- '[c]onsultations must embrace transparency, mutual respect, meaningful dialogue and a sincere desire to reach consensus'¹³³
 - consultations 'must take place in accordance with procedures that are appropriate to the circumstances of the diversity of the disability movement'¹³⁴
 - consultations 'must allow for reasonable and realistic timelines'.¹³⁵

In Chapter 2, we discuss:

- the CRPD Committee's 2019 Concluding Observations recommending Australia strengthen its consultative mechanisms¹³⁶
- the view reached by Professor McCallum in his report that Australia was not in compliance with article 4(3) of the *CRPD*¹³⁷
- the Australian Government's view on what is required under article 4(3).¹³⁸

We recommend below that the DRA require Commonwealth entities to consult with people with disability when:

- developing and evaluating policies, laws and programs
- planning new initiatives in, or making major changes to, services that are provided to the public or have a direct and significant impact on the public.

This would be a legislative requirement applicable to the Commonwealth public sector. It would not be a constitutional obligation and would not impose a duty on the Australian Parliament to consult with people with disability. In this way, the recommended requirement is similar to existing legislative duties such as:

- the *Carer Recognition Act 2010* (Cth), which requires each public service care agency to 'consult carers, or bodies that represent carers, when developing or evaluating care supports'¹³⁹
- the *Legislation Act 2003* (Cth), which requires rule-makers to consult before making legislative instruments¹⁴⁰
- the *Fair Work Act 2009* (Cth), which requires an enterprise agreement to include a term that requires employers to consult employees or their representatives in particular situations, including about major workplaces changes likely to have a significant effect on employees¹⁴¹
- the *Work Health and Safety Act 2011* (Cth), which requires a person conducting a business or undertaking to, so far as it is reasonably practicable, consult workers about work health and safety matters¹⁴²
- legislation that requires various statutory authorities to consult in the performance of their functions.¹⁴³

The AHRC has proposed a ‘participation duty’ be introduced in a Commonwealth Human Rights Act, and has discussed the participation duty specifically in application to people with disability.¹⁴⁴ The AHRC considers that the participation duty ‘applied to persons as a collective would require the consultation of persons with disability, including through their representative organisations, on decisions that directly or disproportionately affect their rights’.¹⁴⁵

The recommended duty

Recommendation 4.11 Consultation with people with disability

- a. The Disability Rights Act should require Commonwealth entities (as defined in the *Public Governance, Performance and Accountability Act 2013* (Cth)), in developing and evaluating policies, laws and programs and in planning new initiatives or making major changes to services that are provided to the public, or have a direct and significant impact on the public, to consult with:
 - people with disability (including disability representative organisations), recognising the special importance of consulting and actively involving First Nations people with disability in issues that affect them
 - children and young people with disability where appropriate, or representatives of children and young people (including, as relevant, disability representative organisations, the National Children’s Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner or equivalents in the states and territories)
 - families, carers and supporters of people with disability (which could include their representative organisations) on issues that will or could affect families, carers and supporters in their caring role.
- b. The Disability Rights Act should specify the nature of any consultation required and the consequences of a failure to consult.
- c. The Disability Rights Act should provide that the consultation requirement does not give rise to a civil cause of action in any person or organisation.
- d. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended, or an accompanying legislative instrument be prepared, requiring statements of compatibility accompanying Bills and legislative instruments to provide information about relevant actions taken by Commonwealth entities to comply with the consultation requirement in the Disability Rights Act.

Explanatory notes

There are several components to the consultation requirement we recommend. We address each of these components below.

The subject of consultation

The scope of the consultation requirement should be broadly defined, covering the development and evaluation of policies, laws and programs and planning for new initiatives or major changes to services that affect the public. This approach builds on wording proposed in the Victorian Government Disability Inclusion Bill Exposure Draft.¹⁴⁶ Clause 9 proposed consultation with people with disability ‘in developing policies and programs and in delivering services that are provided to the public, or have a direct and significant impact on the public’.¹⁴⁷

Anything that affects the public could affect people with disability. Some initial consultation is often required to assess what that effect may be. Too often assumptions are made that policies, programs and services are neutral in relation to people with disability, without asking people with disability about the impacts on them.

A requirement on ‘Commonwealth entities’

To support implementation, we recommend the consultation requirement be applied to ‘Commonwealth entities’. The relevant duty-holder in this context is narrower than the definition of ‘public authority’ above (which includes individual ministers, officials and employees). The consultation requirement would apply at the entity level, rather than requiring each individual public servant involved in a topic to individually consult with people with disability.

As described above, the definition of ‘Commonwealth entity’ in the *Public Governance Act* provides that Commonwealth entities can be corporate or non-corporate entities.¹⁴⁸ Corporate entities include a wide range of statutory entities¹⁴⁹ including the NDIA.¹⁵⁰ Non-corporate entities include Commonwealth government departments¹⁵¹ and ‘listed entities’¹⁵² such as the Australian Federal Police.¹⁵³ It does not include individual ministers or public servants.

Consultation with people with disability

Consultation should be with ‘people with disability’, which should include ‘disability representative organisations’. In doing so, Commonwealth entities should consider, where relevant, the different needs and experiences of people with disability due to one or more attributes such as: sex; gender identity; sexual orientation; ethnicity; language; race; religion, faith or spirituality; socio-economic status; age; neurodiversity; culture; residency status; geographic disadvantage; and experiences of trauma.¹⁵⁴

We recommend particular reference be made in the DRA to a number of groups:

- recognising the special importance of First Nations people with disability being consulted and actively involved in matters that affect them

-
- making specific mention of the need to consult with children and young people with disability, given their views are often not sought or are discounted, and also recognising the important role of not only disability-specific representative organisations, but also entities such as the National Children's Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner and equivalent commissioners at the state and territory level in facilitating the views of children and young people¹⁵⁵
 - recognising the core public sector activities described can also have an impact on families, carers and supporters in their caring roles and the 'critical role families, carers, advocates, the workforce and others play in providing care and support to people with disability'.¹⁵⁶

To assist in the identification of and engagement with organisations that are truly representative of people with disability, the DRA should provide a system for voluntary registration of such organisations. Consultation should include, but not be limited to, registered organisations.

The DRA should establish criteria, consistent with the interpretation of the duty to consult under article 4(3) of the *CRPD*, requiring registered organisations to be led by a majority of people with disability.¹⁵⁷ The DRA should also provide a role for a group of people with disability to approve registrations against established criteria. This role could be an additional function for an existing body or advisory structure. Members of the decision-making group should themselves include a diversity of perspectives and experiences.

The *CRPD* Committee has provided guidance that 'persons with disabilities should be able to decide for themselves which organizations they want to represent them'.¹⁵⁸ They should also have a say in how such organisations are described. For example, this could involve the language of the *CRPD* or the more contemporary form adapted here ('disability representative organisations'). It could also build on the understanding of First Nations approaches in Australia such as 'community-controlled organisations', or some other terminology that describes the intent of being led by and for people with disability.

Registration should be open to a diverse range of organisations and the process for registration should be promoted in a way that recognises that people with disability are a broad, cross-cutting group with different experiences, needs and interests.

The full list of registered organisations may not be relevant for consultation in all circumstances. For example, if the issue under consideration specifically relates to women or children and young people, other types of registered organisations may not be relevant for the consultation. However, a register would provide duty-holders with a clearly defined list to consider and would ensure that people with disability have accepted the groups as representative of people with disability.

The Australian Government should provide practical implementation support to ensure that the opportunity to register is available to a diversity of organisations.

Detailing what consultation requires

We appreciate that, although we do not recommend a civil cause of action attached to the consultation requirement, there may be circumstances in which a Commonwealth entity's action or decision could be challenged on administrative law grounds when there has been a failure to consult. The circumstances in which this could happen, and its potential consequences, could be addressed by specifying in the DRA what consultation requires and the consequences of a failure to consult.

Further specification about consultation should be developed in collaboration with people with disability. For example, this could require the Commonwealth entity to:

- share relevant information about the matter with the public or the people or organisations being consulted in two or more accessible formats
- give the people or organisations being consulted a reasonable opportunity to express their views
- take into account the views expressed
- advise the people or organisations being consulted of the outcome of the consultation in a timely manner.

There are limits to what can be detailed in legislation. We recommend below the National Disability Commission (recommended in Volume 5) be given the function of issuing guidelines on any matter relevant to the DRA. This function should be used to provide further guidance on consultation requirements. For example, guidelines could provide more nuanced guidance on how to make adjustments to support the participation of people with disability during consultations. They could also outline the circumstances in which more active engagement with people with disability, such as a co-design or co-production approach, would be warranted. As discussed in *Our vision for an inclusive Australia*, we heard about the importance of co-design processes in shaping more inclusive and more effective policies and practices. In Volume 5, we discuss ways to embed a co-design approach at the national level, including through the potential establishment of a lived experience branch in government.

Complaints and enforcement

It should be open to a person or organisation with the requisite standing to complain or report to the National Disability Commission a failure to comply with the consultation requirement. The Commission, in an appropriate case, could exercise its compliance functions. A breach of the consultation requirement should not be a ground for a civil cause of action. The DRA should reflect this.

Example

To give a practical example of the difference the proposed consultation requirement would make, we have considered the context of Public hearing 12, 'The experiences of people with disability in the context of the Australian Government's approach to the COVID-19 vaccine rollout'. This example is outlined in Box 4.3.4 below.

Box 4.3.4: Example – the practical difference a consultation requirement could make

In our report on Public hearing 12, we found the Australian Government Department of Health had ‘decided to deprioritise the vaccination of people in disability residential settings without consulting or notifying the Advisory Committee on Health Emergency Response to Coronavirus (COVID-19) for People with Disability or Disability Representative Organisations’.¹⁵⁹

While the Australian Government had established the Advisory Committee on Health Emergency Response to Coronavirus (COVID-19) for People with Disability in April 2020:

The fact is that DOH [the Australian Government Department of Health] did not seek advice and guidance from the Advisory Committee to inform its ‘surveillance’ and data gathering to identify people in disability residential settings who were eligible to receive the vaccine under Phase 1a. That would not have been difficult or time consuming. Had DOH sought advice and guidance from the Advisory Committee it plainly would have been better informed about the nature and magnitude of the tasks involved in a rollout of vaccines to people in disability residential settings.¹⁶⁰

In considering the meetings that did take place during the relevant period, we observed:

The consultations relied on by the Australian Government were mostly events at which information was presented by governments to stakeholders. The evidence does not suggest that they were designed to identify and rectify any deficiencies in the design of the rollout.¹⁶¹

In future, a legal requirement to consult people with disability, and their representative organisations, would elevate the significance and value of consultation in public administration. The duty we recommend would also send a strong signal that a vaccine rollout, as something that affects the public generally, would trigger the requirement to consult with people with disability. The provision would signal that assumptions should not be made about the potential impact of the activity on people with disability and that consultation is required to determine this.

Legislation and practice guidelines from the National Disability Commission would explain that ‘briefing’ stakeholders in meetings is not sufficient to meet this duty. The duty would require a meaningful opportunity to respond and for those views to be taken into account.

There would be a registered list of disability representative organisations to help guide the department about who it could consult with to hear the views of people with disability directly.

The National Disability Commission could take responsibility for advocating for improved practice. It could examine the situation and make recommendations to ensure the

department complies with the consultation requirement in the DRA. The department would be required to respond. The National Disability Commission could publicly name the department and, if necessary, elevate the matter to be considered by a minister.

While such a process could be used to improve practice, its mere existence could also be an incentive for a department to engage more robustly in the first instance.

In addition to Commonwealth entities being required under the DRA to consult with people with disability, in Chapter 4 we recommend that under the *DDA*, the nature and extent of consultation with any person with disability concerned be a factor in determining whether hardship imposed on an alleged discriminator would be ‘unjustifiable hardship’.

Consultation with people with disability by departments in developing Commonwealth Bills and legislative instruments

Finally, we recommend relevant duty-holders report on how people with disability have been consulted in the development of Commonwealth Bills and legislative instruments.

As discussed in Chapter 2, currently the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that every Bill introduced into the Australian Parliament and certain legislative instruments are accompanied by a statement of compatibility. The statement of compatibility must include an assessment of whether the Bill is ‘compatible with human rights’, including the *CRPD*.¹⁶²

In future, the range of matters to be addressed in a statement of compatibility should include any consultation undertaken in accordance with the consultation requirement under the DRA.

A positive duty to promote disability equality and inclusion

In Chapter 2, we explain there are currently limited requirements in Australia for governments and parliaments to consider the rights of people with disability. Where mechanisms that protect rights do exist, harm is usually only addressed after it occurs. There is a lack of proactive consideration of disability rights in government policies and processes.

We recommend the establishment of two new positive duties in Commonwealth law to improve this situation.

In Chapter 4, we recommend a new positive duty under the *DDA* requiring duty-holders to take reasonable and proportionate measures to eliminate all forms of discrimination on the grounds of disability. This provision would apply to all duty-holders under the *DDA*, including both public and private sector entities.

Here, we recommend that a complementary positive duty to promote disability equality and inclusion be included in the DRA. This duty would require Commonwealth entities to have due regard to the need to take necessary and proportionate action to advance:

- the equality and inclusion of persons with disability
- respect for the inherent dignity of persons with disability.

This duty would extend beyond the elimination of discrimination (the recommendation in Chapter 4 in relation to the *DDA*). The duty outlined here for the DRA would align the Commonwealth public sector to the broader policy aims of advancing equality and inclusion. It would recognise the public sector as having important levers to drive systemic change.

International law context

As noted earlier, and as discussed in Chapter 1, the *CRPD* places obligations on States Parties to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.¹⁶³

When applied to article 5, the obligation to promote, protect and ensure is broader than providing effective legal remedies when discrimination has occurred (which is the current focus of the *DDA*). The *CRPD* Committee has said:

Reading article 5 in conjunction with articles 1, 3 and 4 of the Convention, it is clear that, in order to facilitate the enjoyment by persons with disabilities on an equal basis of the rights guaranteed under legislation, States parties must take positive actions.¹⁶⁴

The public sector equality duty in the United Kingdom: An example

As noted in Chapter 2, the *Equality Act 2010* (UK) (*Equality Act*) provides an example of a broad public sector equality duty. The *Equality Act* consolidated and simplified previous discrimination legislation in the United Kingdom, replacing three separate duties under the former discrimination law regime: the race equality duty,¹⁶⁵ the disability equality duty,¹⁶⁶ and the gender equality duty.¹⁶⁷

The public sector equality duty¹⁶⁸ requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.¹⁶⁹

Guidance from the EHRC explains the purpose of the duty as follows:

The broad purpose of the general equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities ... If a public authority does not consider how a function can affect different groups in different ways, the function may not meet its own objectives ... The general equality duty

therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality to be considered in decision-making, in the design of policies and in the delivery of services, including internal policies, and for these matters to be kept under review.¹⁷⁰

Specific duties set out in regulations include requirements for listed public authorities to publish annual information to demonstrate compliance with the general duty. The duties also require public authorities to develop specific and measurable objectives to further any of the aims of the general equality duty at least every four years. This information must be accessible to the public.¹⁷¹

The EHRC is responsible for regulating the public sector equality duty. It provides advice and information, monitors implementation, undertakes compliance assessments,¹⁷² and enters into agreements with public authorities to implement action plans to address breaches.¹⁷³ It has the power to issue a compliance notice which can be enforced through the courts and to seek judicial review.¹⁷⁴

In addition to the EHRC's powers to enforce the duty, if a public authority does not comply with the general duty, its actions or failure to act can be challenged by an application to the High Court of Australia for judicial review. An application can be made by a person or a group of people with an interest in the matter as well as by the EHRC itself.¹⁷⁵

An important aspect of the duty is that it is, 'above all a transparency measure intended to achieve evidence-based policy-making and to encourage fairer and clearer decisions in public functions, including the allocation of public money'.¹⁷⁶

The example below from the United Kingdom illustrates how a public sector equality duty can have a broader impact on public policy. It goes beyond taking steps to eliminate unlawful discrimination. It addresses the development and influence of public policy decisions. This is a space where a positive duty to promote disability equality and inclusion in the Australian context could push further than traditional anti-discrimination laws towards substantive equality.

Box 4.3.5: Example – a United Kingdom council's consideration of a public transport concession scheme

Hampshire City Council was determining whether to adopt the national concession scheme for public transport or maintain the more tailored arrangements that had been set up by councils and that provided for additional concessions. The national scheme provided public transport concessions for people aged over 60 years and people with disability of any age.

To make an informed decision, the council assessed the equality impact of existing scheme options and consulted service users.

The council found that removing the enhancements historically provided by the council scheme was likely to be detrimental to people with disability as well as older people. It considered how it could minimise negative impacts and weighed the estimated cost of each option.

Using this information, the council decided to provide the national scheme, with selected enhancements to better meet the needs of older people and people with disability.

The council also provided transparency about its decision-making by publishing information explaining its decision.¹⁷⁷

The model in the example above has been adapted by the Victorian Government in its efforts to use the large systems of state and local government to drive significant change. It introduced a public sector duty to promote gender equality in the *Gender Equality Act 2020* (Vic).¹⁷⁸ Similarly, the Victorian Disability Inclusion Bill Exposure Draft 2022 proposed a public sector duty to promote disability inclusion.¹⁷⁹ It proposed that a new Commissioner for Disability Inclusion monitor compliance and have the power to enter into an enforceable undertaking by which an entity would commit to take certain action to comply with the Act.¹⁸⁰

As the examples from other jurisdictions demonstrate, a positive duty to promote equality can go beyond taking proactive steps to eliminate discrimination. It can move the public sector into the more transformative role of promoting equality and inclusion. As the then (Australian) Human Rights and Equal Opportunity Commission noted in 2008 about the United Kingdom race equality duty, these types of equality duties ‘place the onus of redressing inequality on those who have the greatest power to achieve social change’.¹⁸¹

The recommended duty

Recommendation 4.12 Positive duty to promote disability equality and inclusion

- a. The Disability Rights Act should include a requirement for a Commonwealth entity, in the exercise of its functions, to have due regard to the need to take necessary and proportionate action to advance the policy objectives of equality, inclusion and respect for the dignity of people with disability.
- b. The requirement in a. should include the Commonwealth entity having due regard to the need to:
 - ensure equality of rights, opportunities, responsibilities and outcomes between people with disability and other members of the Australian community

- act consistently with its obligations under the *Disability Discrimination Act 1992* (Cth), including the duties recommended in Chapter 4 to:
 - take reasonable and proportionate measures to eliminate all forms of discrimination on the grounds of disability
 - make adjustments for people with disability so they can enjoy their human rights without discrimination, unless it would cause an unjustifiable hardship
- address barriers that disadvantage people with disability, including barriers compounded by a person with disability's combination of attributes and experiences
- promote accessibility and universal design, and appropriate remedial action to existing infrastructure
- address stigma, stereotyping, prejudice, violence, abuse, neglect and exploitation affecting people with disability
- foster good relations between people with disability and other members of the community.

Complaints and enforcement

We recommend that a failure to comply with the positive duty to promote disability equality and inclusion be the subject of complaints or reports to the National Disability Commission, and be subject to the commission's compliance functions. It should not give rise to an individual civil cause of action. These matters are discussed below in Section 3.7.

Although we do not recommend a civil cause of action attach to the positive duty to promote equality and inclusion, there may be circumstances where a Commonwealth entity's action or decision could be challenged on administrative law grounds when there has been a failure to meet the duty. The circumstances in which this could happen, and its potential consequences, could be addressed by specifying in the DRA what the duty requires and the consequences of a failure to meet the duty.

A duty to provide an interpreter

Without even the right to Auslan interpreters legally enshrined, Australians with disability are behind many countries in the world.¹⁸²

As noted in Volume 6, information and communications are foundational to people with disability exercising autonomy and accessing systems and services. In that volume, we discuss requirements for information and communications to be accessible, as well as communication barriers for people with disability. We also make recommendations to improve the accessibility of information and communications, and increase the number and skills of interpreters working with people with disability.

We heard in Public hearing 29, ‘The experience of violence against, abuse, neglect and exploitation of people with disability from culturally and linguistically diverse communities’, how the lack of interpreters is a barrier to effective service delivery, or to a service being delivered at all, to a person who is deaf or a person with disability who has low English literacy. That public hearing also showed how a lack of access to interpreters can be a barrier to people with disability understanding, exercising or enjoying their rights, including in situations impacting their liberty.¹⁸³

Counsel Assisting submitted following Public hearing 29 that it is open to the Royal Commission to consider recognising a right to an interpreter for people with disability, particularly people who do not use spoken or written English as a first or primary language.¹⁸⁴ We agree with that submission.

In response, the Australian Government indicated it was ‘currently focused on developing strategies to address key challenges impacting a sustainable interpreting sector’, and referred to the Translating and Interpreting Service National, which provides interpreting and translation services, in certain circumstances, for people who do not speak English.¹⁸⁵ While we welcome this existing service, we consider that targeted measures are required to meet the needs and fulfil the rights of people with disability, as recommended below and in Volume 6.

We also note the definition of ‘disability discrimination’ in the *DDA* includes as an element a failure to provide reasonable adjustments to a person with disability.¹⁸⁶ A failure to provide an interpreter to a person who requires one to communicate, depending on the circumstances, might amount to a failure to provide reasonable adjustments. However, evidence suggested ‘the provision of interpreters was not considered a reasonable adjustment for a person with disability who did not use English as their primary form of communication’.¹⁸⁷ The result in such cases is that a person with disability may experience disability discrimination as defined in the *DDA* if they are unable to use English and no adjustment is made to support them to access and use the service.

The legal context

The *CRPD* contains a number of articles relevant to the use of interpreters by people with disability.

Article 5 of the *CRPD* requires States Parties ‘to take all appropriate steps to ensure that reasonable accommodation is provided’ to promote the equality of, and eliminate discrimination against, people with disability.¹⁸⁸

Article 9 sets out the right to accessibility. It requires States Parties to take appropriate measures to ensure people with disability can access information, communications, and services and facilities on an equal basis with others. This duty includes the requirement to take appropriate measures to provide professional sign language interpreters.¹⁸⁹

Article 21 sets out the freedom of expression and opinion, and the right to access information. It includes the right of people with disability to seek, receive and impart ideas through all forms of communication of their choice. States Parties are required to take all appropriate measures to ensure that people with disability can exercise this right, including by accepting, facilitating, recognising and promoting the use of sign languages.¹⁹⁰

Article 29 requires States Parties to ensure ‘that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others’.¹⁹¹ Article 30 recognises ‘the right of persons with disabilities to take part on an equal basis with others in cultural life’.¹⁹² Article 30(4) specifically recognises that people with disability are entitled to ‘recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture’.¹⁹³

Access to interpreters is an important component for the realisation of these rights in practice.

The recommended duty

Recommendation 4.13 The duty to provide an interpreter

- a. The Disability Rights Act should require Commonwealth entities to provide (arrange and fund) an appropriately trained and credentialed interpreter when required by a person with disability who is accessing or using its services or engaging with its statutory functions. Interpreters may be required in Auslan, First Nations sign languages or spoken languages other than English.
- b. The Disability Rights Act should provide that it is not a breach of the above duty if the relevant Commonwealth entity can demonstrate that:
 - there was no appropriately qualified interpreter available after reasonable enquiry
 - the conversation or activity that the interpreter was required for could not reasonably have been undertaken at an alternative time when an interpreter would have been available.

Explanatory note

This duty is intended to extend the responsibilities of Commonwealth entities, not to take away from people with disability being able to choose and arrange their own interpreter. The duty should not be used as a justification to reduce NDIS funding packages relating to

communication supports. These issues should be the subject of consultation and considered carefully in the legislative drafting process.

This duty on Commonwealth entities should not be limited by unjustifiable hardship criteria, such as that discussed in Chapter 4 in relation to the *DDA*. However, the duty should recognise there are circumstances where it may not be possible to provide an interpreter.

We recognise there is a shortage of Auslan interpreters in Australia.¹⁹⁴ There is also a lack of skilled and accredited spoken language interpreters for people with disability from culturally and linguistically diverse backgrounds, particularly in rural communities. We discuss these challenges in Volume 6. There, we also make recommendations to increase the number of Auslan interpreters and to improve the abilities of spoken language interpreters working with people with disability.

Complaints and enforcement

We recommend that a failure to comply with the duty to provide an interpreter be the subject of complaints or reports to the National Disability Commission and the use of the commission's compliance functions. It should also be a ground for a civil cause of action. These matters are discussed below in Section 3.7.

A duty to provide accessible information

Accessible information from government helps to ensure that everyone has the opportunity to access information, services and opportunities offered through government programs. Such information can be vital to people with disability understanding their rights and seeking action to respond to violence, abuse, neglect and exploitation. Accessible information from government is also critical to health, education, employment, accessing justice and safety in an emergency. We discuss these issues in detail in Volume 6.

The legal context

Article 5 of the *CRPD* requires States Parties 'to take all appropriate steps to ensure that reasonable accommodation is provided' to promote the equality of, and eliminate discrimination against, people with disability.¹⁹⁵

Article 9 requires States Parties to 'ensure to persons with disabilities access ... to information and communications'.¹⁹⁶

Article 21 set outs the freedom of expression and opinion, and the right to access information. It includes the right of people with disabilities to seek, receive and impart ideas through all forms of communication of their choice. States Parties are required to provide 'information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost'.¹⁹⁷

Article 29 also requires States Parties to ensure ‘that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others’.¹⁹⁸

The CRPD Committee has stated that ‘[a]ccessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society’.¹⁹⁹

Domestically, under the *DDA*, it is unlawful to discriminate against a person with disability, including in the provision of goods and services.²⁰⁰ Duty-holders are required to make reasonable adjustments for people with disability unless doing so would impose an ‘unjustifiable hardship’.²⁰¹ Adjustments can include the provision of accessible information.

We discuss the international and domestic legal context in detail in Volume 6. There, we conclude that, despite obligations under international and domestic law, many people with disability in Australia still cannot access information and communications on an equal basis with others. This can have serious consequences, including leaving people with disability at greater risk of violence, abuse, neglect and exploitation. We saw, for example, the risk of neglect heightened during the COVID-19 pandemic because many people with disability could not access crucial information. In Volume 6, we recommend the Australian Government and state and territory governments develop an Associated Plan in connection with Australia’s Disability Strategy 2021–2031 (ADS) to improve the accessibility of information and communications for people with disability across Australia.

Here, we recommend a complementary duty on Commonwealth entities under the DRA to provide accessible information.

The recommended duty

Recommendation 4.14 The duty to provide accessible information

The Disability Rights Act should provide that a Commonwealth entity must ensure that its communications are provided in at least two formats accessible to people with disability when:

- publishing public information
- consulting or engaging with persons with disability.

Explanatory note

The DRA should provide that a Commonwealth entity must ensure that its communications are provided in two or more accessible formats when publishing public information; and consulting or engaging with persons with disability (which may at times be conducted privately).

A similar duty was proposed under the Victorian Disability Inclusion Bill Exposure Draft 2022 in relation to consultation activities.²⁰²

An ‘accessible format’ means a format that presents a document or other communication in a manner that enables the document or communication to be accessible by persons with disability. It includes, but is not limited to, Easy Read, Auslan, live and closed captioning, Braille and audio description.

The simple example below illustrates how the duty to provide accessible information could improve access to government services and resources for people with disability.

Box 4.3.6: Example – access to disaster recovery payments

After a recent flood, Services Australia distributes information to the local communities affected about the availability of disaster recovery payments. In their planning, they take into account their duty to provide accessible information under the DRA and publish information in an Easy Read format and via an Auslan video explaining how to make an application for the payment.

Such a provision in the DRA would not require a person with disability to ask for the information in a particular format. It would drive the publication of information by prescribed Commonwealth entities in accessible formats as a standard practice. The duty could be enforced by the National Disability Commission without needing a person with disability to make a complaint.

In Volume 6 we discuss the lack of accessible information relating to a range of areas including emergency situations and public health. The states and territories play important roles in those areas. In Section 3.9 below we recommend that state and territory governments enact equivalent protections to those set out in the DRA at the Commonwealth level, including the duty to provide accessible information.

Complaints and enforcement

We recommend that a failure to comply with the duty to provide accessible information be the subject of complaints or reports to the National Disability Commission and the use of the commission’s compliance functions. It should also be a ground for a civil cause of action. These matters are discussed in Section 3.7 below.

Duties supporting compliance with the DRA

We outline below the statutory responsibilities that duty-holders should have to support implementation of and compliance with the DRA. As a starting point, duty-holders would have a responsibility for effective implementation of their duties under the DRA. This self-assessment

approach should be backed up by transparent reporting. It should also be reinforced by an appropriately equipped independent oversight body that can drive accountability, as discussed in Section 3.7 below.

Annual reporting to support compliance and oversight

Commonwealth entities should be required to report annually on action they have taken to implement their obligations under the DRA.²⁰³

Our intention is to exclude individuals such as Australian Government ministers and employees of Commonwealth entities from this reporting requirement.

Reporting requirements alone will not be sufficient to ensure compliance with the DRA. However, they are useful in ensuring:

- the attention of senior officers within an entity is drawn to compliance issues each year
- ideas and lessons can be shared between entities (and performance can be compared)
- a base level of public transparency in the activity undertaken by relevant entities. This transparency provides useful information that stakeholders and oversight bodies can engage with the entity about.

Volume 5, *Governing for inclusion*, and Volume 12, *Beyond the Royal Commission*, include further discussion on monitoring and reporting. This includes recommendations on independent reporting and monitoring related to outcomes for people with disability (Volume 5) and recommendations by this Royal Commission (Volume 12).

Impact assessment, self-audit and publication of objectives to further the aims of the positive duty

Commonwealth entities should be required to:

- conduct a disability impact assessment when developing or reviewing any policy or law administered, or any program or service provided, by the entity that has a direct and significant impact on the public²⁰⁴ (noting that, in doing so, the same entities also have obligations to consult with people with disability as outlined above)
- undertake a disability inclusion self-audit every four years, including consideration of any relevant legislation administered by the entity
- publish at least every four years their specific and measurable objectives to further the aims of the positive duty to promote disability equality and inclusion.²⁰⁵

A regulation-making power should be included in the DRA enabling the Australian Government to set out further detail in relation to self-audits and reporting requirements. Regulations could include requirements for entities of a certain size, a particular focus for audits or reporting in certain years or indicators that certain listed entities must report against to demonstrate action

they have taken. We envisage that reporting requirements against indicators may apply to a more limited group of entities (for example, tailored requirements could be set out for certain sectors or types of entities).²⁰⁶

Complaints and enforcement

We recommend that a failure to comply with these statutory duties be subject to the use of the National Disability Commission's compliance functions. A breach of these duties should not be a ground for individual complaints or reports or a civil cause of action. These matters are discussed in Section 3.7 below.

Recommendation 4.15 Duties supporting compliance with the Disability Rights Act

To support compliance with the Disability Rights Act, the Act should require Commonwealth entities to:

- a. report annually on action they have taken to implement their duties under the Disability Rights Act
- b. conduct a disability impact assessment when developing or reviewing any policy or law administered, or program or service provided, by the entity that has a direct and significant impact on the public
- c. undertake a self-assessment audit for disability inclusion at least every four years
- d. publish their specific and measurable objectives to further the aims of the positive duty to promote disability equality and inclusion at least every four years.

Summary: Rights and duties in relation to First Nations people with disability

As discussed in Chapter 1, the particular situation of First Nations people with disability has been an important part of our inquiry.²⁰⁷ Our work has been based on the understanding that First Nations people with disability face unique forms of disadvantage and specific challenges. The lived experience of First Nations people with disability regarding violence, abuse, neglect and exploitation has been affected by the intersection of racial and disability discrimination. Accordingly, in addition to the application of the core human rights treaties to which Australia is party, we also considered the important role of the *UNDRIP*.²⁰⁸

Upholding the human rights set out in the *UNDRIP* should be a priority in all relevant government decisions and actions. There is a need to recognise better the links between the *CRPD* and the *UNDRIP* for First Nations people with disability. Regardless of geographic location, the human rights of First Nations people with disability should mean being able to access culturally safe services and support.

In Volume 9, *First Nations people with disability*, we discuss the rights of First Nations people with disability and make recommendations to improve outcomes across a range of settings.

The summary below sets out the parts of this chapter and the proposed DRA that give special consideration to the rights of First Nations people with disability.

Strengthening protection of the rights of First Nations people with disability through the DRA

All rights in the DRA would apply to First Nations people with disability. In addition, we have drawn special attention to the rights of First Nations people with disability in several ways.

In Section 3.3 we recommend the guiding principles of the DRA include that:

- people with disability are entitled to recognition and support of their specific cultural and linguistic identity, including First Nations sign languages
- First Nations people are entitled to all human rights without discrimination and possess collective and cultural rights which are indispensable to their existence, wellbeing and integral development as peoples, as recognised in the *UNDRIP*.²⁰⁹

In Section 3.4, in setting out rights for the DRA:

- We indicate the recommended right to equality and non-discrimination has special importance for First Nations people with disability. The right of indigenous peoples to enjoy their human rights without discrimination is reflected in the *UNDRIP*.²¹⁰
- We recommend the right to equal recognition before the law requires that supports for people with disability from First Nations communities be provided in a way that recognises that cultural, language and other differences may create barriers to providing the supports; addresses those barriers and the needs of those people with disability; and is informed by consultation with their communities.
- We recommend the right to equitable access to health services include the right of First Nations people with disability to receive health care that is culturally safe and recognises the importance of their personal connection to community and Country.

In Section 3.5, we recommend that:

- the consultation requirement recognise the special importance of consulting and actively involving First Nations people with disability in issues that affect them
- Commonwealth entities have a duty to provide (arrange and fund) an appropriately trained and credentialed interpreter when required by a person with disability who is accessing or using its services or engaging with its statutory functions. Interpreters may be required in First Nations sign languages or in spoken languages other than English.

In Section 3.6 we recommend the DRA be interpreted consistently with the international human rights treaties to which Australia is a party, including the *CRPD*, and with the *UNDRIP*.

3.6. Considerations when adapting international human rights into domestic law

There are a number of additional considerations when adapting international human rights into a domestic law context, particularly when those rights may be subject to consideration by federal courts.

Australian courts, for example, have identified several complexities when the wording of international law is adopted directly into the domestic law context:

- The ‘text of the international instrument may lack precision and clarity’.²¹¹
- The court may be required to consider ‘whether it is constitutionally competent to apply the criteria’ as ‘[o]bligations imposed by international instruments on States do not necessarily take account of the division of functions between their branches of government’.²¹²
- In domestic law there is a basic principle that the intended meaning of a term is fixed at the time the Act was passed, whereas international law accepts that expressions used in a treaty may evolve and change. This means that a disconnect can develop between the understanding of the provision in international law on the one hand, and in domestic law on the other.²¹³

We have taken these issues into account in framing the initial rights for the DRA (outlined in Section 3.4) to ensure those rights are practical, capable of domestic implementation and, where appropriate, amenable to judicial oversight.

In addition, we consider below the role of statutory interpretation; a framework for when and how rights may be limited; and the progressive realisation of economic, social and cultural rights in the domestic law context.

Interpretation of the DRA

As noted in Chapter 1, human rights treaties can influence domestic law and policy in different ways, including through the common law rule of statutory interpretation that legislation be interpreted and applied, so far as its language permits, so that it is consistent with established rules of international law.²¹⁴

However, as Counsel Assisting submitted following Public hearing 18, ‘The human rights of people with disability and making the *Convention on the Rights of Persons with Disabilities* a reality in Australian law, policies and practice’, ‘there is reluctance to use or have regard to international law, particularly human rights and a scepticism which is deeply rooted in Australian federalism and our adherence to dualism’.²¹⁵ ‘Dualism’ is the principle that domestic law does not incorporate international law automatically.

Further, where a statute confers a discretion on an administrative decision-maker, there is no general duty on the decision-maker to act in conformity with, or even to have regard to, Australia’s international obligations when exercising the discretion.²¹⁶

We recommend the DRA include a specific provision that requires interpretation of the Act to be compatible, as far as possible, with the international human rights treaties to which Australia is a party, including the *CRPD*. Interpretation should also be compatible, as far as possible, with the *UNDRIP*.

Such a provision would create a link between the Australian translation of disability rights in the DRA and international human rights law. It would aim to ensure that when domestic decision-makers and courts interpret and apply the DRA, their interpretations are consistent with Australia's international human rights obligations regarding people with disability.

In terms of existing practice in Australia, human rights legislation in Victoria, Queensland and the Australian Capital Territory include an interpretative obligation to interpret all statutory provisions consistently with human rights, so far as is possible to do so consistently with the purpose of the relevant statute.²¹⁷ An interpretative clause is also proposed by the AHRC in its position paper on an Australian Human Rights Act.²¹⁸

Leading case law from the High Court in *Momcilovic*²¹⁹ about an equivalent provision in the *Victorian Charter* indicates the interpretative obligation does not create a 'new paradigm' or 'special rule' of interpretation; nor does it permit a court to depart from the intention of the parliament which enacted the statute.²²⁰ The High Court upheld the Victorian Court of Appeal's reasoning that:

Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.²²¹

Thus, while the duty would not create a 'special rule' of interpretation, it would create a statutory directive for decision-makers and the judiciary to consider the *CRPD*, other relevant international human rights treaties and the *UNDRIP* when interpreting the DRA.

Recommendation 4.16 Interpretation of the Disability Rights Act consistently with international human rights

The Disability Rights Act should require interpretation of the Act to be compatible, as far as possible, with the international human rights treaties to which Australia is a party, including the *Convention on the Rights of Persons with Disabilities*, and with the *United Nations Declaration on the Rights of Indigenous Peoples*.

Ensuring any limitations on disability rights are appropriate

The next issue we have considered when adapting international human rights for a domestic law context is the question of when and how disability rights may be limited.

As discussed in Chapter 1, many human rights under international law are not absolute and may be subject to reasonable and proportionate limitations. While the *CRPD* is silent on limitations of human rights and therefore requires case-by-case consideration,²²² other international human rights instruments allow for limitations on rights where necessary in pursuit of some legitimate public interest.²²³

Domestically, the practical reality is that governments may consider it necessary in certain circumstances to make decisions that affect the human rights of people with disability. It is therefore important that, if domestic legislation is intended to allow for limitations to be imposed on human rights in certain circumstances, it provides clear guidance on when and how this is permissible. In proposing a limitations clause for the DRA, as set out below, our intention is not to permit legislative restrictions on the rights of people with disability; rather it is to ensure that in practice, those rights are not unduly limited as a result of the Act being silent on this matter. This issue should be subject to consultation prior to enactment of the DRA.

Currently, human rights under Victorian, Queensland and Australian Capital Territory human rights legislation are subject to limitations.²²⁴ A limitations clause is also proposed by the AHRC in its position paper on a Commonwealth Human Rights Act.²²⁵

A practical example of how the issue of reasonable and proportionate limitations on human rights can arise for Australian governments under domestic law is set out in the box below.

Box 4.3.7: Example – COVID-19 pandemic orders placing limitations on human rights

In Victoria, at the height of the COVID-19 pandemic, orders required people with a COVID-19 infection (and those who may have been exposed to such an infection to self-quarantine) to self-isolate at home.²²⁶ These orders limited the freedom of movement of people in the interests of public health. They also limited the right to equality, as they limited the human rights of people because they had an infection or were associated with a person who had an infection. An infection is covered by the definition of ‘disability’ in Victorian law.²²⁷

Without a limitations clause in the *Victorian Charter*, the pandemic orders would have been unlawful under Victorian law.

Having a limitations clause in place meant the Victorian Government was required to consider the factors set out in the *Victorian Charter* when making decisions that would limit human rights.²²⁸ Human rights statements accompanied a range of orders made during the pandemic, explaining how the orders limited human rights and for what purpose.²²⁹

The limitations clause in the *Victorian Charter* also meant that oversight bodies such as the Victorian Ombudsman could inquire into whether limitations placed on rights by government in response to the COVID-19 pandemic were reasonable and proportionate.

For example, in its report *Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020*, the Victorian Ombudsman noted that 'the Charter of Rights Act acts as a compass under which those exercising public power are expected to make the right decisions, for the right reasons'.²³⁰ The Ombudsman was of the opinion that a number of aspects of the detention of the people in the public housing towers in July 2020 were 'contrary to law'. It considered that the actions were incompatible with human rights in the *Victorian Charter* and did not result from proper consideration of relevant human rights.²³¹

We propose the rights in the DRA be subject to a general limitations clause based on the proportionality test in some international and domestic human rights instruments. Such a clause would enable limitations to be made only where they are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.

When deciding whether a limitation is reasonable and justifiable, the following relevant factors could be included in the provision:²³²

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, any limitations that are applied over a period of time should be subject to review.

The DRA should also provide that the right to recognition before the law, an absolute right under international law,²³³ must not be subject to any limitations. Under international law, no circumstance justifies a qualification or limitation of absolute rights.²³⁴

Recommendation 4.17 Limitations on rights

- a. The Disability Rights Act should require that rights in the Act be subject only to such limitations that are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors (to be specified in the legislation).

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- b. The Disability Rights Act should make clear that the right to recognition before the law (see Recommendation 4.6), as an absolute right under international law, is not subject to any limitations.
 - c. This issue should be subject to consultation prior to enactment of the Disability Rights Act.

Implementing economic, social and cultural rights

The final issue we briefly consider in this section is the place in domestic law of economic, social and cultural rights recognised under international law.

The initial rights for the DRA outlined in Section 3.4 above focus on particular areas considered in detail during this inquiry – namely, violence against, and abuse, neglect and exploitation of, people with disability. We see no barrier to the inclusion of other rights in the DRA. This may include additional economic, social and cultural rights and progressive realisation components, should that be the outcome of further consultation by the Australian Government with people with disability.

In crafting further rights for the DRA, it is important to consider the clarity of the rights and the tailoring of appropriate duties and remedies for the domestic law context.

For example, the AHRC's position paper *Free and Equal: A Human Rights Act for Australia*, states:

The Commission notes that it does not consider progressive realisation principles to be inherently non-justiciable. However, it acknowledges the importance of providing certainty that the implementation of ICESCR is constitutional, suitably adapted for the Australian context, and directly enforceable by the courts. It also recognises the importance of providing sufficient clarity about the contents of rights – both for the benefit of judges and public authorities interpreting and applying the rights; and for the benefit of individuals that seek to rely upon them through complaints and judicial review processes.²³⁵

We agree with this approach and note that clarity of rights and duties is important to ensure that domestic law can achieve practical improvements for people with disability.

3.7. Remedies and enforcement under the DRA

In this section, we consider how to drive compliance with the duties and obligations in the DRA, and to provide remedies when the rights of people with disability are breached.

As discussed in Chapter 2, there is currently a piecemeal approach to the protection of the rights of people with disability in Australia, and limited access to effective remedies when rights recognised in the *CRPD* are breached. In that chapter, we found Australia has the

opportunity to strengthen implementation of *CRPD* rights. Taking advantage of that opportunity involves introducing measures which more effectively respect, protect and fulfil the human rights of people with disability, especially their right to live free from violence, abuse, neglect and exploitation.

Articulating rights and setting standards alone are insufficient to effect real change. The provisions of the DRA need to be capable of being applied and enforced in practice in the Australian context. It is clear from our inquiry that an ambitious, systemic approach to designing remedies will be important to bring about real change for people with disability in Australia.

Key concepts and legal context

Before outlining our recommendations, it is important first to clarify key terms and legal concepts that underpin our analysis.

Remedies are about the way the law can be used to enforce a right and how breaches of rights are compensated or addressed. Remedies constitute a complex area in both domestic and international law and practice; they have been described as a ‘challenging and neglected subject’.²³⁶

The right to a remedy under domestic and international law

As discussed in Chapter 1, the right to an effective remedy is a foundational human rights principle. Australia has accepted international obligations to respect, protect and fulfil the right to a remedy through various international treaties.²³⁷ Remedies for human rights violations have twin goals:²³⁸

- a backward-looking goal designed to redress past harms or violations for individuals
- a forward-looking, systemic goal to minimise future rights violations, and focus on cessation and non-repetition.

Obligations under the *CRPD*

Under the *CRPD*, Australia has a general obligation under article 4(1) to ‘ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’.²³⁹

This general obligation ‘to ensure and promote’ encompasses several dimensions. These include obligations to refrain from violations of the rights articulated in the *CRPD* and, also, obligations to take positive action.²⁴⁰ The latter is sometimes referred to as an ‘obligation to fulfil’. Under this obligation, Australia is required to undertake a range of appropriate measures to support the full realisation of *CRPD* rights, as discussed in Chapter 1.

To give effect to the general ‘obligation to fulfil’ under article 4(1), Australia has a series of additional supporting obligations, enumerated in article 4(1)(a)–(i), to adopt concrete positive measures to safeguard the full spectrum of rights contained in the *CRPD*.²⁴¹ These include obligations to:²⁴²

- ‘adopt all appropriate legislative, administrative and other measures for the implementation of the rights’ recognised in the *CRPD*
- ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’
- ‘take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’
- ‘ensure that public authorities and institutions act in conformity with’ the *CRPD*
- ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’
- ‘promote the training of professionals and staff working with persons with disabilities’ in the rights recognised in the *CRPD* ‘so as to better provide the assistance and services guaranteed by those rights’.

The *CRPD* leaves significant discretion to States Parties to determine what measures will be regarded as ‘appropriate’ to give effect at the domestic level to the rights of people with disability.²⁴³ However, it is clear that such measures would include remedies and enforcement mechanisms.²⁴⁴

For example, the *CRPD* Committee has explained that, in implementing article 5 of the *CRPD* on equality and non-discrimination, States Parties must ‘[e]stablish accessible and effective redress mechanisms and ensure access to justice, on an equal basis with others, for victims of discrimination based on disability’.²⁴⁵ The *CRPD* Committee’s guidelines on deinstitutionalisation also state that governments:

should provide individualized, accessible, effective, prompt and participatory pathways to access to justice for persons with disabilities who wish to seek redress, reparations and restorative justice, and other forms of accountability.²⁴⁶

The development of appropriate systems for remedies for the rights of people with disability is an important measure in Australia’s fulfilment of its *CRPD* obligations.

Existing mechanisms for remedies in the domestic law context

Various remedies (also referred to as forms of ‘redress’ in this *Final report*) are available for breaches of the human rights of people with disability in Australia. However, as noted in Chapter 2, current protections are not comprehensive and often lack enforcement mechanisms.

Existing remedies arise through a combination of Commonwealth, state and territory laws, including various discrimination laws and, less directly, through human rights legislation in Victoria, Queensland and the Australian Capital Territory. While a detailed examination lies beyond the scope of this chapter, in broad terms the range of remedies can be conceptualised in different ways. For example, along a graduated regulatory spectrum, there are a range of relatively ‘non-intrusive’ remedies, such as:

- voluntary measures
- apologies
- counselling
- declaratory judgements
- damages or compensation.

In addition, there are more ‘intrusive’ or ‘interventionist’ forms of remedies, such as:

- compliance notices
- investigative measures
- enforceable undertakings
- civil penalties
- injunctions
- prohibitions
- affirmative orders
- criminal penalties.

Some of these remedies may be negotiated privately between individuals. An individual may seek some remedies through a complaints process with an independent institution or by instituting court proceedings. Some remedies may be pursued by a regulator in the public interest. Remedies can be classified according to whether they focus on the individual or on systems; they can also be classified according to whether they focus on past violations or prevention of future violations. It is against the backdrop of this complex landscape that we have developed our recommendations about the most appropriate and effective remedies in the context of the DRA.

The role of regulation

Regulation can support the delivery of remedies for human rights breaches through institutional rather than individual action. It can also drive compliance with the law and thereby act as a preventative mechanism.

In considering the regulatory framework for the DRA, we have found responsive regulation to be a useful conceptual tool. The concept of responsive regulation was introduced by Professors Ian Ayres and John Braithwaite in 1992 and is premised on an ongoing and dynamic relationship between the regulator and regulatee.²⁴⁷

Professors Ayres and Braithwaite contend that compliance is ‘most likely’ when a regulator displays an explicit enforcement pyramid:

Most regulatory action occurs at the base of the pyramid where attempts are initially made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance, imposition of civil monetary penalties; if this fails, criminal prosecution; if this fails, plant shutdown or temporary suspension of a license to operate; if this fails, permanent revocation of license. ... It is not the content of the enforcement pyramid on which we wish to focus during this discussion, but its form. Different kinds of sanctioning are appropriate to different regulatory arenas.²⁴⁸

The AHRC has observed that, when viewed through the lens of the regulatory pyramid, the AHRC’s powers:

all sit at the bottom: at the level of persuasion, including education and training. The Commission is a ‘gatekeeper’, most of the Commission’s work comprising complaint handling and education and awareness raising about human rights law and the complaint handling pathways.

The Commission does not have enforcement powers. Nor does it have the ability to investigate possible systemic discrimination law abuses. It has an inquiry power, but this is limited, and can only result in a report with non-binding recommendations. While agencies in areas like competition law and occupational health and safety have a broad range of powers to enforce compliance, ‘successive governments have chosen not to invest the AHRC with equivalent powers’.²⁴⁹

The AHRC has concluded that ‘its effectiveness as a regulatory agency can be enhanced by shifting from the current reliance solely on conciliation and persuasion to a broader suite of regulatory approaches, including co-regulatory powers and inquiry powers’.²⁵⁰

Since these observations were made by the AHRC, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) has introduced new functions for the AHRC relating to systemic discrimination, including enabling the AHRC to inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination.²⁵¹ In addition, several new compliance functions for the AHRC were introduced in relation to the positive duty in the *Sex Discrimination Act*. Specifically, the AHRC has been given functions to use compliance notices and enforceable undertakings, with these provisions due to come into force in December 2023.²⁵²

The Office of the Australian Information Commissioner (OAIC) is illustrative of an agency with a comprehensive and contemporary suite of regulatory functions. The OAIC regulates both the public and private sectors. The responsibilities of the Information Commissioner include conducting monitoring, assessments,²⁵³ investigations,²⁵⁴ reviewing decisions, offering conciliation in relation to complaints²⁵⁵ and providing guidance and advice.²⁵⁶ The Information Commissioner can enter into enforceable undertakings in relation to compliance with the law,²⁵⁷ make a determination and bring proceedings to enforce such determinations in court.²⁵⁸ The Information Commissioner can also seek an injunction in certain circumstances²⁵⁹ or apply to the court for a civil penalty order.²⁶⁰

We do not recommend replicating these functions for the DRA, but consider below the appropriate and effective mix of functions to drive compliance with the rights of people with disability.

Current issues in practice

Our approach to remedies and enforcement has also been informed by the barriers and inadequacies in the current system for protecting the rights of people with disability in Australia.

Volume 11 details the barriers and inadequacies of current complaint-handling mechanisms and makes recommendations to make them work better for people with disability.

We acknowledge the important efforts of some complaint-handling bodies to adapt their processes, provide accessibility supports and address power imbalances. However, we have observed through our inquiry that existing individual complaints mechanisms are often not an accessible or practical option for many people with disability.

Barriers include the lack of accessible information, physical inaccessibility, the complexity of navigating systems, and that processes can be overly formalistic.

The operation of formal public institutions can often be ableist by default. People with Disability Australia cited an example where:

one advocate attended an online court case where no one introduced themselves, meaning that for a person with blindness, it was not clear who was talking. The advocate also reported that in another case they had written to the court numerous times requesting procedural accommodations but received no response.²⁶¹

Inadequacies in the current system include the:

- lack of responsiveness to the needs of people with disability
- inability to address the significant power imbalances between complainants and respondents
- inadequacy of remedies to address the needs of the people with disability and the broader systemic drivers of rights breaches.

In addition, as discussed in Chapter 4, currently under the *DDA* it is individuals with disability who bear the burden of making a complaint, commencing proceedings and proving the elements of discrimination. The cost is often high. Associate Professor Belinda Smith has observed:

Anti-discrimination legislation is designed to protect disempowered groups – those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.²⁶²

Dr Robin Banks, former Tasmanian Anti-Discrimination Commissioner, similarly observed that:

the overarching question, though, is one of a legislative scheme that relies on the most disadvantaged people in society pursuing the public good of equality ... and not having really any systemic mechanism available.²⁶³

Dr Graeme Innes AM, the Australian Disability Discrimination Commissioner from 2005 to 2014, gave evidence in a personal capacity at Public hearing 19, 'Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability'. He concluded that:

When all the burden is placed on the complainant to go through the lengthy and time-consuming conciliation process, often only for minimal compensation, the reality is that people with disability may become worn down. The costs and risks involved are also high ...²⁶⁴

The Law Council of Australia referred to the experience of a person with a psychosocial disability, who described the ongoing stress and anxiety caused by her engagement with the legal system:

This was one of the most hardest and stressful processes I have ever experienced in my life. This whole process impacted terribly on our family. It impacted significantly on my physical and emotional health and on our family ... At times it felt quite too hard and not worth the personal costs. At times, it was the system so to speak telling us to give up.²⁶⁵

While legal assistance can help people access the justice system, research demonstrates that legal services are 'under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities'.²⁶⁶ Moreover, '[t]he financial constraints experienced by many people with disability ... are also likely to mean that relatively few can afford a private lawyer'.²⁶⁷

These practical issues with current systems for complaint and oversight have informed our recommendations for the DRA.

The recommended approach

As discussed, our recommendations in relation to remedies and enforcement under the DRA have been shaped by the general principles of the *CRPD*, good practice in responsive regulation, and what is required to deliver an effective system of rights protection for people with disability.

The mechanisms we recommend are designed to deliver the key features set out in Box 4.3.8.

Box 4.3.8: Key features of an effective system for the enforcement of disability rights and the remedy of rights breaches

Complaints pathways must be:

- **clear**, with accessible information provided to promote a good understanding about what the pathways offer and how to use them
- **accessible**, with multiple ways to access them, to ensure that people with disability can use and interact with the pathways in a manner that suits their needs
- **inclusive**, designed to ensure people with disability, including people with disability with diverse and intersecting identities and experiences, and their families and supporters feel safe (including culturally safe), valued, respected and welcomed
- **efficient and responsive**, to minimise delays and to inform people about anticipated timing for progress through a particular remedial pathway.

Compliance mechanisms must be:

- **expert**, providing leadership and guidance on good practice
- **timely**, so issues can be addressed as early as possible (rather than waiting for a person to be harmed and to make a complaint)
- **agile**, so they are capable of rapid response when issues are time-critical
- **strategic**, so they can consider both the needs of the individual and the systemic drivers of violence, abuse, neglect and exploitation and the inequality and exclusion of people with disability
- **accountable**, so feedback is sought with an open approach to learning and improvement.

Available remedies must be:

- **effective**, designed to be capable of contributing to practical, positive outcomes
- **intersectional**, addressing experiences of intersectional disadvantage
- **enforceable**, so that breaches of legal rights have consequences and attract appropriate remedies and responses.

Our recommendations on this topic are set out in two parts. First, we consider the role of an independent oversight body to support compliance with the DRA. Second, we consider what mechanisms are required to ensure there are effective remedies available when a person's rights have been breached.

The statutory role of an independent oversight body

We recommend that an independent oversight body be given statutory functions to support compliance with the DRA. We have given careful consideration to where these independent oversight functions should be placed.

We recognise the important role the AHRC plays as Australia's national human rights institution. It has a range of relevant functions including research and education,²⁶⁸ the publication of guidelines,²⁶⁹ complaint-handling,²⁷⁰ and inquiries²⁷¹ with a focus on both human rights and disability (and other forms of) discrimination. In addition, from December 2023, the AHRC will have new compliance functions in relation to the positive duty in the *Sex Discrimination Act*.²⁷²

We also recognise the potential role of other bodies such as the Commonwealth Ombudsman, and specialist bodies like the NDIS Commission, the Fair Work Commission and other regulators, as discussed in Volume 10 and Volume 11.

However, we have identified the need for significant changes to realise the rights of people with disability. Volume 5 outlines the need for governments to do things differently and the need for innovative and intentional effort to improve outcomes for people with disability. It demonstrates the need for dedicated national disability leadership arrangements within the Australian Government.

The establishment of the National Disability Commission as an independent statutory authority, as recommended in Volume 5, provides an opportunity to take a more comprehensive approach to promoting and protecting the human rights of people with disability under the DRA. In that volume, we recommend:

- the National Disability Commission be established by mid-2025 as an independent statutory body, with its functions to be set out in the DRA
- its purposes should include:
 - supporting the realisation of the human rights of people with disability through monitoring and oversight of the DRA
 - monitoring and reporting on outcomes for people with disability across Australia
 - promoting best practice and innovative approaches to improve outcomes for people with disability by sharing information between governments, the community sector, the private sector and the broader community

-
- its functions should include:
 - developing an Outcomes for People with Disability report every two years, to be tabled in the Australian Parliament
 - promoting and disseminating information, research and evidence on best practice models for – and innovative approaches to – improving outcomes for people with disability.

In Volume 12 we also propose that the National Disability Commission monitor and report on the implementation of our recommendations.

There is an opportunity to build on this with oversight functions in relation to the DRA. A dedicated disability rights-focused body would have a number of advantages:

- **Specialist** – It would be able to build up the specialist skills required to guide best practice and provide robust oversight functions. This specialisation would be both in providing an accessible service that meets the needs of people with disability, but also in maintaining a deep understanding of the violence against, and abuse, neglect and exploitation of, people with disability and its systemic drivers.
- **Strategic** – Given the role the National Disability Commission would play in reporting on outcomes of people with disability, including implementation of the ADS and the recommendations of this Royal Commission (see Volume 5 and Volume 12), it would have a strategic and whole-of-government view of the levers required to drive significant change. This perspective would help to inform and prioritise the use of a broader suite of compliance functions and would align strongly with the public sector focus of the duties under the DRA.
- **Tailored** – The establishment of the National Disability Commission would enable statutory functions to be designed with and for people with disability so they are fit-for-purpose.
- **Co-ordinated** – Noting its public sector focus, the National Disability Commission would be able to build deep relationships with key duty-holders under the DRA. This deepening of relationships would support issue identification and timely problem-solving. Duty-holders would be more likely to ask for advice rather than wait to respond to a complaint.
- **Dedicated** – Finally, resources for the specialist body should be designed to facilitate focus on the long-term reform effort required to realise the rights of people with disability in practice. Proposals to remove or shift funding to other activities as future Australian Government priorities change should attract political accountability for government decision-making.

We are therefore of the view that the National Disability Commission should have a central role in relation to the DRA.

Powers and functions of the National Disability Commission in relation to compliance under the DRA

We recommend the National Disability Commission be given a suite of functions to support compliance with the DRA. We outline functions that are designed: (1) to build compliance through capacity-building; and (2) to address non-compliance.

Compliance through capacity-building

Capacity-building functions would help duty-holders understand their obligations and rights bearers to understand their rights under the DRA.

Research – The National Disability Commission should undertake research in relation to the rights and obligations in the DRA.²⁷³ As noted above, in Volume 5 we recommend the Commission have a broader function to promote research and share information and evidence on best-practice models and innovative approaches to improving outcomes for people with disability.

Guidelines – The DRA should empower the National Disability Commission to issue guidelines on any matter relating to the DRA.²⁷⁴ For example, it could issue guidelines detailing what is required of Commonwealth entities to comply with the consultation requirement. As a Commonwealth entity itself, the National Disability Commission would be required to consult with people with disability when developing such guidelines.

Guidelines would not be legally binding, but a court may consider evidence of compliance with a guideline if relevant to any matter before it under the DRA.²⁷⁵

In relation to its current function to issue guidelines, the AHRC has noted that:

Guidelines are practical tools to assist decision making and compliance. These are non-binding and do not provide a defence in any subsequent legal action, although they do have an educative value and are able to reflect best practice approaches to various issues. Courts have, on occasion, referred to guidelines issued by the Commission when considering an employer's compliance with federal discrimination laws.²⁷⁶

Associate Professor Belinda Smith has identified the different roles guidelines can play. These include explaining or translating the law; illustrating rules by providing examples of wrongful practice and correct practice; and providing best-practice guidance to aid duty-holders in their own proactive efforts.²⁷⁷

Voluntary reviews of compliance – The DRA should empower the National Disability Commission to review a person or entity's compliance with the DRA (or an aspect of the DRA), at the request of the person or entity.²⁷⁸ The National Disability Commission should have the ability to consent to or to refuse such a request. The commission should also be able to charge a fee for service to undertake a voluntary compliance review.

The outcomes of a review should be at the National Disability Commission's discretion to discuss and agree with the relevant person or entity, but could include a report and recommendations. This voluntary review function would provide a pathway for duty-holders to seek proactive advice from the commission. It would also provide a cooperative (rather than adversarial) mechanism for duty-holders to seek assistance when they self-identify that things are not going well and where they need help.

With such a function, the National Disability Commission would not need to be satisfied that there is an act or practice that may be inconsistent with or contrary to the DRA prior to commencing a review.

Complaint-handling – While complaints are a vehicle for obtaining a remedy when rights have been breached, complaint-handling is also an important means of identifying and rectifying compliance failure, educating parties to a dispute about the law, and identifying both individual and systemic responses.

The National Disability Commission should have a complaint-handling function and be empowered to attempt to resolve a complaint by alternative dispute resolution; choose to undertake an inquiry in relation to it; choose to refer the complaint to another appropriate body; or choose to take no further action.

In addition to complaints, the National Disability Commission should have the function of receiving anonymous or confidential reports of alleged contraventions of the DRA. An anonymous report is one where the name of the reporter is not identified. A confidential report is one where the reporter is named and can be identified by the commission, but they want the commission to keep the complaint private (and not identify them to the relevant public authority).

This function would give people with disability choice and control (including in how they manage potential safety concerns or concerns about the withdrawal of services and support). Such a mechanism would also be available to relevant families, carers and supporters, and members of the disability workforce.

Alternative dispute resolution between a complainant and respondent could not be offered in relation to anonymous or confidential reports because the complainant could not be identified to the respondent. However, the reports could be used to inform advice and referrals offered to the reporter, and would inform use of the National Disability Commission's other functions and powers to address systemic issues. This could include, for example, the focus it takes in education and guidance materials or the use of compliance functions and own-motion inquiries.

The Fair Work Ombudsman is an example of an existing body that allows for anonymous reports. It uses these reports to help it plan 'current and future education and enforcement activities'.²⁷⁹

We discuss who can lodge a complaint and the complaint-handling process under the DRA below.

Intervention in proceedings – The DRA should empower the National Disability Commission to intervene in any proceedings before a court or tribunal:

- relating to the application of the DRA
- where a question arises with respect to the proper interpretation of a statutory provision, having regard to the interpretive requirements in the DRA.

By way of example, the AHRC has the power to intervene in proceedings involving issues of discrimination or human rights.²⁸⁰ The relevant Victorian, Queensland, and Australian Capital Territory commissions also have intervention functions under the human rights legislation in those jurisdictions.²⁸¹

The role of the National Disability Commission as intervenor would be to provide the court with specialist and independent views on the interpretation and application of the DRA. In this role, the Commission would assist the court. It would not be an advocate for one party or another. Through the intervention function, the National Disability Commission could play an important role in supporting the development of case law, consistently with the objectives of the DRA.

Functions to address non-compliance

Functions to address non-compliance involve the exercise of powers to enforce the law. Such powers can be both active, preventing a breach of a person's rights or obligations, and reactive, responding to a breach of a person's rights or obligations. There should be some functional separation within the structure of the National Disability Commission between its educational and guidance functions and its non-compliance functions. Such a functional separation is common for regulators.

Where applicable, we recommend the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (*Regulatory Powers Act*) be used to support enforcement under the DRA.

Functions to address non-compliance with the law can take several forms. We recommend that the National Disability Commission be given the following functions to address non-compliance: conducting inquiries, entering into enforceable undertakings, issuing compliance notices, and seeking injunctions. Each of these functions is discussed below.

Conducting inquiries – The National Disability Commission should be empowered to inquire into any act or practice that may be inconsistent with or contrary to the DRA.²⁸² The Commission should be able to exercise this power on its own motion, and not be limited to acting in response to a request from government or requiring that the issue be the subject of a complaint.

The National Disability Commission should be empowered to:

- conciliate a dispute to bring about a settlement of the matters that gave rise to the inquiry
- at the conclusion of an inquiry, report its findings and recommendations to the relevant person or entity, report to the relevant minister on matters of public importance, and publish the report

-
- enter into an enforceable undertaking
 - issue a compliance notice
 - take no further action.

Where a report of an inquiry is presented to the minister by the Commission, the minister should be required to table the report within 15 sitting days after the report is received.²⁸³ The legislation should require the minister to table the government's response to the report within a set period of time, recording how the government intends to address the recommendations made in the report.

The DRA should provide that the National Disability Commission must not make an adverse finding about a person or entity unless it has given reasonable opportunity to the person or entity to make oral or written submissions.²⁸⁴

To support its inquiry functions, the National Disability Commission should have a similar range of powers in relation to the DRA as the AHRC currently has in relation to inquiries into 'acts' or 'practices' of the Commonwealth under section 11(1)(f) of the *AHRC Act* – that is, the power to require the:

- giving of information and the production of documents²⁸⁵
- examination of witnesses under oath or affirmation.²⁸⁶

Penalties should apply for non-compliance with such requirements.²⁸⁷

We do not recommend that powers to enter and search premises be included in the DRA.

Enforceable undertakings – The National Disability Commission should be empowered (engaging Part 6 of the *Regulatory Powers Act*) to enter into undertakings with a person or entity in relation to compliance with the DRA. The undertaking may then be enforced by a relevant court if the undertaking is not complied with.²⁸⁸

Under section 114 of the *Regulatory Powers Act*, an authorised person may accept any of the following undertakings:²⁸⁹

- a written undertaking given by a person (defined in Commonwealth legislation as a legal person, including an entity)²⁹⁰ that the person will, in order to comply with a provision enforceable under Part 6, take specified action
- a written undertaking given by a person that the person will, in order to comply with a provision enforceable under Part 6, refrain from taking specified action
- a written undertaking given by a person that the person will take specified action directed towards ensuring that the person does not contravene a provision enforceable under Part 6, or is unlikely to contravene such a provision, in the future.

Many regulatory bodies in Australia can enter into enforceable undertakings, including the Office of the Australian Information Commissioner,²⁹¹ the Fair Work Ombudsman,²⁹² the Australian Competition and Consumer Commission (ACCC),²⁹³ the Australian Securities and Investments Commission,²⁹⁴ the Australian Prudential Regulation Authority,²⁹⁵ and, from December 2023, the AHRC in relation to the positive duty in the *Sex Discrimination Act*.²⁹⁶

The ability to enter into enforceable undertakings would enable the National Disability Commission to take a scaled approach to encourage and enforce compliance with the DRA, depending on the circumstances and the willingness of the entity involved to comply.

Enforceable undertakings are an important tool because they provide a mechanism for discussion, engagement, education and advice between a regulator and duty-holder. Enforceable undertakings can also be published and thereby create accountability through transparency. Published undertakings also provide examples and lessons for others to draw on (both rights bearers and other duty-holders).

An example of an enforceable undertaking entered into by an Australian regulator is outlined in the box below.

Box 4.3.9: Example – enforceable undertaking entered into under consumer law²⁹⁷

On 4 May 2023, the ACCC accepted an enforceable undertaking from Universal Pharmaceuticals Pty Ltd for alleged false or misleading representations made on its Wealthy Health website in contravention of Australian consumer law.

Universal Pharmaceuticals is a manufacturer and online retailer of vitamins and supplements. They were offering squalene capsules and claimed the product was ‘sustainably sourced from sharks from the crystal-clear oceans of Australia’ and ‘obtained from the clear oceans surrounding Australia’.

The ACCC found that Universal Pharmaceuticals knew from at least 2019 that the squalene used in the product was not exclusively sourced from Australian waters.

Universal Pharmaceuticals provided undertakings that it would: not make such representations without supporting information; publish a corrective statement; and establish an Australian Consumer Law Compliance Program including by training staff and developing a complaint-handling system.

Compliance notices – Compliance notices constitute a process through which remedial action can be required, in the absence of agreement.²⁹⁸

Where the National Disability Commission reasonably believes the relevant person or entity, without reasonable excuse, has failed to comply with the DRA, it should have the power to issue

a compliance notice. This compliance notice could require the relevant person or entity to do either or both of the following, within such reasonable time as is specified in the notice:²⁹⁹

- take, or refrain from taking, specified action to remedy a contravention of or prevent a continued failure to comply with the DRA
- produce reasonable evidence of the person or entity's compliance with the notice.

The DRA should provide an avenue for a person affected to seek a review of a compliance notice by a court.³⁰⁰ The court should be able to confirm, cancel or vary the notice after reviewing it. The High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* confirmed that a non-judicial body (which the proposed National Disability Commission would be) cannot, consistently with Chapter III of the *Australian Constitution*, exercise judicial functions.³⁰¹ These functions include enforcing a compliance notice.

The DRA should therefore provide for the National Disability Commission to be able to apply to the Federal Court or the Federal Circuit and Family Court for enforcement of a compliance notice.³⁰² If the court is satisfied that the person or entity has not complied with the notice, it should be able to make an order directing the person or entity to comply with the notice or make any other order that the court considers appropriate.

Compliance notices are a common feature of contemporary regulatory approaches, particularly in areas where there are significant power imbalances between duty-holders and rights holders.³⁰³

The use of compliance notices takes the burden of enforcing the law off the individuals whose rights have been breached. As noted earlier, current systems that rely on people with disability taking legal action to enforce their rights makes justice inaccessible for many people with disability.

In addition to shifting the power imbalance, the use of compliance notices also allows issues to be dealt with systemically rather than on a case-by-case basis.

Seek an injunction – The DRA should trigger Part 7 of the *Regulatory Powers Act* which creates a framework for the use of injunctions to enforce provisions. This power would enable the National Disability Commission to seek an injunction to respond to or prevent a breach of the DRA.

Section 121 of the *Regulatory Powers Act* empowers the court to grant injunctions on application by an authorised person. A court can issue an injunction to prevent a person (defined in Commonwealth legislation as a legal person, including an entity)³⁰⁴ from engaging in particular conduct; or issue an injunction to compel a person to engage in particular conduct if the court is satisfied that an injunction is necessary or desirable to respond to, or prevent, a contravention of an enforceable provision.³⁰⁵ Interim injunctions are also available to restrain or require a person to do a thing before a court decides on an application for an injunction.³⁰⁶

Recommendation 4.18 Functions of the National Disability Commission to support compliance with the Disability Rights Act

To support compliance with the Disability Rights Act, the Act should provide the National Disability Commission (recommended in Volume 5, *Governing for inclusion*) with functions and powers to:

- a. promote understanding and acceptance of the rights of people with disability under the Act
- b. undertake research in relation to the rights and duties under the Act
- c. issue guidelines on any matter relating to the Act
- d. review a person or entity's compliance with the Act (or an aspect of the Act) at that person or entity's request
- e. receive complaints or anonymous or confidential reports alleging a contravention of the Act
- f. inquire into and report on any act or practice that may be inconsistent with or contrary to the Act
- g. require the giving of information and the production of documents during the conduct of a formal inquiry
- h. require the examination of witnesses under oath or affirmation during the conduct of a formal inquiry
- i. enter into an enforceable undertaking with a person or entity in relation to compliance with the Act (engaging Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth))
- j. issue a compliance notice where the National Disability Commission reasonably believes that the relevant person or entity, without reasonable excuse, has failed to comply with the Act
- k. apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia for enforcement of a compliance notice
- l. apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia for an injunction (engaging Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth)) to prevent or stop a contravention of the Act
- m. intervene in any proceedings before a court or tribunal that relate to the application or interpretation of the Act.

These functions would be in addition to those recommended for the National Disability Commission in Volume 5, *Governing for inclusion*, and Volume 12, *Beyond the Royal Commission*.

The Australian Government should provide the National Disability Commission with dedicated resources to undertake these functions.

Remedies when disability rights are breached

This section focuses on how a person with disability may seek to enforce a right they hold under the DRA, or seek a response or some form of rectification if that right has been infringed.

Complaints and reports

As noted above, the National Disability Commission should have the function of receiving complaints and reports alleging a contravention of the DRA.

Lodging a complaint or making a report

The DRA's provision for who can lodge a complaint, and on whose behalf such a complaint can be lodged, should be part of additional consultations with people with disability. At a minimum, we recommend that it include:³⁰⁷

- a person aggrieved by the alleged acts, omissions or practices, on their own behalf or on behalf of themselves and others who are also aggrieved
- two or more persons aggrieved by the alleged acts, omissions or practices (on their own behalf or on behalf of themselves and others who are also aggrieved)
- a person or disability representative organisation on behalf of one or more other persons aggrieved by the alleged acts, omissions or practices.

A representative complaint should be able to be lodged without the consent of class members as long as other statutory conditions are met.³⁰⁸

For example, the *AHRC Act* provides:

(1) A representative complaint may be lodged under section 46P only if:

- (a) the class members have complaints against the same person; and
- (b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) all the complaints give rise to a substantial common issue of law or fact.

(2) A representative complaint under section 46P must:

- (a) describe or otherwise identify the class members; and
- (b) specify the nature of the complaints made on behalf of the class members; and
- (c) specify the nature of the relief sought.

(3) In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are.

(4) A representative complaint may be lodged without the consent of class members.³⁰⁹

In addition, the DRA should have no restriction on who can make a report (see the subsection on complaint-handling above under the heading 'Compliance through capacity-building').

Co-design of the complaints mechanism

The complaints mechanism under the DRA should be co-designed with people with disability. Co-design involves partnering and collaborating with people with lived experience in each aspect of the design of products, services, environments, systems, policies, laws and research. It includes developing proposed approaches and alternatives, and identifying preferred solutions. It is a process that appreciates people with disability understand their own needs and goals, and takes a partnership approach, where lived expertise influences all stages of the process.

Co-design should not only consider the process for complaint-handling, but also its purpose, goals, the potential range of participants, and the role of the National Disability Commission.

The establishment of the National Disability Commission provides a rare opportunity to re-imagine what effective complaints and remedies processes look like for people with disability.

For example, as illustrated in the Dementia Reparations Principles set out by Dr Linda Steele and Ms Kate Swaffer as part of the project on Redressing Abuse and Neglect of People Living with Dementia in Residential Aged Care,³¹⁰ a more sophisticated approach is required to:

- recognise, redress and repair the harm caused to people with disability by serious human rights breaches
- hold people, organisations and systems accountable for that harm
- positively influence the broader context of advancing the equality and inclusion of people with disability.

Recognising the need for a broader approach, justice under the DRA may not simply focus on the relationship between a complainant and respondent, but also on the roles of government and the community. It may require a shift in the traditional understanding of a dispute between a 'complainant' versus a 'respondent'. The role of the National Disability Commission also requires further consideration in this context.

The role of the National Disability Commission could, for example, be more closely modelled on the roles of ombudsmen rather than the impartial third-party roles of some statutory authorities offering conciliation and mediation.³¹¹ Ombudsmen facilitate complaint resolution and can be more active participants in addressing the improper, unlawful or unfair conduct of public authorities in relation to citizens. The Commonwealth Ombudsman, for example, can assist people to resolve their complaints by investigating the processes of public agencies.³¹²

In the disability context, ‘fairness’ may not necessarily be delivered by neutrality but through independence, consistent advocacy for the law and its objectives, and active participation.

Co-design for accessibility and inclusion in the process of a complaints mechanism is also important to ensuring equality before the law.

The National Disability Commission’s complaints mechanism should:

- draw on good practice internationally³¹³
- draw on the national guideline for accessible and responsive complaint handling and investigative practice to be co-designed with people with disability (as recommended in Volume 11)
- at a minimum, offer information about the DRA; offer dispute resolution and referrals; and deliver on the key features required to provide effective remedies when disability rights are breached, which are identified at the beginning of this subsection.

Making complaints mechanisms easier to navigate

We have considered potential concerns about the complexity of having multiple avenues for complaints. While nominating an existing body as having the complaint-handling function under the DRA would minimise the number of pathways for complaints, we have concluded that the benefits of a specialist body (discussed above under the heading ‘The statutory role of an independent oversight body’) outweigh the benefits of streamlining DRA complaints and compliance under an existing body. We must not underestimate the complexity of the reform task ahead and the sustained attention that will be required to deliver on it. The need for a comprehensive and coordinated approach to support and guide these efforts should not be undervalued.

The solution to the complexity of multiple pathways for complaints is not to confine all matters potentially relating to violence against, and abuse, neglect and exploitation of, people with disability to a single forum. This is not realistic and would risk further marginalisation of the rights of people with disability, by minimising the reforms needed to ‘mainstream’ systems. Instead, there needs to be a multifaceted approach, as follows:

- Co-design of the National Disability Commission’s complaints mechanism should also consider the development of protocols in relation to police reports and reports to other regulatory or oversight bodies. The Commission should be able to enter into arrangements with other entities specifying when referrals should be made and cooperating in the performance of relevant functions.
- Complaints bodies should be able to connect people with disability to other entities or jurisdictions that can give effect to their rights, whether through referrals or joined-up processes. In this way, institutional actors can take up more of the load of understanding and navigating the complexity of the various oversight and regulatory frameworks.

- Greater advocacy support is needed for people with disability. In Volume 11 we recommend that state and territory governments establish an independent complaint reporting, referral and support mechanism to receive reports of violence or abuse involving people with disability.
- Complaints processes for the general community also need to be effective for people with disability (whether they are provided by services, registration bodies, independent regulators and oversight bodies, or the police). We make recommendations about this in Volume 11.

Taken together, these mechanisms would make the various regulatory and oversight systems easier to navigate for people with disability.

The role of existing Commonwealth oversight bodies

In some contexts, existing Commonwealth oversight bodies could consider DRA rights where relevant to the complaint or issue before it. For example, whether a Commonwealth entity or an Australian Public Service employee has acted lawfully in compliance with the DRA may be relevant to a Commonwealth Ombudsman investigation into administrative action³¹⁴ or an audit by the Australian National Audit Office.³¹⁵ In addition, whether a public servant has acted lawfully may be significant if the employer is considering allegations of misconduct.³¹⁶

To allow complaints relating to the same subject matter, decision or events to be considered together, and to prevent duplication of processes, the *AHRC Act* should be amended to allow the AHRC to also offer dispute resolution for relevant DRA matters in certain circumstances. These circumstances should be where DRA issues are raised and relate to the same subject matter as a human rights complaint (in relation to the Commonwealth) or a discrimination complaint that the AHRC has existing jurisdiction to consider. This concurrent jurisdiction should apply with the exception of a failure to comply with duties that support compliance with the DRA, such as reporting obligations.

The AHRC can currently receive human rights complaints, including complaints about the *CRPD*. It can offer dispute resolution³¹⁷ and report on a matter.³¹⁸ However, there are no associated compliance functions and there is no enforcement mechanism through the federal courts like there is for discrimination complaints.

Recommendation 4.19 Co-design a new complaints mechanism for people with disability

- a. The National Disability Commission should co-design its complaints mechanism under the Disability Rights Act with people with disability, taking into account:
 - the national guideline for accessible and responsive complaint handling and investigative practice to be co-designed with people with disability (recommended in Volume 11, *Independent oversight and complaint mechanisms*)

- processes to support referrals to police and other regulatory or oversight bodies (noting that Volume 11 recommends a ‘one-stop shop’ independent complaint reporting, referral and support mechanism in each state and territory)
 - key features for effective remedies outlined in this *Final report*.
- b. Acts, omissions or practices that are unlawful under the Disability Rights Act (with the exception of duties supporting compliance with the Act, such as reporting obligations) should be added to the definition of ‘unlawful discrimination’ under section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth). This would enable the Australian Human Rights Commission to offer dispute resolution for relevant Disability Rights Act matters alongside related human rights and discrimination complaints involving a public authority.

A standalone cause of action under the DRA

The DRA should provide for a standalone cause of action where a person could seek a remedy in the Federal Court or the Federal Circuit and Family Court, where an aggrieved person alleges a relevant duty-holder has acted in contravention of the DRA. A number of exceptions to this are discussed below. We recognise there may be some concerns about providing a cause of action in the DRA; we address these below in the subsection ‘Concerns about a cause of action for breaches of “human rights” laws’.

A standalone cause of action has been adopted under human rights legislation in the United Kingdom, Canada, Fiji and the Australian Capital Territory, among many others.³¹⁹

Five issues need particular consideration in the context of elaborating on the detail of a cause of action provision:

- First, should the cause of action apply to all alleged contraventions of the DRA?
- Second, should a complaint be required to be lodged with the National Disability Commission prior to bringing a claim to court?
- Third, who should have standing to bring a claim?
- Fourth, what remedies should be available if a breach of the DRA is found?
- Fifth, how should costs be considered?

Each of these issues is considered below.

Scope of the cause of action

We recommend an independent cause of action be available for alleged contraventions of the DRA described in this chapter, other than:

- the procedural duties: consultation; refusals to respond as required to a notice of the National Disability Commission; and duties relating to disability impact assessments, self-audits, publication of objectives, and reporting
- the positive duty to promote disability equality and inclusion.

The DRA should include a provision making it clear that these duties do not give rise to any civil cause of action. This should not limit legal rights established elsewhere in the law, such as in the common law or other legislation. Such a provision would be similar to the provision proposed in the Victorian Disability Inclusion Bill Exposure Draft³²⁰ and the existing provision in the *Carer Recognition Act 2010* (Cth).³²¹

A failure to comply with procedural duties could be appropriately dealt with by the National Disability Commission, noting its range of compliance functions as discussed above.

Further, the purpose of the positive duty to promote disability equality and inclusion is that it does not require complaints in response to individual harm. Because the focus is on broad-ranging practices and policies, the preferable approach to enforcement is for the National Disability Commission to use its compliance powers to address policy and practice issues.

This is consistent with the approach taken in other jurisdictions.³²²

A requirement first to lodge a complaint with the National Disability Commission

Under the *AHRC Act*, complaints alleging ‘unlawful discrimination’ must be first lodged with the AHRC. If conciliation fails or is inappropriate, the AHRC can terminate the complaint and the complainant can commence proceedings (or in some cases, seek leave to commence a proceeding) in the Federal Court or Federal Circuit Court and Family Court to seek remedies set out in section 46PO(4) of the *AHRC Act*.³²³

The DRA should contain a similar requirement to lodge a complaint with the National Disability Commission prior to commencing judicial proceedings. As a matter of public policy, there should be an opportunity for a duty-holder to be made aware of a complaint and have an opportunity to resolve it outside of court if appropriate.

Concerns that lodgement of a complaint with the National Disability Commission in the first instance would be a barrier to the resolution of urgent matters could be addressed by providing for termination of a complaint by the Commission on the ground of urgency, and permitting direct access to court to seek an injunction at the time the complaint is lodged.³²⁴

Standing

Standing is about who has a legal right to bring a claim or be involved in proceedings before a court.

The DRA should provide for the same range of persons or entities who can bring a complaint to the National Disability Commission to make an application to the federal courts (discussed in the subsection above under ‘Complaints and reports’).

This approach is consistent with the *AHRC Act*. That Act was amended by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) to enable representative bodies to make an application to the federal courts on behalf of a group if a relevant matter was not resolved and was terminated by the AHRC.³²⁵

Available remedies

Where a court finds that a person or entity has acted incompatibly with the DRA, it should have the power to grant any relief or remedy that it considers just and appropriate. Examples of remedies a federal court may order include:

- a declaration (for example, that something was unlawful)
- an injunction (for example, that an unlawful course of action stop)
- an order requiring a person or entity to perform a duty
- damages
- civil penalties.

There has been some reluctance in Australia to make damages available as a remedy for human rights complaints. In contrast to anti-discrimination laws which provide for damages to compensate people for harm caused, Victorian,³²⁶ Queensland³²⁷ and Australian Capital Territory³²⁸ human rights laws do not allow damages as a remedy.

In his 2015 independent review of the *Victorian Charter*, Michael Brett Young concluded that ‘Charter remedies are designed to achieve practical outcomes, and I do not recommend the inclusion of damages (financial compensation) as a remedy.’³²⁹

We are not persuaded by this exceptionalism when it comes to human rights claims or the distrust of the courts’ judgement about when damages may be appropriate.

There are international examples of different approaches being taken to this question. For example, damages are available for human rights breaches in the United Kingdom, Fiji, Canada and New Zealand.³³⁰

Under the *Human Rights Act 1998* (UK), for example, a court or tribunal can grant any relief or remedy, or make any order, that is within its power and that it considers just and appropriate.³³¹

Awards of damages are restricted but not prohibited. Damages may be awarded only if, in all the circumstances, it is necessary to afford just satisfaction to the person concerned.³³² Damages have not been awarded frequently and have generally been fairly modest.³³³ Two examples are noted in the box below.

Box 4.3.10: Examples – damages awarded in the United Kingdom for human rights breaches

In *Re H (A Child: Breach of Convention Rights: Damages)* the court awarded £12,000 damages against Leicester City Council for breaches of the right to a fair hearing and the right to respect for private and family life of the parents of a child who was taken into care.³³⁴ Both parents have learning disabilities. The court found that the parents had ‘suffered a loss of time with their daughter which was both unnecessarily lengthy and deeply distressing’.³³⁵ HHJ Clifford Bellamy, sitting as a Deputy High Court Judge, said ‘the nature and extent of the poor practice admitted by the local authority is such that an adverse impact on these parents was inevitable’.³³⁶

In another case, *R (Bernard) v Enfield London Borough Council*,³³⁷ Mrs Bernard, who uses an electric wheelchair, and her husband, Mr Bernard, who was her sole caregiver, alleged the local housing department did not provide them with accommodation suitably adapted for her disability. As the property was not wheelchair accessible, Mr Bernard had to be home most of the time to lift his wife for all transfers from the chair including toileting and bathing. The Bernards made many requests for appropriate housing and the social services department filed a detailed report explaining how the current accommodation was unsuitable.³³⁸ These requests were largely ignored or delayed.³³⁹

Accommodation was found more than two years after initial assessments were made. Lawyers for the Bernards pointed out that during those two years, Mrs Bernard ‘had to live in conditions where she was unable to access the toilet or to keep herself clean without the greatest difficulty’.³⁴⁰ The court held that the department’s inaction showed ‘a singular lack of respect for the claimants’ private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life.’³⁴¹ The court awarded damages of £10,000.³⁴²

As these cases illustrate, duty-holders can have a significant impact on the lives of people with disability. There are circumstances where changes in policy and practice or declaratory relief simply do not respond appropriately to harm caused by the breach of a person’s human rights.

We therefore recommend that the DRA include the power of a court to award damages if, in all the circumstances, such relief is just and appropriate.³⁴³

This approach is consistent with the position recommended by the National Human Rights Consultation Committee in its 2009 report and the AHRC’s 2022 position paper on a Commonwealth Human Rights Act.³⁴⁴

Costs

In legal cases, parties can employ lawyers to represent them in court proceedings. Lawyers usually charge their clients for their services (fees) and expenses they have paid or incurred on the client's behalf (disbursements, which may include court fees as well as things like copying documents). Together, these charges are known as costs.

Although the courts have discretion about how they deal with costs,³⁴⁵ the usual rule in the federal courts is that at the end of a proceeding the unsuccessful party is ordered to pay the costs of the successful party. Ordinarily the order requires the unsuccessful party to pay costs on a 'party to party basis', which generally means the successful party recovers only a proportion of their costs of the proceedings. In some circumstances courts order the unsuccessful party to pay costs on an 'indemnity basis', which allows the successful party to recover all their costs of the proceedings.

We have been told the risk of adverse costs orders is a barrier to pursuing disability discrimination complaints in the federal courts. For example, Dr Robin Banks, former Tasmanian Anti-Discrimination Commissioner, giving evidence in her personal capacity at Public hearing 19, said:

The one that has come up probably loudest and clearest in terms of the federal scheme is the risks of a costs order if you go ... if it doesn't resolve at the Human Rights Commission level, people quite understandably ... people with disability are fearful that if they lose, and, you know, it's not ... even with a good complaint it's not guaranteed you'll win, that they face the loss of home and whole lot of other things because of an adverse costs order. So costs impact, definitely.³⁴⁶

In its 2021 position paper on reform of Commonwealth discrimination laws, the AHRC said that 'the default position should be that parties bear their own costs ... with the court retaining a discretion to award costs in the interests of justice'.³⁴⁷ It further recommended that mandatory criteria be set out that the court would be required to consider in determining whether to award costs in the interests of justice.³⁴⁸

This approach is more consistent with litigation under anti-discrimination laws in the states and territories, where disputes are heard before tribunals in the first instance and the parties generally bear their own costs.³⁴⁹

However, this model also has disadvantages.

Firstly, a costs-neutral approach can inhibit the ability of people with disability to get legal representation. People who cannot afford to pay their own lawyer would have no way of recouping that expense. The model also eliminates the incentive for law firms to offer representation on a 'no win, no fee basis' (because fees could not be recovered or would need to be taken out of any damages awards, which are usually relatively small in the discrimination jurisdiction). Legal aid and community legal centres would be able to assist fewer people if they could not seek to recover some of their costs.

Secondly, the potential for an award of costs plays a role in the settlement of disputes by agreement (whether through private negotiation, during dispute resolution at the AHRC or early settlement in litigation).

The Anti-Discrimination and Human Rights Legislation (Respect at Work) Bill 2022 (Cth) sought to insert a cost protection provision in the *AHRC Act*. It adopted a 'cost neutrality' approach where parties would bear their own costs, with courts retaining discretion to order costs in the interests of justice.³⁵⁰

Concerns were raised during parliamentary debates about the proposed amendment.³⁵¹ A letter from a group of expert commentators to the Attorney-General and the Minister for Women in November 2022 proposed an 'equal access' asymmetrical costs model.³⁵² According to commentators, this approach would 'protect a complainant from an adverse costs order, unless they have acted vexatiously or unreasonably, but enable them to recover costs should they succeed'.³⁵³

On 25 November 2022, the Australian Government announced it would remove the costs provision from the Anti-Discrimination and Human Rights Legislation (Respect at Work) Bill. It referred the issue of costs in discrimination proceedings to the Australian Government Attorney-General's Department (AGD) for review.³⁵⁴ The government said, '[w]e intend to legislate the costs model recommended by that review as quickly as possible'.³⁵⁵

Noting the complexity of navigating these issues for complainants/applicants, the recent and extensive public debate in the discrimination law context, and the careful balancing of rights and interests involved, arrangements for costs under the DRA should be aligned with provisions for costs under Commonwealth discrimination law, as amended following this review by AGD. The outcome of the AGD review had not been announced at the time of writing this report.

Concerns about a cause of action for breaches of 'human rights' laws

Outside the Australian Capital Territory, we recognise there have historically been concerns among Australian governments about introducing a cause of action in relation to dedicated human rights legislation. The *Victorian Charter* and the *Qld HRA* do not contain a direct civil cause of action that would allow a person to bring a claim to court solely because of a breach of the rights set out in the relevant Act.³⁵⁶

Human rights laws, including those in Victoria and Queensland, have still had important work to do in educating duty-holders and the public about human rights, and in changing the culture and practices of duty-holders, without a cause of action provision attached.

There are two main concerns that are often raised about having legally enforceable remedies for breaches of human rights laws.

The first concern is that human rights are of a different legal character than other rights in domestic law.³⁵⁷ We have sought to address this by appropriately adapting international human rights to the domestic law context so that rights are practical, implementable and capable of consideration and enforcement by domestic courts.

When adapted, the nature of these rights is not of a substantially different character to a court considering whether:

- reasonable adjustments are required for a person with disability under the *DDA* or whether such action would amount to an unjustifiable hardship³⁵⁸
- a person or entity has breached their duty of care by failing to avoid doing things that could foreseeably cause harm to another person³⁵⁹
- a person conducting a business or undertaking has, so far as is reasonably practicable, ensured the health and safety of their workers.³⁶⁰

Australian courts commonly consider concepts like reasonableness, proportionality, or what is reasonably practicable.

As noted above, we have not recommended that the cause of action attach to procedural duties such as the consultation or reporting requirements; or the positive duty to promote disability equality and inclusion (that focuses on policy and preventative action).

A second concern, usually expressed in political contexts, is that a cause of action under human rights laws ‘opens the floodgates’ to vexatious litigants and to an overly litigious approach to resolving issues, primarily aimed at government or government-funded service providers.³⁶¹

The United Kingdom has over two decades of experience with human rights legislation that does not support the ‘floodgates’ arguments. It has legal and cultural conditions that are far more comparable to Australia than, for example, the more litigious approaches seen in the United States.

Further, we have recommended safeguards in the implementation of the DRA. We have recommended that complaints should first have to be lodged with the National Disability Commission prior to bringing a claim to court. This provides an opportunity for the relevant duty-holder to try to resolve the matter first through a dispute resolution process. It also provides a check and balance system through the National Disability Commission, and then through the courts.

By way of example, under the discrimination jurisdiction, the *AHRC Act* allows the President of the AHRC to terminate a complaint if they are satisfied that the alleged acts are not unlawful under the relevant Act.³⁶² It also requires the President to terminate the complaint if it is ‘trivial, vexatious, misconceived or lacking in substance’.³⁶³ Complaints terminated by the President on these grounds require leave of the court to proceed.³⁶⁴

While recognising the above concerns, we have concluded that providing for rights in a DRA without a corresponding pathway for individuals to enforce those rights would be a flawed regulatory model. The rights of people with disability have not been prioritised over a long period of time, and approaches to the protection of their rights are decades behind contemporary approaches in other areas. This situation has continued despite evidence of significant harm to people with disability caused by breaches of their rights.

The *Victorian Charter* and the *Qld HRA* provide an alternative model. These Acts do not create a new or independent right to relief or a remedy through an independent cause of action, but allow for human rights claims to be ‘piggy-backed’ onto matters where there is an existing cause of action.³⁶⁵ However, the use of these provisions in practice is convoluted and does not provide an accessible form of justice to people with disability.

To take the *Victorian Charter* as an example, if a public authority has acted incompatibly with a charter right, or has failed to properly consider a relevant charter right in making a decision, the *Victorian Charter* does not allow a person to bring a legal action against the public authority for that charter breach alone. However, if the person may seek relief or remedy on the basis of a separate, non-charter ground, then they may also seek that relief or remedy on the basis of the charter breach.³⁶⁶

In 2015, the eight-year review of the *Victorian Charter* found that ‘[s]ince the Charter commenced, section 39 has been criticised as an “irremediable” remedies provision that is “drafted in terms that are convoluted and extraordinarily difficult to follow”’.³⁶⁷ In that review, Michael Brett Young recommended an independent cause of action be included in the *Victorian Charter*.³⁶⁸ This recommendation has not been implemented by the Victorian Government to date.

We do not see that replicating the Victorian or Queensland approaches would be appropriate or effective when seeking to better respect, protect and fulfil the human rights of people with disability in Australia.

Judicial review

Duties under the DRA may be relevant to judicial review proceedings in some circumstances.

Judicial review is a procedure by which a person who has been affected by a particular decision, action or failure to act by the Commonwealth may make an application to the court for a review of the decision. The court does not reconsider the facts of the decision but it looks at whether the decision-maker had acted within the boundaries, or exceeded the limits, of their power to make the decision and whether the decision-maker correctly applied the law and considered everything that was legally relevant. It is a way of ensuring that the government acts lawfully.

The concepts of executive accountability and the rule of law that are inherent in judicial review are important for the protection of human rights, including for people with disability. While the availability of judicial review is important, it is not a complete answer to the need for relief and remedies under the DRA.

Firstly, judicial review applies to a narrower category of entities and decisions than those that would be covered by the general public authority obligations under the DRA (see Section 3.5). The definition of ‘public authorities’ we propose is broad and extends to certain entities that are neither agencies of the Australian Government nor statutory bodies. Ordinarily, decisions by these non-public entities are not subject to judicial review by the courts.

Secondly, judicial review is focused on the rule of law over executive action – that is, ensuring that public administration is conducted in compliance with the law. Judicial review is not focused on the substance of rights protection or providing remedies to people with disability for any harm caused by breaches to their human rights.

Recommendation 4.20 Enabling remedies through the courts

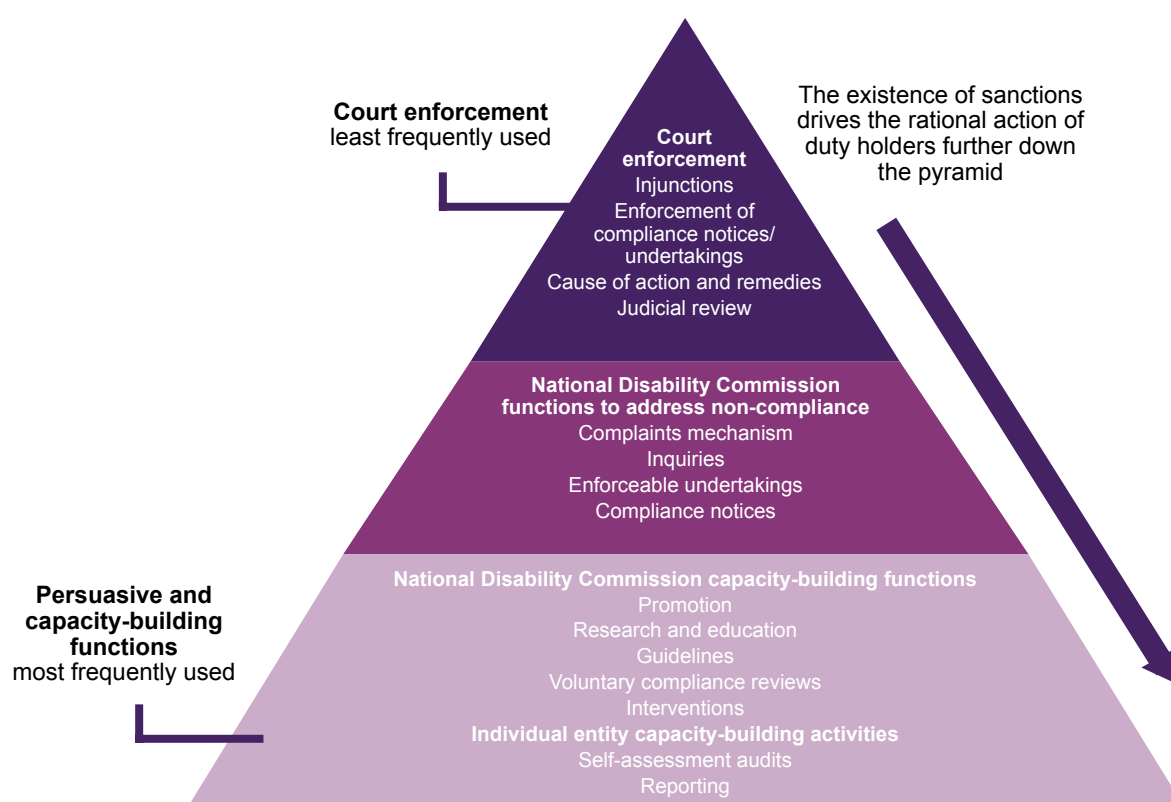
The Disability Rights Act should establish a standalone cause of action under which:

- a. the following persons can bring a claim to the Federal Court of Australia or the Federal Circuit and Family Court of Australia that a relevant duty-holder has acted in contravention of the Disability Rights Act (other than compliance with the consultation requirement, notices of the National Disability Commission, duties supporting compliance with the Act such as reporting and self-audit obligations, and the positive duty to promote disability equality and inclusion):
 - an aggrieved person on their own behalf; an aggrieved person on behalf of themselves and others who are also aggrieved
 - two or more aggrieved persons on behalf of themselves or others who are also aggrieved (a group claim)
 - a person or disability representative organisation on behalf of one or more aggrieved persons (a representative claim)
- b. where a claim is brought before a court under a. and the court finds that a person or entity has acted incompatibly with the Disability Rights Act, it can make any order it considers just and appropriate, including damages
- c. provisions in relation to costs are aligned with Commonwealth discrimination law, as amended following the 2022–23 review by the Australian Government Attorney-General’s Department.

Summary: The recommended enforcement pyramid for the DRA

Figure 4.3.1 below outlines the recommended enforcement pyramid for the DRA. It sets out a pyramid with three layers and provides an overview of the functions that have been discussed above. The base layer of the pyramid sets out the capacity-building functions recommended for the National Disability Commission and individual entities. The middle layer of the pyramid sets out functions recommended for the National Disability Commission to address non-compliance with the DRA. The top layer of the pyramid sets out court enforcement activity and court-based remedies.

Figure 4.3.1: Enforcement pyramid for the DRA



3.8. Strengthening awareness and understanding of disability rights

States Parties undertake to adopt immediate, effective and appropriate measures ... To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities ...³⁶⁹

Human rights are those things the international community has agreed are fundamental for all human beings to live a life of basic dignity. They are part of the social contract in democratic societies between governments and the citizens they are there to serve. However, for too long, the human rights of people with disability have been poorly understood and have been neglected.

As discussed in Chapter 2, lack of awareness and understanding of disability rights is a significant issue in Australia. It contributes to the violence, abuse, neglect and exploitation that people with disability experience.

The establishment of the DRA would itself be an important first step in strengthening the awareness and understanding of disability rights in Australia. One of many factors contributing to the current lack of awareness about disability rights is that there is no easily accessible list of the rights people with disability are entitled to under Australian law. The rights in the *CRPD* have not been translated into Australian law in a way that clearly sets out what disability rights mean in the Australian context.

However, it is not enough that rights exist in law or on paper. As Counsel Assisting submitted following Public hearing 18:

A human rights approach assumes the existence of rights, but goes beyond merely enshrining rights in the law. Indeed, a human rights approach is proactive. It does not wait to respond after a person's rights have been violated.³⁷⁰

Providing accessible information, guidance and training about disability rights is an important part of making those rights a reality, and a critical aspect of the package of reforms discussed in this volume.

Australia has obligations under article 8 of the *CRPD* to raise awareness about the human rights of people with disability.³⁷¹ These obligations include:³⁷²

-
- running public awareness campaigns designed to ‘nurture receptiveness to the rights of persons with disabilities’
 - promoting respect for the rights of people with disability at ‘all levels of the education system’
 - promoting training about the rights of people with disability.

Below, we make recommendations to strengthen awareness of disability rights and for the provision of guidance materials and training to support the implementation of the DRA.

Strengthening awareness about disability rights

The National Disability Commission should have the function to promote an understanding and acceptance, and public discussion, of the rights of persons with disability under the DRA.³⁷³ This function would support the provision of information to the public and the participation of the commission in public discussion through, for example, the provision of information in publications, media engagement, presentations and submissions.

There are three key audiences for the promotion of disability rights.

The first audience is people with disability, and their families, carers and supporters. They should have the opportunity to learn about human rights and the relevance of human rights to their lives. This should include the rights protected under the DRA. Knowledge about the human rights of people with disability should not be the exclusive domain of specialist advocates or government officials with responsibility for the *CRPD*. Building knowledge of human rights among people with disability has protective benefits. For example, an understanding of human rights is important to people establishing minimum expectations for their interactions with government and service providers. It is also an important foundation for equipping people to enforce their rights and seek remedies when their rights have been breached.

The second audience is duty-holders under the DRA. Awareness raising, guidance and education sit at the base of the regulatory pyramid (discussed in Section 3.7), where most effort should be expended to change the attitudes and behaviour of duty-holders.

The third audience for disability rights promotion is the general community. As several royal commissions in Australia have demonstrated (for example, in relation to First Nations people, children, aged care, mental health and disability), significant human rights abuses can occur where the experiences of groups are hidden, marginalised or subject to low community expectations. Governments generally deliver human rights protections to the standard that the broader community accepts. Understanding disability rights can help to raise the bar on those expectations and hold governments to account.

Providing guidance and training to support implementation of the DRA

For the DRA to be effective, the Australian Government must prioritise work to build capacity to give life to the rights it protects.

The Australian Government should fund the National Disability Commission to produce and maintain accessible guidance to explain the rights and duties in the DRA. These resources should particularly target duty-holders under the DRA as well as people with disability and their supporters.

Guidance from the National Disability Commission should also address the intersectional experiences and identities of people with disability and how these experiences can affect the ways in which their rights are limited or promoted in practice.

The National Disability Commission should also work with the AHRC to ensure that guidance clearly explains the differences between the DRA and the *DDA*. This combined effort should assist people with disability and their supporters to understand their rights and options for remedies under each law. It should also assist duty-holders to understand their obligations under each law.

These resources should be clear, practical, accessible and publicised.

The National Disability Commission should also have the function to develop and deliver educational and training programs in relation to the rights and obligations under the DRA.³⁷⁴ It should be funded to do so on an ongoing basis.

Prior to the introduction of the DRA there should be an initial whole-of-government education program, as well as training for private organisations that act as public authorities under the Act. This should be followed up by ongoing routine educational requirements for duty-holders under the DRA.

Training programs and resources should be co-designed with people with disability, and people with disability should be involved in their delivery.

It should be remembered in this context that compliance with the DRA is not an end goal in itself. Guidance and education about disability rights is an investment in better decision-making by duty-holders and, ultimately, the promotion and protection of the human rights of people with disability in Australia. The best human rights outcomes are achieved when human rights are built into the everyday work of policy, law-making and service delivery, and harm is prevented from occurring in the first place.

Recommendation 4.21 Strengthening awareness and understanding of disability rights

- a. The Disability Rights Act should provide the National Disability Commission with statutory functions to:
 - promote understanding and acceptance, and the public discussion, of the rights of people with disability under the Act
 - develop and deliver guidance materials and educational and training programs in relation to the rights and duties under the Act. Guidance should include how the intersectional experiences and identities of people with disability can affect the ways in which rights are limited or promoted in practice.
- b. The National Disability Commission should co-design and co-deliver training programs and resources with people with disability, and with the Australian Human Rights Commission where relevant, to provide a complete picture of human rights protections for people with disability under the Disability Rights Act and the *Disability Discrimination Act 1992* (Cth).
- c. The Australian Government should provide the National Disability Commission and the Australian Human Rights Commission with dedicated resources to undertake these roles.

Producing guidance and training about legislative rights protection is just one aspect of the broader change required to ensure that people with disability can better understand and enjoy their human rights. To be most effective, this recommendation should be implemented alongside other recommendations across this *Final report* that aim to increase awareness and understanding of the rights of people with disability, including:

- establishing a Disability Employment Rights Council to improve coordination, consistency and clarity across regulatory bodies and frameworks at the federal and state level to improve outcomes for people with disability in employment (as discussed in Volume 7, *Inclusive education, employment and housing*)
- introducing consistent adjustment principles across the public sector (as recommended in Volume 7)
- guidelines issued by state and territory education authorities on the provision of adjustments to students with disability (as discussed in Volume 7)
- increasing understanding and implementation of human rights in disability services (as discussed in Volume 10)

- training to strengthen the disability capability of workforces in the health, education and criminal justice systems (as discussed in Volumes 6, 7, and 8)
- strengthening the capacity of disability advocates to assist people with disability in accessing their rights through the provision of additional funding (as discussed in Volume 6).

3.9. Strengthening disability rights protection in state and territory laws

As discussed in Chapter 1, within Australia's federal system of government it is the Australian Government that enters into and holds obligations under international law, including the *CRPD*, and the Australian Government that has the constitutional power to implement international human rights treaties across Australia.³⁷⁵ However, implementation of Australia's obligations under the *CRPD* to respect, protect and fulfil the human rights of people with disability requires the participation of state and territory governments in practice.³⁷⁶ Article 4(5) of the *CRPD* explicitly notes that '[t]he provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions'.³⁷⁷

Disability rights at the state and territory level

State and territory legislation currently touch on the rights of people with disability in a range of ways.³⁷⁸ For example, each state and territory has legislation:

- dealing with the delivery of services to people with disability - in particular state and territory legislation continues to deal with quality and safeguards measures such as the management of complaints, restrictive practices, community visitor schemes and worker screening³⁷⁹
- determining when medical treatment can be administered to people who are assessed under legislative criteria as not having the capacity to consent³⁸⁰
- making discrimination against people on the basis of disability unlawful in certain areas of public life and providing mechanisms for dispute resolution or determination of a claim of discrimination by the relevant court or tribunal³⁸¹
- dealing with rights when people are subject to compulsory mental health treatment.³⁸²

Each state and territory also have laws of general application that are relevant to the rights of people with disability. For example, each state and territory provides for a system of:

- criminal laws and policing
- complaints about health service providers³⁸³
- oversight of public administration through relevant ombudsmen.³⁸⁴

In addition, as outlined in Chapter 2, Victoria, Queensland and the Australian Capital Territory have dedicated human rights legislation which protects the rights of all persons within their jurisdiction, including people with disability.³⁸⁵ However, those laws are not expressly aimed at recognising or protecting the rights of people with disability. Only the *ACT HRA* provides for a direct cause of action where a person can bring a claim to court for a breach of human rights.³⁸⁶

The examples described above are not exhaustive, but illustrate the multifaceted approach to disability rights at the state and territory level. These mechanisms offer some protection in some areas, but each has limitations. Further, as outlined in a research report prepared by the Australian Government Solicitor for the Royal Commission, they differ between each state and territory.³⁸⁷ None of these mechanisms provide equivalent and enforceable coverage of the rights and duties we have recommended in relation to the DRA.

Equivalent protections to the DRA for state and territory law

In addition to the recommended scope of a DRA in Commonwealth law, and noting the areas of state and territory responsibility relevant to the violence, abuse, neglect and exploitation experienced by people with disability in Australia, we recommend that each state and territory establish equivalent protections within their jurisdiction.

The application of disability rights in sectors like public health, public education, public housing, child protection, and corrections requires equivalent state and territory legislation to be effective. For example, the right to equitable access to health services (proposed in Section 3.4 above) requires action from public hospitals run by the states and territories to operate effectively across Australia.

An equivalent level of protection to the DRA would include:

- protecting the rights as set out in the DRA (as recommended by us and as further developed by the Australian Government in consultation with people with disability)
- applying the equivalent duties to relevant state/territory public entities, institutions and employees; entities contracted by the state/territory to deliver goods and services; and sectors established or primarily regulated by state and territory legislation (noting that regulation of restrictive practices by states and territories is recommended in Volume 6)
- providing an independent oversight body or bodies with equivalent compliance functions to those recommended for the National Disability Commission
- providing for an equivalent range of remedies through relevant courts or tribunals.

We recognise the complexity and diversity of the existing legal frameworks and the various oversight mechanisms that exist at the state and territory level. For that reason, we recommend that a consistent range of rights be protected and that states and territories have flexibility to adapt appropriately the duties and compliance mechanisms to their legal context and institutional structures. For example, jurisdictions with dedicated human rights legislation may choose to build on those Acts by adding specific rights of persons with disability.

Other jurisdictions may choose to amend disability-focused legislation or to establish a new, standalone Act.

While this flexibility will inevitably lead to some variation between the states and territories in implementation, we have considered several alternatives below, and each has its own complexities.

The first alternative we have considered is making the DRA national legislation, with application to state and territory public sectors, in addition to the role outlined above in relation to Commonwealth entities and public authorities. The Australian Parliament is likely to have the power to legislate nationally on disability rights (relying on the external affairs power in the *Australian Constitution* and implementing Australia's international legal obligations under the *CRPD*).³⁸⁸ By way of example, the *Racial Discrimination Act* makes racial discrimination unlawful in public life³⁸⁹ (implementing Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*) and it applies to the conduct of the states and territories.³⁹⁰

While this option has the attraction of providing national consistency, it would do little to encourage state and territory ownership of implementation. The general public authority obligation to consider and act compatibly with disability rights proposed in the DRA would go to the heart of executive government activity within a jurisdiction. Without commitment and action by the relevant government, disability rights and duties are unlikely to achieve the degree of change desired within wider state and territory decision-making processes.

Further, any duties and remedies applied by the Australian Parliament to the states would need to navigate the implied limitation on Commonwealth power set out by the High Court in *Melbourne Corporation*.³⁹¹ That is, that states are immune from certain Commonwealth laws that would interfere substantially with the constitutional functions of the state as a government.³⁹² While such provisions could be shaped carefully to seek to ensure they are in accordance with that limitation, legal challenges to test their scope and constitutional validity in the High Court of Australia would be likely. The shadow cast by such challenges could make the provisions difficult to use and their protections unclear for people with disability in the short to medium term.

The second alternative we have considered is a national cooperative scheme which could be established through mirror legislation in each of the states and territories. This type of scheme occurs where one jurisdiction enacts an agreed law that other jurisdictions then enact in similar terms. This option would provide for greater consistency than the local tailoring approach recommended here. However, given the different starting points of the states and territories, the variation in the existing oversight mechanisms, and the linkage to broader debates about the protection of human rights in state and territory law, a national cooperative scheme is likely to take some time to negotiate an agreed position on. Our assessment is the practical prospect of achieving unanimity across Australian parliaments in the short to medium term is low.

We have therefore recommended that states and territories appropriately adapt equivalent protections to the DRA into state and territory law. Each state and territory will need to determine how to adapt the provisions of the DRA to its own legal context and institutional structures.

Concurrent operation of state and territory laws

Section 109 of the *Australian Constitution* provides that where a state law is incompatible with federal law, the state law is invalid to the extent of the inconsistency.³⁹³

The *Racial Discrimination Act* provides that the Act is not intended to exclude or limit the operation of state or territory laws that further the objects of the *International Convention on the Elimination of All Forms of Racial Discrimination* and are capable of operating concurrently with the Act.³⁹⁴ Similar provisions are incorporated in other Commonwealth anti-discrimination legislation.³⁹⁵ We recommend a similar provision for the DRA.

Recommendation 4.22 Strengthening disability rights protection in state and territory laws

- a. States and territories should enact legislation complementary or equivalent to the Australian Disability Rights Act, taking into account their own legal frameworks.
- b. The Disability Rights Act should provide that the Act is not intended to exclude or limit the operation of a state or territory law that furthers the objectives of the *Convention on the Rights of Persons with Disabilities* and is capable of operating concurrently with the Act.

The next chapter details our recommendations to improve the legal protection of the human rights of people with disability under the *DDA*.

Endnotes

- 1 *Letters Patent* (Cth), 4 April 2019 (as amended), (a).
- 2 *Letters Patent* (Cth), 4 April 2019 (as amended), (c).
- 3 *Letters Patent* (Cth), 4 April 2019 (as amended), recitals; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16.
- 4 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(3).
- 5 James Charlton, *Nothing about us without us: Disability oppression and empowerment*, 1st edn, University of California Press, 2000, p 3.
- 6 See, for example, Human Rights Council, *Overview of consultations on the contribution of the Human Rights Council to the prevention of human rights violations*, 43rd sess, Agenda Item 5, UN Doc A/HRC/43/37 (14 January 2020), pp 3–4 [7–11].
- 7 James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi & Nansi Richards, Taylor Fry & Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, *Economic cost of violence, abuse, neglect and exploitation of people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, p 1.
- 8 James Vincent, Hugh Miller, Kirsten Armstrong, Grant Lian, David Qi & Nansi Richards, Taylor Fry & Dennis McCarthy, Sarina Lacey & Tomas Berry, Centre for International Economics, *Economic cost of violence, abuse, neglect and exploitation of people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, February 2023, pp 1, 3.
- 9 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 92 (references omitted).
- 10 Submissions by the Australian Government in response to Counsel Assisting’s submissions following Public hearing 31, 9 March 2023, p 12 [41]; Australian Government Department of Social Services, ‘A New Act to Replace the Disability Services Act (1986)’, *DSS Engage*, web page. <www.engage.dss.gov.au/a-new-act-to-replace-the-disability-services-act-1986/>; Amanda Rishworth, Minister for the Department of Social Services, *Consultation opens on a modernised Disability Services Act*, media release, 8 November 2022.
- 11 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022.
- 12 Letter from the Attorney-General, Mark Dreyfus, to the Chair of the Parliamentary Joint Committee on Human Rights, Josh Burns, 15 March 2023.
- 13 ‘Inquiry into Australia’s Human Rights Framework’, *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>
- 14 ‘Inquiry into Australia’s Human Rights Framework’, *Parliament of Australia*, web page. <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>
- 15 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022; Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021.
- 16 *Acts Interpretation Act 1901* (Cth) s 15AA.
- 17 *National Disability Insurance Scheme Act 2013* (Cth) ss 3, 4.
- 18 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 3.
- 19 See, for example, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 3; *Accessible Canada Act*, SC 2019, c 10, s 6; *Disability Inclusion Act 2014* (NSW) s 4; *Disability Inclusion Act 2018* (SA) s 9; Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 8. At the time of writing this report, the Exposure Draft had not progressed to a Bill.
- 20 See, for example, *Disability Inclusion Act 2014* (NSW) s 4; *Disability Inclusion Act 2018* (SA) s 9.
- 21 This list of attributes and experiences builds on *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(2) and the requirement for States Parties to ‘ensure that protection services are age-

gender- and disability-sensitive'; the Royal Commission's terms of reference, which direct this inquiry to consider 'the specific experiences of violence against, and abuse, neglect and exploitation of, people with disability ... associated with their age:, [sic] sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability' (*Letters Patent* (Cth), 4 April 2019 (as amended), (g)); and adapts wording from the *Mental Health and Wellbeing Act 2022* (Vic) s 25 'Diversity principle', which states that the diverse needs and experiences of a person receiving mental health and wellbeing services are to be actively considered noting that such diversity may be due to a variety of attributes, including socioeconomic status, neurodiversity, residency status, geographic disadvantages and experiences of trauma.

- 22 *United Nations Declaration on the Rights of Indigenous Persons*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), annex [preamble, art 1].
- 23 In October 2022, the Australian Government announced a review of the NDIS. A final report is due by October 2023. See Australian Government, 'About the NDIS review', *NDIS Review*, web page. <<http://www.ndisreview.gov.au/about>>. See also Australian Government NDIS Review, 'Terms of Reference: Building a strong, effective NDIS', October 2022.
- 24 See *Human Rights Act 2019* (Qld) s 9 (the definition of 'public entity', which includes a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (Cth) when it is performing functions of a public nature in Queensland), s 10 (describing when a function is of a public nature, including public disability services among others), and s 58 (the duty of public entities to consider and act compatibly with human rights). See also div 2 of the Act, under which a person can make a complaint to the Queensland Human Rights Commission about a public entity that fails to comply with its duty under s 58 and under which the Queensland Human Rights Commission may refer relevant complaints to the NDIS Quality and Safeguards Commission.
- 25 See *Human Rights Act 2019* (Qld) s 9 (the definition of 'public entity', which includes a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (Cth) when it is performing functions of a public nature in Queensland), s 10 (describing when a function is of a public nature, including public disability services among others).
- 26 *Human Rights Act 2019* (Qld) s 58.
- 27 *Human Rights Act 2019* (Qld) ss 4(b), 9. See also Queensland, *Parliamentary debates*, Legislative Assembly, 31 October 2018, p 3185 (Yvette D'Ath, Attorney-General and Minister for Justice); Explanatory Notes, Human Rights Bill 2018 (Qld), pp 14–15.
- 28 *Human Rights Act 2019* (Qld) ss 9(2)(a), 9(5), 10.
- 29 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. edn, Engel, 1993, p 458, cited in Jessica Lynn Corsi, 'Article 5: Equality and Non-Discrimination' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 141.
- 30 Anne Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', (1990), vol 11, *Human Rights Law Journal*, p 2.
- 31 See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 2(1), 14, 24, 25, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), arts 2, 3; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), preamble, arts 1(4), 2, 4, 5; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), arts 1, 2, 3, 4(1), 10, 11, 12, 15(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 2, 23; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), opened for signature on 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 14; *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*, adopted 7 June 1999, UN Doc AG/RES 1608 XXIX-O/99 (entered into force 14 September 2001), art 4(2)(b); *African Charter on the Rights and Welfare of the Child*, adopted 1 July 1990, CAB/LEG/24.9/49(1990) (entered into force 29 November 1999), art 13.

- 32 See, for example, the *Charter of the United Nations*, adopted 26 June 1945, 1 UNTS XVI, preamble [2], arts 55, 56; United Nations General Assembly, *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, UN Doc A/810 (10 December 1948), arts 1, 2; 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities', GA Res 48/96, 48th sess, Agenda Item 109, UN Doc A/RES/48/96 (4 March 1994, adopted 20 December 1993); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF 157/23 (12 July 1993).
- 33 Jessica Lynn Corsi, 'Article 5: Equality and Non-Discrimination' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 141.
- 34 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 3.
- 35 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5.
- 36 Jessica Lynn Corsi, 'Art.5 Equality and Non-Discrimination' in Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 141, citing Jarlath Clifford, 'Equality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, pp 420–45.
- 37 When considering the right to equality before the law in section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), courts have interpreted the right as being directed to the enforcement and administration of laws, rather than to their content: *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] 31 VAR 286, pp 316–17 [136]; *Matsoukatidou v Yarra Ranges Council* [2017] 51 VR 624, p 640 [50], pp 642–43 [58], p 657 [104].
- 38 See, for example, Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) cl 8.
- 39 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(2)–(3).
- 40 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, [108] (Bell J).
- 41 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 2, 5, 12(1).
- 42 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2004* (ACT) s 8; *Human Rights Act 2019* (Qld) s 15.
- 43 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 18, 110.
- 44 It should be noted that 'special measures' as defined in section 45 of the *Disability Discrimination Act 1992* (Cth) are not unlawful discrimination. Special measures are designed to improve equality of opportunity for people with disability.
- 45 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 21.
- 46 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [9].
- 47 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), annex, arts 2, 9, 14(2), 16, 21(1), 22 (2), 24(1), 29(1), 46(2), (3).
- 48 Summer Foundation, Submission, 25 November 2022, SUB.001.02788, p 6.
- 49 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 3(a).
- 50 The *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 12(1) provides: 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'. The *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, UN Doc A/810 (10 December 1948), art 6 provides: 'Everyone has the right to recognition everywhere as a person before the law'. The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 16 states: 'Everyone shall have the right to recognition everywhere as a person before the law'.

- 51 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1, (19 May 2014), [1].
- 52 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, 37th sess, Agenda Item 3, UN Doc A/HRC/37/56 (12 December 2017), [14].
- 53 United Nations Department of Economic and Social Affairs, United Nations Office of the High Commissioner for Human Rights & Inter-Parliamentary Union, *From exclusion to equality: Realizing the rights of persons with disabilities*, Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, No.14, UN Doc HR/PUB/07/6 (2007), [89].
- 54 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1, (19 May 2014) [8].
- 55 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8(1); Human Rights Act 2019 (Qld) s 15(1); Human Rights Act 2004 (ACT) s 8(1).
- 56 *Racial Discrimination Act 1975* (Cth) s 10. See also *Wotton v State of Queensland (No 5)* (2016) 352 ALR 146, 279 [513], 285 [544].
- 57 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 18, 110.
- 58 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 12(3).
- 59 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [17]. For a more detailed discussion of the interpretation of article 12(3) and the issue of support for the exercise of legal capacity, see Lucy Series & Anna Nilsson, 'Article 12: CRPD equal recognition before the law', in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, pp 363–68.
- 60 Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [17].
- 61 Ilan Katz, Rosemary Kayess, Shona Bates, Karen Fisher & Julian Laurens, Social Policy Research Centre, University of New South Wales; Liz Hudson, Miranda Cross & Brittney Wilson, Children and Young People with Disability Australia; Becky Rowe & Brooke Canham, Inclusion Australia, *Growing up making decisions*, Report prepared for the National Disability Research Program, September 2022, p 10. See also Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [3], [26], [28–29]; United Nations Department of Economic and Social Affairs, United Nations Office of the High Commissioner for Human Rights & Inter-Parliamentary Union, *From exclusion to equality: Realizing the rights of persons with disabilities*, Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, No.14, UN Doc HR/PUB/07/6 (2007), [89–91].
- 62 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, 37th sess, Agenda Item 3, UN Doc A/HRC/37/56 (12 December 2017), [54].
- 63 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, 37th sess, Agenda Item 3, UN Doc A/HRC/37/56 (12 December 2017), [28].
- 64 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 49.
- 65 See, for example, *Disability Inclusion Act 2014* (NSW) s 4(5), which sets out the general principle that 'People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support'.

- 66 At the time of writing, the definition of ‘advocacy service’ in the *Disability Services Act 1986* (Cth), s 7 states that:
 ‘advocacy service means:
 (a) a service that seeks to support persons with disabilities to exercise their rights and freedoms, being rights and freedoms recognised or declared by the Disabilities Convention [*Convention on the Rights of Persons with Disabilities*], through:
 (i) one-to-one support; or
 (ii) supporting them to advocate for themselves, whether individually, through a third party or on a group basis; or
 (b) a service that seeks to introduce and influence long-term changes to ensure that the rights and freedoms of persons with disabilities, being rights and freedoms recognised or declared by the Disabilities Convention, are attained and upheld so as to positively affect the quality of their lives; or
 (c) a service included in a class of services approved by the Minister under section 9B’.
- If as a result of the Australian Government’s review of the *Disability Services Act 1986* (Cth) (ongoing at the time of writing), this definition is removed or its function and scope substantially changed, the definition could instead be included in the proposed Australian Disability Rights Act directly.
- 67 Christine Bigby & Jacinta Douglas, Living with Disability Research Centre, La Trobe University; Terry Carney, University of Sydney Law School; Shih-Ning Then & Julia Duffy, Australian Centre for Health Law Research, Queensland University of Technology; Ian Wiesel, School of Geography, Earth and Atmospheric Sciences, University of Melbourne, & Craig Sinclair, School of Psychology, University of New South Wales, *Diversity, dignity, equity and best practice: A framework for supported decision-making*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, January 2023, p 119.
- 68 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16.
- 69 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(1) concerns the protection of persons with disabilities, while art 16(2) imposes an obligation to prevent harm through support, and art 16(3) imposes an obligation to prevent harm through effective monitoring by independent authorities. See Amanda Keeling, ‘Article 16: Freedom from Exploitation, Violence, and Abuse’, in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 478.
- 70 Amanda Keeling, ‘Article 16: Freedom from Exploitation, Violence, and Abuse’, in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 467.
- 71 Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities*, 2nd sess, UN Doc CRPD/C/2/3 (18 November 2009), annex [art 16]. This is one of six specific matters that the Committee recommends States Parties should report on (bullet points 1–6).
- 72 For example, art 16(1) refers to ‘gender-based aspects’ of exploitation, violence and abuse; art 16(2) refers to ‘protection services that are gender- and age-sensitive; art 16(4) refers to ‘gender- and age-specific needs’ and art 16(5) refers to ‘women- and child-focused legislation and policies’. See Antonio Marchesi, ‘Article 16 [Freedom from Exploitation, Violence and Abuse]’ in Valentina Della Fina, Rachele Cera & Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A commentary*, Springer, 2017, pp 319–19.
- 73 Committee on the Rights of Persons with Disabilities, *General comment no. 3 (2016) on women and girls with disabilities*, UN Doc CRPD/C/GC/3 (25 November 2016), [29]–[37].
- 74 Amanda Keeling, ‘Article 16: Freedom from Exploitation, Violence, and Abuse’, in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018 pp 483–84. See, for example, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of the Cook Islands*, 13th sess, UN Doc CRPD/C/COK/CO/1 (15 May 2015), [30], [35]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of the Czech Republic*, 13th sess, UN Doc CRPD/C/CZE/CO/1 (15 May 2015), [34]–[35];

Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Germany*, 13th sess, UN Doc CRPD/C/DEU/CO/1 (13 May 2015), [36]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Kenya*, 14th sess, UN Doc CRPD/C/KEN/CO/1 (30 September 2015), [31(c)]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial periodic report of Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (22 October 2012), [32].

75 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013), [37]–[38]. The Committee on the Rights of People with Disability recommended that the Australian Government ‘investigate without delay the situations of violence, exploitation and abuse experienced by women and girls in institutional settings, and that it take appropriate measures on the findings’, [38].

76 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [31], in particular [31(d)], expressing concern about ‘[t]he lack of an explicit reference to women and girls with disabilities in the National Plan to Reduce Violence against Women and their Children 2010–2022’, [31(e)], ‘[i]nsufficient expertise and structural barriers within services dealing with domestic violence, sexual assault and related crises to adequately support women and girls with disabilities’, and [31(f)], ‘[t]he fact that the instruments to collect data on violence against women and girls with disabilities are limited in both number and scope’. The Committee on the Rights of Persons with Disabilities made a number of specific recommendations for action to be taken by the Australian Government to address these concerns, [32].

77 Committee on the Rights of the Child, *General comment no. 7 (2005) on implementing child rights in early childhood*, 40th sess, CRC/C/GC/7/Rev.1 (20 September 2005), [11(b)(ii)].

78 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(3). See Judy Laing, ‘Preventing violence, exploitation and abuse of persons with mental disabilities: Exploring the monitoring implications of article 16 of the United Nations Convention on the Rights of Persons with Disabilities’, (2017), Vol 53, *International Journal of Law and Psychiatry*, pp 27–38.

79 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(5).

80 This right is based on art 16 of the *Convention on the Rights of Persons with Disability*. Variations of this right have been recognised as principles underpinning disability legislation in Australian states. For example, *Disability Inclusion Act 2014* (NSW) s 4(8), *Disability Inclusion Act 2018* (SA) s 9(1)(j), *Disability Act 2006* (Vic) s 5(2)(b), *Disability Services Act 1993* (WA) sch 1 [10], *Disability Services Act 2011* (Tas) s 5(1)(f), *Disability Services Act 2005* (Qld) s 7(e).

81 As outlined in Volume 3 of the *Final report*, the Royal Commission considers that: ‘Neglect is the failure to provide for the physical, emotional, social and cultural wellbeing and development of a person or group of people with disability.

Forms of neglect include but are not limited to:

- deprivation of basic necessities of life, including food, clothing and housing
- failure to provide assistance with daily activities
- failure to provide health care
- depriving a person of the right, or limiting their right, to education
- depriving a person of the opportunity, or limiting their opportunity, to develop personal relationships, friendships or engage in community activities
- depriving a person of access to, or limiting their access to, language and forms of communication
- infringing a person’s human rights
- failing to act in the best interests of a child
- developmental neglect, including failing to provide an environment for each person to maximise their potential
- the failure to facilitate access to cultural practices or relationships
- exclusion from access to or participation in settings and services available to the general population
- failing to provide services essential for the safety, health and wellbeing of a person.

Neglect can occur where natural and systemic safeguards fail to protect a person, such as when family, friends, neighbours, communities and government agencies ignore or fail to take action to prevent the risk of violence against, or abuse, neglect or exploitation of, a person with disability.’

- 82 See, for example, *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, UN Doc A/810 (10 December 1948), art 9; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 9; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended, art 5.
- 83 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 14 states that:
- ‘1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.’
- 84 Committee on the Rights of Persons with Disabilities, *Views: Communication No 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016, adopted 2 September 2016) [8.7] (*‘Noble v Australia’*). See also Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities*, 14th sess, UN GAOR, 72nd sess, Supp No 55, UN Doc A/72/55 (2017), annex [3].
- 85 Human Rights Committee, *General comment no. 35 (2014) on Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014), [5]. Regarding physical restraining devices, the Human Rights Committee referred to its concluding observations: Human Rights Committee, *Concluding observations: Czech Republic*, 90th sess, UN Doc CCPR/C/CZE/CO/2 (9 August 2007), [13]; and Human Rights Committee, *Concluding observations: Republic of Korea*, 88th sess, UN Doc CCPR/C/KOR/CO/3 (28 November 2006), [13]. See also Human Rights Council Working Group on Arbitrary Detention, *Opinion No. 68/2017 concerning Zaheer Seepersad (Trinidad and Tobago)*, 80th sess, UN Doc A/HRC/WGAD/2017/68 (20 December 2017), [22].
- 86 *Charter of Rights and Responsibilities Act 2006* (Vic) s 21; *Human Rights Act 2004* (ACT) s 18; *Human Rights Act 2019* (Qld) s 29.
- 87 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2002, pp 18, 112.
- 88 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 4: Health care and services for people with cognitive disability*, October 2020, [182].
- 89 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 4: Health care and services for people with cognitive disability*, October 2020, [488].
- 90 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 25.
- 91 Committee on Economic, Social and Cultural Rights, *General comment no. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, Agenda Item 3, UN Doc E/C12/2000/4, 22nd sess, (11 August 2000) [4].
- 92 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 25.
- 93 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 25(a)–(f).
- 94 Penelope Weller, ‘Article 25: Health’ in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 716.
- 95 Michael Ashley Stein, Janet Lord & Dorothy Weiss Tolchin, ‘Equal Access to Health Care Under the UN Disability Rights Convention’ in Rosamond Rhodes, Margaret Battin & Anita Silvers (eds), *Medicine and Social Justice: Essays on the Distribution of Health Care*, Oxford University Press, 2012, p 245, cited in Penelope Weller, ‘Article 25: Health’ in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 710.

- 96 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(2). In turn, this reflects *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2(1), which sets out the general obligation on States Parties to ‘undertak[e] to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.
- 97 Exhibit 18-021, CTD.9999.0030.0001, p 1 [3].
- 98 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), arts 2(2), 12; Penelope Weller, ‘Article 25: Health’ in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 717.
- 99 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 25(c).
- 100 See Committee on the Rights of Persons with Disabilities, *General comment no. 1 (2014) on Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [37].
- 101 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, p 27 [95], noting Committee on the Rights of Persons with Disabilities, *General comment no. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017), p 10 [46] and Exhibit 18-020, CTD.9999.0007.0001, pp 7–8 [31].
- 102 See, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 19, 20; *Human Rights Act 2004* (ACT) ss 27A, 27; *Human Rights Act 2019* (Qld) s 37.
- 103 Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect*, Final report, vol 1, 2021, p 206 [Recommendation 2(a)(i)].
- 104 Australian Government, Response to final report of the Royal Commission into Aged Care Quality and Safety: *Care, Dignity and Respect*, May 2021, p 1.
- 105 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2019* (Qld) 58(1); *Human Rights Act 2004* (ACT) s 40B(1).
- 106 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2002, p 20.
- 107 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 1.
- 108 *Public Governance, Performance and Accountability Act 2013* (Cth) ss 10–11.
- 109 *Public Governance, Performance and Accountability Act 2013* (Cth) s 11.
- 110 *National Disability Insurance Scheme Act 2013* (Cth) s 117.
- 111 *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(a).
- 112 *Public Governance, Performance and Accountability Act 2013* (Cth) ss 8, 10(1)(c).
- 113 *Australian Federal Police Act 1979* (Cth) s 6(2)(a); *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(c). Listed entities do not include state and territory police or prisons that are run by state and territory governments. These would be covered by equivalent legislation recommended in Section 3.9 of this chapter.
- 114 *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(d).
- 115 Victoria, *Parliamentary debates*, Legislative Assembly, 4 May 2006, p 1293 (Robert Hulls, Attorney-General).
- 116 Michael Brett Young, commissioned by the Victorian Government, *From commitment to culture: The 2015 review of the Charter of Human Rights and Responsibilities Act 2006*, September 2015, p 20.
- 117 United Kingdom Equality and Human Rights Commission, *The impact of a human rights culture on public sector organisations: Lessons from practice*, Research report, June 2009, p 8.
- 118 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 12: The experiences of people with disability, in the context of the Australian Government’s approach to the COVID-19 vaccine rollout*, May 2021, p 4, [Finding 1]; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 6: Psychotropic medication, behaviour support and behaviours of concern*, September 2020, p 105 [366].

- 119 Submissions of Counsel Assisting the Royal Commission following Public hearing 32,
31 March 2023 (amended 18 May 2023), p 57 [188].
- 120 See Recommendation 4.4. Note that Commissioners Bennett, Galbally and McEwin alternatively
recommend this be considered by the Australian Government as a priority and additional
duty-holders be included from the commencement of the Act.
- 121 *Human Rights Act 2004* (ACT) s 40D.
- 122 Michael Brett Young, commissioned by the Victorian Government, *From commitment to culture:
The 2015 review of the Charter of Human Rights and Responsibilities Act 2006*, September 2015,
p 65 noting the work of Louis Schetzer, PhD candidate, University of New South Wales.
- 123 Michael Brett Young, commissioned by the Victorian Government, *From commitment to culture:
The 2015 review of the Charter of Human Rights and Responsibilities Act 2006*, September 2015,
p 65 [Recommendation 15]; Australian Human Rights Commission, *Free and Equal: A Human
Rights Act for Australia*, Position paper, December 2002, p 20.
- 124 Transcript, Hayley Dean, Public hearing 32, 13 February 2023, P-79 [33–35].
- 125 Darwin Community Legal Service, Submission, 31 December 2022, SUB.100.03168, p 80.
- 126 Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms—Encroachments
by Commonwealth Laws*, Final report, ALRC Report 129, December 2015, pp 19 [1.56–1.57],
391 [14.1], citing *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40,
[30] (Kiefel, Bell and Keane JJ). See also Mark Aronson, Matthew Groves & Greg Weeks,
‘Procedural fairness’ in *Judicial review of administrative action*, 7th rev edn, Lawbook Co, 2022,
p 399 [8.10]. Over recent decades there have been several English court cases considering
the issue of consultation and recognising a common law duty to consult as an aspect of the
duty of procedural fairness. See, for example, *R v Brent London Borough Council; Ex parte
Gunning* (1985) 84 LGR 168, p 189. See also the UK Supreme Court’s detailed discussion of a
duty to consult in *R (Moseley) v. London Borough of Haringey* [2014] 1 WLR 3947. For further
discussion, see Mark Aronson, Matthew Groves & Greg Weeks, ‘Duty to consult’ in *Judicial review
of administrative action and government liability*, 7th rev edn, Lawbook Co, 2022, pp 443–50,
[8.150–8.160]. For a detailed discussion of procedural fairness, see ALRC, *Traditional Rights and
Freedoms—Encroachments by Commonwealth Laws*, Final report, ALRC Report 129, December
2015, pp 391–411 [14.1–14.83] and Mark Aronson, Matthew Groves & Greg Weeks, ‘Procedural
fairness’ in *Judicial review of administrative action and government liability*, 7th rev edn, Lawbook
Co, 2022, pp 399–496 [8.10–8.320].
- 127 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities:
An assessment of Australia’s level of compliance*, Report prepared for the Royal Commission
into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 156,
citing Valentina Della Fina, ‘Article 4 General Obligations’, in Valentina Della Fina, Rachele Cera
& Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with
Disabilities: A commentary*, Springer, 2017, pp 150–52; Andrea Broderick, ‘Article 4 General
Obligations’ in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN
Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University
Press, 2018, pp 134–37; Marianne Schulze, *A Handbook on the Human Rights of Persons with
Disabilities: Understanding the Convention on the Rights of Persons with Disabilities*, Handicap
International, 3rd edn, 2010 p 59.
- 128 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), preamble [15].
- 129 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), art 3(c).
- 130 Committee on the Rights of Persons with Disabilities, *General comment no. 7 (2018) on
the participation of persons with disabilities, including children with disabilities, through their
representative organizations, in the implementation and monitoring of the Convention*, 20th sess,
UN Doc CRPD/C/GC/7 (9 November 2018), [15].
- 131 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons
with disabilities*, Human Rights Council, 31st sess, Agenda Item 3, UN Doc A/HRC/31/62,
(12 January 2016), [78].
- 132 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons
with disabilities*, Human Rights Council, 31st sess, Agenda Item 3, UN Doc A/HRC/31/62,
(12 January 2016), [79].

- 133 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, Human Rights Council, 31st sess, Agenda Item 3, UN Doc A/HRC/31/62, (12 January 2016), [79].
- 134 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, Human Rights Council, 31st sess, Agenda Item 3, UN Doc A/HRC/31/62, (12 January 2016), [79].
- 135 Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, Human Rights Council, 31st sess, Agenda Item 3, UN Doc A/HRC/31/62, (12 January 2016), [79].
- 136 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [8].
- 137 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, p 159.
- 138 Submissions by the Australian Government in response to Counsel Assisting's submissions following Public hearing 31, 9 March 2023, SUBM.0055.0001, pp 10–11 [35–36].
- 139 *Carer Recognition Act 2010* (Cth) s 8(2). A 'public service care agency' is defined in section 4 of the Act and means a 'public service agency that is responsible for the development, implementation, provision or evaluation of care supports'.
- 140 *Legislation Act 2003* (Cth) s 17.
- 141 *Fair Work Act 2009* (Cth) s 205. See also Australian Government Fair Work Ombudsman, Consultation and cooperation in the workplace: Best practice guide, May 2022, pp 3–5.
- 142 *Work Health and Safety Act 2011* (Cth) s 47.
- 143 For example, *Corporations Act 2001* (Cth) s 981L(1); *Air Services Act 1995* (Cth) s 10; *Telecommunications Act 1997* (Cth) s 135; *National Transport Commission Act 2003* (Cth) s 9.
- 144 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 161–242. See, in particular, [7.8] 'Participation of persons with disability', at pp 205–15.
- 145 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 213. The Australian Human Rights Commission has recommended that such a duty 'would be binding on public authorities, and complimented [sic] by the non-binding requirement for proponents of legislation to engage in consultations and report on this through Statements of Compatibility and Parliamentary scrutiny mechanisms', p 213.
- 146 Disability Inclusion Bill (Exposure Draft) 2022 (Vic). At the time of writing this report, the Exposure Draft had not progressed to a Bill.
- 147 Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 9(1). At the time of writing this report, the Exposure Draft had not progressed to a Bill.
- 148 *Public Governance, Performance and Accountability Act 2013* (Cth) s 11.
- 149 *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(d)–(e).
- 150 *National Disability Insurance Scheme Act 2013* (Cth) s 117.
- 151 *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(a).
- 152 *Public Governance, Performance and Accountability Act 2013* (Cth) ss 8, 10(1)(c).
- 153 *Australian Federal Police Act 1979* (Cth) s 6(2)(a); *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(c).
- 154 This list of attributes and experiences builds on the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 16(2) and the requirement for States Parties to 'ensure that protection services are age-, gender- and disability-sensitive'; the Royal Commission's terms of reference, which direct this inquiry to consider 'the specific experiences of violence against, and abuse, neglect and exploitation of, people with disability ... associated with their age:, [sic] sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability' (*Letters Patent* (Cth), 4 April 2019 (as amended), (g)); and adapts wording from the *Mental Health and Wellbeing Act 2022* (Vic) s 25 'Diversity principle', which states that the diverse needs and experiences of a person receiving mental health and wellbeing services

- are to be actively considered, noting that such diversity may be due to a variety of attributes, including socioeconomic status, neurodiversity, residency status, geographic disadvantages and experiences of trauma.
- 155 See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 4(3) (duty to consult, which specifically refers to 'including children with disabilities'), 3(h) (general principles), 7 (children with disabilities). The Committee on the Rights of Persons with Disabilities has discussed in depth 'the importance of systemically "including children with disabilities" in the development and implementation of legislation and policies to give effect to the Convention, and in other decision-making processes, through organizations of children with disabilities or supporting children with disabilities'. See, for example, Committee on the Rights of Persons with Disabilities, *General comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 20th sess, UN Doc CRPD/C/GC/7 (9 November 2018), in particular [24]–[26]. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 12 (right of the child to be heard); Committee on the Rights of the Child, *General comment no. 12 (2009) on the right of the child to be heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009); Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, *Joint Statement: The rights of children with disabilities* (adopted by the Committee on the Rights of the Child during its 89th sess, 31 January – 11 February 2022; adopted by the Committee on the Rights of Persons with Disabilities during its 26th sess, 7–25 March 2022).
- 156 *Letters Patent* (Cth), 4 April 2019 (as amended), (h).
- 157 Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities on its eleventh session (31 March – 11 April 2014)*, 11th sess, UN Doc CRPD/C/11/2, 14 May 2014, annex II, [3].
- 158 Committee on the Rights of Persons with Disabilities, *General comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 20th sess, UN Doc CRPD/C/GC/7 (9 November 2018), [12(a)].
- 159 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 12: The experiences of people with disability, in the context of the Australian Government's approach to the COVID-19 vaccine rollout*, 29 October 2021, p 84 [Finding 7].
- 160 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 12: The experiences of people with disability, in the context of the Australian Government's approach to the COVID-19 vaccine rollout*, 29 October 2021, p 63 [208].
- 161 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 12: The experiences of people with disability, in the context of the Australian Government's approach to the COVID-19 vaccine rollout*, 29 October 2021, p 64 [211].
- 162 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 3(1), 8(1–3), 9(1).
- 163 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 1.
- 164 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6, (26 April 2018), [16].
- 165 *Race Relations Act 1976* (UK) s 71 (repealed).
- 166 *Disability Discrimination Act 2005* (UK) pt 5A (repealed).
- 167 *Sex Discrimination Act 1975* (UK) s 76A(1) (repealed). Note also *Sex Discrimination Code of Practice (Public Authorities) (Duty to Promote Equality, Scotland) (Appointed Day) Order 2007* (UK) SI 1597.
- 168 *Equality Act 2010* (UK) ss 149(1), 153(1).
- 169 *Equality Act 2010* (UK) s 149(1).
- 170 United Kingdom Equality and Human Rights Commission, *The essential guide to the public sector equality duty: England (and non-devolved public authorities in Scotland and Wales)*, Guidance report, March 2022, p 8.
- 171 *Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017* (UK), SI 353,

regs 4, 5.

172 *Equality Act 2006* (UK) ss 11–13, 31.

173 *Equality Act 2006* (UK) s 23.

174 *Equality Act 2006* (UK) ss 30, 32.

175 *Equality Act 2006* (UK) s 30.

176 United Kingdom Equality and Human Rights Commission, *Publishing equality information: Commitment, engagement and transparency*, Report, 2012, p 3.

177 'Public Sector Equality Duty Case Studies', *United Kingdom Equality and Human Rights Commission*, web page. <www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-case-studies>

178 *Gender Equality Act 2020* (Vic) s 7; section 8 provides that the duty does not give rise to legal rights or any civil cause of action.

179 Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 9. At the time of writing this report, the Exposure Draft had not progressed to a Bill.

180 Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 31–32. Note: Compliance notices proposed under cl 26 do not apply to a breach of the public sector duty to promote disability inclusion. At the time of writing this report, the Exposure Draft had not progressed to a Bill.

181 Australian Government Human Rights and Equal Opportunity Commission, *An international comparison of the Racial Discrimination Act 1975*, Background Paper No 1, 2008, p 67.

182 Disability Discrimination Legal Service, Submission, 2 June 2022, SUB.100.02108, p 10.

183 See Box 4.2.6 'Access to interpreters and information to realise rights' in Chapter 2, referencing Transcript, Rebecca Adam, Public hearing 29, 25 October 2022, P-165 [44] – P-166 [9]. See also submissions of Counsel Assisting the Royal Commission following Public hearing 29, 21 December 2022, pp 28–31 [85–88].

184 Submissions of Counsel Assisting the Royal Commission following Public hearing 29, 21 December 2022, p 72 [239(a)].

185 Submissions by the Australian Government in response to Counsel Assisting's submissions in Public hearing 29, 7 February 2023, SUBM.0046.0003, p 5. See also submissions by the NSW Government in response to Counsel Assisting's submissions in Public hearing 29, 7 February 2023, SUBM.0046.0004, pp 2–4, setting out information about access to interpreters in New South Wales and pp 5–6, indicating that the New South Wales Government 'notes' the recommendation by Counsel Assisting; submissions by the State of Queensland in response to Counsel Assisting's submissions in Public hearing 29, 7 February 2023, SUBM.0046.0002, p 2, noting the Queensland Language Services Policy.

186 *Disability Discrimination Act 1992* (Cth) ss 5, 6.

187 Submissions of Counsel Assisting the Royal Commission following Public hearing 29, 21 December 2022, p 32 [100], reflecting on Transcript, Dominic Golding, Public hearing 29, 26 October 2022, P-192 [11–14], noting that there is 'systemic racism' and where people's 'language ability' was 'dismissed' or 'caused them to have more negative experiences'.

188 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5(3).

189 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 9(2)(e).

190 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 21 (b), (e).

191 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 29(a).

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

193 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 30(4).

194 See, for example, Transcript, Michelle Stark, Public hearing 29, 25 October 2022, P-146 [25–35].

195 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5(3).

196 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 9(1).

197 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515

- UNTS 3 (entered into force 3 May 2008), art 21(a).
- 198 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 29(a).
- 199 Committee on the Rights of Persons with Disabilities, *General comment no. 2 (2014) on Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014), [1].
- 200 *Disability Discrimination Act 1992* (Cth) ss 5–6, 24.
- 201 *Disability Discrimination Act 1992* (Cth) ss 11, 29A.
- 202 Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 9(2). At the time of writing this report, the Exposure Draft had not progressed to a Bill.
- 203 Note the National Human Rights Consultation Committee recommended Australian Government departments and agencies report on human rights compliance in their annual reports: National Human Rights Consultation Committee, *National Human Rights Consultation*, Report, September 2009, p xxxii [Recommendation 10].
- 204 See, for example, Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 11(1). At the time of writing this report, the Exposure Draft had not progressed to a Bill.
- 205 See, for example, *Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017* (UK) reg 5.
- 206 See, for example, *Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017* (UK) reg 4, sch 2.
- 207 *Letters Patent* (Cth), 4 April 2019 (as amended), (g).
- 208 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), annex.
- 209 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), annex.
- 210 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), annex, arts 21(1), 22(2), 24(1), 29(1), 46(2), 46(3).
- 211 *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ) quoting Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [49].
- 212 *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ).
- 213 *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, pp 67–68 [112], 77–78 [140]; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, pp 242–43 [64–66]; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(b). See also *Report of the International Law Commission*, UN GAOR, 73rd sess, Supp No 10, UN Doc A/73/10 (2018), p 14 [Conclusion 7(1)], [Conclusion 8].
- 214 *Jumbunna Coal Mine NL v Victoria Coal Miners' Association* (1908) 6 CLR 309, p 363; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, p 204 [37] (Gibbs CJ); *AMS v AIF* (1999) 199 CLR 160, [50] (Gleeson CJ, McHugh and Gummow JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, p 492 [29] (Gleeson CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247] (Kiefel J).
- 215 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, p 50 [179], noting *Brown v Lizars* (1905) 2 CLR 837, pp 860–61; *Chow Hung Ching v The King* (1948) 77 CLR 449, pp 477–78; *Kioa v West* (1985) 159 CLR 550, pp 570–71; *Dietrich v The Queen* (1992) 177 CLR 292, pp 305–06, 321, 348–49, 359–61; *Tajjour v New South Wales* (2014) 88 ALJR 860, [48]. See also Robert French, ‘Oil and water? International law and domestic law in Australia’, speech, The Brennan Lecture [Bond University], June 2009, pp 15–16.
- 216 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [383–88] (Gageler J). See also, in the context of an asserted duty to consider the *CRPD*, *Kassam v Hazzard* [2021] NSWSC 1320, [228] (Beech-Jones CJ).
- 217 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2019* (Qld) s 48(1); *Human Rights Act 2004* (ACT) s 30.
- 218 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 23–24, 247–253.
- 219 *Momcilovic v The Queen* (2011) 245 CLR 1.
- 220 *Momcilovic v The Queen* (2011) 245 CLR 1, p 22 [46] (French CJ), p 216 [539] (Crennan and

Kiefel JJ); *R v Momcilovic* [2010] VSCA 50, [101].

221 *R v Momcilovic* [2010] VSCA 50, [103].

222 Submissions of Counsel Assisting the Royal Commission following Public hearing 18,
14 December 2021, pp 42–43 [149–51].

223 See, for example, *International Covenant on Civil and Political Rights*, opened for signature
19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 4, 12(3), 18(3),
19(3), 21, 22(2); *International Covenant on Economic, Social and Cultural Rights*, opened for
signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 4.

224 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld)
s 13; *Human Rights Act 2004* (ACT) s 28.

225 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*,
Position paper, December 2022, pp 24–25, 254–56.

226 See, for example, *Pandemic (Quarantine, Isolation and Testing) Order 2021 (No. 2)* (Vic).
Clause 8 required people with a COVID-19 infection to self-isolate and cl 13 required close
contacts to self-quarantine.

227 *Equal Opportunity Act 2010* (Vic) s 4(1) defines ‘disability’ to include ‘the presence in the body of
organisms that may cause disease’. Personal association with a person with a disability is also a
protected attribute under the Act (s 6(q)). Direct discrimination occurs if a person treats a person
with a disability unfavourably because of that attribute (s 8(1)). *Charter of Human Rights and
Responsibilities Act 2006* (Vic) s 8(2) states that ‘[e]very person has the right to enjoy their human
rights without discrimination’. To give one example, in the Human Rights Statement accompanying
Pandemic (Quarantine Isolation and Testing) Order 2021 (No. 2) (Vic), the Victorian Minister
for Health stated ‘[i]n my opinion, the Order limits [the right to equality] because the restrictions
imposed by the Order can amount to unfavourable treatment on the basis of disability, or
association with a person with a disability ... by requiring people with the disability of infection with
COVID-19 to self-isolate ...’ (emphasis in original). See Victorian Government Minister for Health,
Human Rights Statement: Pandemic (Quarantine Isolation and Testing) Order 2021 (No. 2) (Vic),
30 December 2021, [52].

228 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

229 In Victoria, sections 165AP(2)(c) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) explicitly
required that an explanation of the nature of human rights limited by the Order be published.

230 Victorian Ombudsman, *Investigation into the detention and treatment of public housing residents
arising from a COVID-19 ‘hard lockdown’ in July 2020*, Investigation report, December 2020, p 167.

231 Victorian Ombudsman, *Investigation into the detention and treatment of public housing residents
arising from a COVID-19 ‘hard lockdown’ in July 2020*, Investigation report, December 2020,
p 179.

232 This list is consistent with that proposed in Australian Human Rights Commission, *Free and
Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 255.

233 Human Rights Committee, *General comment no. 29 (2001) on states of emergency (article 4)*,
UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001), [7], [11].

234 ‘Absolute rights: public sector guidance sheet’, *Australian Government Attorney-General’s
Department*, web page. <[www.ag.gov.au/rights-and-protections/human-rights-and-anti-
discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights](http://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights)>

235 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position
paper, December 2022, p 128. The ICESCR is the *International Covenant on Economic, Social
and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force
3 January 1976).

236 Kent Roach, *Remedies for human rights violations: A two-track approach to supra-national and
national law*, Cambridge University Press, 2021, p 4.

237 For example, the right to an effective remedy is contained in the *International Covenant on Civil
and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into
force 23 March 1976), art 2(3) and the *Convention against Torture and Other Cruel, Inhuman
or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465
UNTS 85 (entered into force 26 June 1987), art 14. The concept is also given expression in
the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for
signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 2 and
the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for

- signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 6.
- 238 Kent Roach, *Remedies for human rights violations: A two-track approach to supra-national and national law*, Cambridge University Press, 2021, p 13. See also Dinah Shelton, 'Meanings and Purposes of Remedies' in *Remedies in international human rights law*, 3rd edn, Oxford University Press, 2015, pp 13–31.
- 239 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4(1).
- 240 See, for example, Human Rights Committee, *General comment no. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [6].
- 241 Andrea Broderick, 'Article 4: General Obligations' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 116.
- 242 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 4(1)(a), (b), (c), (d), (e), (i). It has been noted in commentary that training of professionals is important in the context of the provision of remedies and sanctions and that, in its concluding observations to several States parties, the Committee on the Rights of Persons with Disabilities has recommended the provision of training to all departments dealing with remedies and sanctions under the *CRPD*, to ensure that persons with disabilities have information on lodging complaints and seeking remedies. See Andrea Broderick, 'Article 4: General Obligations' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 1st edn, Oxford University Press, 2018, p 130, citing as an example Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Italy*, 16th sess, UN Doc CRPD/C/ITA/CO/1 (6 October 2016), [8].
- 243 It should be noted that some academic commentary and some human rights bodies consider that the ultimate determination as to whether all appropriate measures have been taken would be one for the Committee on the Rights of Persons with Disabilities to make (a view that is likely to be contested by many nation states). See, for example, Andrea Broderick, 'Article 4: General obligations' in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A commentary*, 1st edn, Oxford University Press, 2018, p 120, citing Committee on Economic, Social and Cultural Rights, *General comment no. 3: The nature of States Parties' obligations, (Art 2, Para 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990), [8].
- 244 The Committee on Economic, Social and Cultural Rights has indicated that it understands the term 'appropriate means' in the *International Covenant on Economic, Social and Cultural Rights* to include the provision of judicial or other remedies, where appropriate, as well as 'administrative, financial, educational and social measures'. See Committee on Economic, Social and Cultural Rights, *General comment no. 3: The nature of States Parties' obligations (Art. 2, Para. 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990), [5–7].
- 245 Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018), [73(h)].
- 246 Committee on the Rights of Persons with Disabilities, *Guidelines on deinstitutionalization, including in emergencies*, UN Doc CRPD/C/5 (10 October 2022), [117].
- 247 Ian Ayres & John Braithwaite, *Responsive regulation: Transcending the deregulation debate*, Oxford University Press, 1992. See also Arie Freiberg, *Regulation in Australia*, Federation Press, 2017, p 443.
- 248 Ian Ayres & John Braithwaite, *Responsive regulation: Transcending the deregulation debate*, Oxford University Press, 1992, pp 35–36.
- 249 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 40, quoting Dominique Allen, 'Barking and biting: The Equal Opportunity Commission as an enforcement agency', (2016), vol 44 (2), *Federal Law Review*, p 311.
- 250 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 93.
- 251 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 3, item 8 (inserting new Division 4B ('Functions relating to systemic discrimination'), including s 35L(1) ('Functions of Commission relating to systemic discrimination') into the

Australian Human Rights Commission Act 1986 (Cth)).

252 See *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new ss 35F ('Giving of compliance notice'), 35J ('Enforcement of compliance notice'), and 35K ('Enforceable undertakings') into the *Australian Human Rights Commission Act 1986* (Cth)).

253 *Privacy Act 1988* (Cth) ss 28A, 33C.

254 *Privacy Act 1988* (Cth) ss 40(1), 40(2).

255 *Privacy Act 1988* (Cth) s 40A.

256 'About the OAIC', *Office of the Australian Information Commissioner*, web page. <www.oaic.gov.au/about-the-OAIC>

257 *Privacy Act 1988* (Cth) s 80V. This provision triggers part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

258 *Privacy Act 1988* (Cth) ss 52, 55A, 62.

259 *Privacy Act 1988* (Cth) s 80W. This provision triggers part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which creates a framework for using injunctions to enforce provisions.

260 *Privacy Act 1988* (Cth) s 80U. This provision triggers part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which creates a framework for the use of civil penalties to enforce civil penalty provisions.

261 People with Disability Australia, Submission in response to *Safeguards and quality issues paper*, 1 March 2021, ISS.001.00579, p 27.

262 Belinda Smith, 'It's about time – for a new regulatory approach to equality', (2008), vol 36 (2), *Federal Law Review*, p 132.

263 Transcript, Robin Banks, Public hearing 19, 22 November 2021, P-48 [46–47], P-49 [1–3].

264 Exhibit 19-1, 'Statement of Graeme Innes', 30 June 2021, at [55].

265 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, p 32 citing confidential submission No. 19.

266 Exhibit 11-11.04, IND.0028.0001.0075, p 10.

267 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, p 24.

268 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(h), 31(d).

269 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(n), 31(h).

270 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(aa), 11(1)(f), 31(b).

271 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20A, 31(b).

272 See *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new ss 35F ('Giving of compliance notice'), 35J ('Enforcement of compliance notice') and 35K ('Enforceable undertakings') into the *Australian Human Rights Commission Act 1986* (Cth)).

273 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(h).

274 Examples of statutory functions to issue guidelines include *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(n), 31(h) and *Equal Opportunity Act 2010* (Vic) s 148(1).

275 See, for example, *Equal Opportunity Act 2010* (Vic) s 149.

276 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 115, citing *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102.

277 Belinda Smith, 'How might information bolster anti-discrimination laws to promote more family-friendly workplaces?', (2014), vol 56 (4), *Journal of Industrial Relations*, pp 547–65.

278 See, for example, *Equal Opportunity Act 2010* (Vic) s 151.

279 'Send us an anonymous tip-off', *Fair Work Ombudsman*, web page. <www.fairwork.gov.au/workplace-problems/fixing-a-workplace-problem/report-an-issue-anonymously>

280 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 31(j).

281 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 40; *Human Rights Act 2019* (Qld) s 51; *Human Rights Act 2004* (ACT) s 36.

282 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f).

283 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 46.

- 284 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 35P.
- 285 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 21. See also *Fair Work Act 2009* (Cth) s 712.
- 286 See, for example *Australian Human Rights Commission Act 1986* (Cth) s 22. See also *Fair Work Act 2009* (Cth) s 712AE.
- 287 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 23. See also *Fair Work Act 2009* (Cth) ss 546, 712(3), 712(4), 712B.
- 288 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 115.
- 289 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 114.
- 290 *Acts Interpretation Act 1901* (Cth) s 2C.
- 291 *Privacy Act 1988* (Cth) s 80V.
- 292 *Fair Work Act 2009* (Cth) s 715.
- 293 *Competition and Consumer Act 2010* (Cth) s 87B.
- 294 *Australian Securities and Investments Commission Act 2001* (Cth) ss 93A, 93AA.
- 295 *Banking Act 1959* (Cth) s 18A; *Insurance Act 1973* (Cth) s 126; *Superannuation Industry (Supervision) Act 1993* (Cth) s 262A.
- 296 See *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new s 35K ('Enforceable undertakings') into the *Australian Human Rights Commission Act 1986* (Cth)).
- 297 The Australian Competition and Consumer Commission may accept a court-enforceable undertaking under the *Competition and Consumer Act 2010* (Cth) s 87B; 'Universal Pharmaceuticals Pty Ltd', *Australian Competition & Consumer Commission*, web page. <www.accc.gov.au/public-registers/undertakings-registers/universal-pharmaceuticals-pty-ltd>
- 298 Julian Gardner, *An Equality Act for a fairer Victoria: Equal Opportunity Review*, Final report, June 2008, [6.140].
- 299 See, for example, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new s 35F ('Giving of compliance notice') into the *Australian Human Rights Commission Act 1986* (Cth)).
- 300 See, for example, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new ss 35G ('Reconsideration of compliance notice') and 35H ('Review of compliance notice') into the *Australian Human Rights Commission Act 1986* (Cth)). Under section 96(1)(c) of the *Privacy Act 1988* (Cth), a respondent can apply to the Administrative Appeals Tribunal for review of a decision by the Information Commissioner to make a determination under sections 52(1) or (1A) of the Act.
- 301 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, [8], [20] (Deane, Dawson, Gaudron and McHugh JJ).
- 302 See, for example, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new s 35J ('Enforcement of compliance notice') into the *Australian Human Rights Commission Act 1986* (Cth)).
- 303 See, for example, *Fair Work Act 2009* (Cth) s 716; *National Disability Insurance Scheme Act 2013* (Cth) s 73ZM; *Paid Parental Leave Act 2010* (Cth) s 157; *Gender Equality Act 2020* (Vic) s 22; *AntiDiscrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 23 (inserting new ss 35F ('Giving of compliance notice') and 35J ('Enforcement of compliance notice') into the *Australian Human Rights Commission Act 1986* (Cth)).
- 304 *Acts Interpretation Act 1901* (Cth) s 2C.
- 305 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 121.
- 306 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 122.
- 307 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 46P(2).
- 308 *Australian Human Rights Commission Act 1986* (Cth) s 46PB.
- 309 *Australian Human Rights Commission Act 1986* (Cth) s 46PB.
- 310 Linda Steele & Kate Swaffer, *Reparations for harm to people living with dementia in residential aged care*, Project report, March 2023, pp 61–210.
- 311 See, for example, Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 104; 'Conciliation – how it works', *Australian Human Rights Commission*, web page. <humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>; National Mediator Standards Board, 'National Mediator

Accreditation Standards: Practice Standards', 2012, pp 8–10.

312 'How to make a complaint', *Commonwealth Ombudsman*, web page. <www.ombudsman.gov.au/complaints/how-to-make-a-complaint>

313 See, for example, Office of the United Nations High Commissioner for Human Rights, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020); Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04, (2011).

314 The Commonwealth Ombudsman can investigate any administrative action of a relevant entity. See *Ombudsman Act 1976* (Cth) s 5.

315 The Auditor-General 'may at any time conduct a performance audit' of relevant entities. See *Auditor-General Act 1997* (Cth) s 17.

316 Compliance with 'all applicable Australian laws' is part of the Australian Public Service Code of Conduct. See *Public Service Act 1999* (Cth) s 13(4).

317 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f).

318 *Australian Human Rights Commission Act 1986* (Cth) s 20A.

319 *Human Rights Act 1998* (UK) s 7; *Human Rights Act 2004* (ACT) s 40C; *Rights of Persons with Disabilities Act 2018* (Fiji) s 49(1); *Constitution Act 1982* (Canada) pt 1, s 24(1).

320 Disability Inclusion Bill (Exposure Draft) 2022 (Vic) cl 10. At the time of writing this report, the Exposure Draft had not progressed to a Bill.

321 *Carer Recognition Act 2010* (Cth) s 10.

322 See, for example, *Equal Opportunity Act 2010* (Vic) ss 15(4), 113(1)(a), 123(1)(a), pt 9; *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2, item 16 (inserting new s 35A ('Functions of Commission relating to positive duty in relation to sex discrimination') and item 23 (inserting new ss 35B ('Performance of inquiry function relating to positive duty in relation to sex discrimination'), 35C ('Commission to notify person and give opportunity for making of submissions'), 35F ('Giving of compliance notice') and 35K ('Enforceable undertakings')) into the *Australian Human Rights Commission Act 1986* (Cth).

323 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

324 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 46PP.

325 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 4.

326 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

327 *Human Rights Act 2019* (Qld) s 59(3).

328 *Human Rights Act 2004* (ACT) s 40C(4).

329 Michael Brett Young, *From commitment to culture: The 2015 review of the Charter of Human Rights and Responsibilities Act 2006*, Report commissioned by the Victorian Government, September 2015, p 132.

330 *Human Rights Act 1998* (UK) s 8; *Rights of Persons with Disabilities Act 2018* (Fiji) s 49(3); *Constitution Act 1982* (Canada) pt 1, s 24(1). While the *New Zealand Bill of Rights Act 1990* (NZ) does not make specific provision for remedies, the New Zealand Court of Appeal has held that compensation is available for breach of the human rights protected under that Act. See *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (Court of Appeal of New Zealand).

331 *Human Rights Act 1998* (UK) s 8(1).

332 *Human Rights Act 1998* (UK) s 8(3).

333 See, for example, *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, [41–46] (Lords Justices Waller, Richards and Hughes agreeing); *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [11–13] (Lords Reed, Neuberger, Mance and Kerr agreeing); *Josef (A Minor: Breach of Human Rights: Declaration: Damages: Costs)* [2020] NIFam 20, [23], [36–41] (Keegan J); *Re X, Y and Z (Damages – Inordinate Delay in Issuing Proceedings)* [2016] EWFC B44, [57–74] (Farquhar J); *Kent County Council v M and K (Section 20: Declaration and Damages)* [2016] EWFC 28, [6], [75–81] (Theis J DBE); *R (on the application of Aso Mohammed) v The Chief Constable of West Midlands Police* [2010] EWHC 1228, [23–45] (Wyn Williams J); *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 2493, [4–41], (Green J); *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWFC 38, [91] (Bellamy J); *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [34–62] (Sullivan J).

334 *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWFC 38, [91] (Bellamy J).

- 335 *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWFC 38, [82] (Bellamy J).
- 336 *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWFC 38, [45] (Bellamy J).
- 337 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin).
- 338 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [6].
- 339 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [11], [14].
- 340 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [19], [26].
- 341 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [34].
- 342 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [62].
- 343 See, for example, *Human Rights Act 1998* (UK) s 8(3).
- 344 National Human Rights Consultation Committee, *National Human Rights Consultation*, Report, September 2009, p xxxviii [Recommendation 31]; Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, p 272.
- 345 *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214.
- 346 Transcript, Robin Banks, Public hearing 19, 22 November 2021, P-48 [28–34]. See also Exhibit 19-3, ‘Statement of Melanie Schleiger’, 5 November 2021, at [67–68].
- 347 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 191.
- 348 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 191.
- 349 See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100.
- 350 Anti-Discrimination and Human Rights Legislation (Respect at Work) Bill 2022 (Cth) sch 5.
- 351 See, for example, Commonwealth, *Parliamentary debates*, Senate, 25 November 2022, p 2269 (Larissa Waters).
- 352 Letter from a group of experts to Attorney-General, Mark Dreyfus, and Minister for Women, Katy Gallagher, 4 November 2022.
- 353 Letter from a group of experts to Attorney-General, Mark Dreyfus, and Minister for Women, Katy Gallagher, 4 November 2022.
- 354 Minister for Women, Katy Gallagher, and Attorney-General, Mark Dreyfus, *Respect@work amendments*, media release, Canberra, 25 November 2022.
- 355 Minister for Women, Katy Gallagher, and Attorney-General, Mark Dreyfus, *Respect@work amendments*, media release, Canberra, 25 November 2022.
- 356 There is no direct cause of action included in the relevant provisions: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39 and *Human Rights Act 2019* (Qld) s 59.
- 357 See, for example, National Human Rights Consultation Committee, *National human rights consultation*, Report, September 2009, pp 51–63 [3.1]; comments by the Scrutiny of Acts and Regulations Committee (Parliament of Victoria), *Review of the Charter of Human Rights and Responsibilities Act 2006*, September 2011, pp 71–73.
- 358 See, for example, *Disability Discrimination Act 1992* (Cth) ss 5, 6, 11.
- 359 See, for example, *Civil Liability Act 1936* (SA) s 31.
- 360 See, for example *Work Health and Safety Act 2011* (Cth) s 19.
- 361 See, for example, National Human Rights Consultation Committee, *National human rights consultation*, Report, September 2009, p 333.
- 362 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(a).
- 363 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B).
- 364 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(3A).
- 365 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2019* (Qld) s 59.
- 366 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).
- 367 Michael Brett Young, *From commitment to culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Report commissioned by the Victorian Government, September 2015, p 119, citing Jeremy Gans, ‘The Charter’s Irremediable Remedies Provision’, (2009), vol 33, *Melbourne University Law Review*, pp 105–31 and *Director of Housing v Sudi* (2011) 33 VR 559, [214] (Weinberg JA).
- 368 Michael Brett Young, *From commitment to culture: The 2015 review of the Charter of Human Rights and Responsibilities Act 2006*, Report commissioned by the Victorian Government,

September 2015, p 133 [Recommendation 27(a)].

369 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), art 8(1)(a).

370 Submissions of Counsel Assisting the Royal Commission following Public hearing 18,
14 December 2021, p 116 [424].

371 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), art 8.

372 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), art 8.

373 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g).

374 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(h).

375 *Australian Constitution* s 51(xxix).

376 See, for example, submissions of Counsel Assisting the Royal Commission following Public
hearing 18, 14 December 2021, p 72 [245].

377 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
UNTS 3 (entered into force 3 May 2008), art 4(5).

378 For further detail, see Australian Government Solicitor, *Report on the key elements of the
legislative framework affecting people with disability*, Report prepared for the Royal Commission
into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020.

379 See, for example, *Disability Inclusion Act 2014* (NSW); *Ageing and Disability Commissioner
Act 2019* (NSW); *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW);
National Disability Insurance Scheme (Worker Checks) Act 2018 (NSW); *Disability Act 2006* (Vic);
Disability Service Safeguards Act 2018 (Vic); *Guardianship and Administration Act 2019* (Vic);
Disability Services Act 2006 (Qld); *Guardianship and Administrative Act 2000* (Qld); *Disability
Inclusion Act 2018* (SA); *Ageing and Adult Safeguarding Act 1995* (SA); *Guardianship and
Administration Act 1993* (SA); *Disability Services Act 1993* (WA); *Health and Disability Services
(Complaints) Act 1995* (WA); *Guardianship and Administration Act 1990* (WA); *Disability Services
Act 2011* (Tas); *Registration to Work with Vulnerable People Act 2013* (Tas); *Guardianship
and Administration Act 1995* (Tas); *Disability Services Act 1993* (NT); *Health and Community
Services Complaints Act 1998* (NT); *National Disability Insurance Scheme (Worker Clearance)
Act 2020* (NT); *Disability Services Act 1991* (ACT); *Official Visitor Act 2012* (ACT); *Human
Rights Commission Act 2005* (ACT); *Working with Vulnerable People (Background Checking)
Act 2011* (ACT).

380 *Guardianship Act 1987* (NSW); *Medical Treatment Planning and Decisions Act 2016* (Vic);
Guardianship and Administration Act 2019 (Vic); *Guardianship and Administration Act
2000* (Qld); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Guardianship and
Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship and
Administration Act 1995* (Tas); *Advance Personal Planning Act 2013* (NT); *Guardianship of Adults
Act 2016* (NT); *Emergency Medical Operations Act 1973* (NT); *Guardianship and Management of
Property Act 1991* (ACT).

381 *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination
Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA);
Anti-Discrimination Act 1998 (Tas); *Anti-Discrimination Act 1992* (NT); *Discrimination Act
1991* (ACT).

382 *Mental Health Act 2007* (NSW); *Mental Health and Wellbeing Act 2022* (Vic); *Public Health Act
2005* (Qld); *Mental Health Act 2016* (Qld); *Mental Health Act 2009* (SA); *Mental Health Act 2014
(WA)*; *Mental Health Act 2013* (Tas); *Mental Health and Related Services Act 1998* (NT); *Mental
Health Act 2015* (ACT).

383 *Health Care Complaints Act 1993* (NSW); *Health Complaints Act 2016* (Vic); *Health Ombudsman
Act 2013* (Qld); *Health and Community Services Complaints Act 2004* (SA); *Health and Disability
Services (Complaints) Act 1995* (WA); *Health Complaints Act 1995* (Tas); *Health and Community
Services Complaints Act 1998* (NT); *Human Rights Commission Act 2005* (ACT).

384 *Ombudsman Act 1974* (NSW); *Ombudsman Act 1973* (Vic); *Ombudsman Act 2001* (Qld);
Ombudsman Act 1972 (SA); *Parliamentary Commissioner Act 1971* (WA); *Ombudsman Act 1978
(Tas)*; *Ombudsman Act 2009* (NT); *Ombudsman Act 1989* (ACT).

385 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld);
Human Rights Act 2004 (ACT).

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- 386 *Human Rights Act 2004* (ACT) s 40C.
- 387 Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020.
- 388 *Australian Constitution* s 51(xxix).
- 389 *Racial Discrimination Act 1975* (Cth) s 9(1).
- 390 The constitutional validity of the *Racial Discrimination Act 1975* (Cth) was upheld by the High Court of Australia in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- 391 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.
- 392 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, p 66 (Rich J), p 70 (Starke J).
- 393 *Australian Constitution* s 109.
- 394 *Racial Discrimination Act 1975* (Cth) s 6A.
- 395 See *Age Discrimination Act 2004* (Cth) s 12(3); *Sex Discrimination Act 1984* (Cth) s 10(3).

Temperance*

‘My university experience was like everything I had experienced, plus more, on steroids, the worst yet.’

Temperance, mid-30s, has a vision impairment, attention deficit hyperactivity disorder, scotopic sensitivity syndrome, photophobia and anxiety.

In high school, Temperance had to constantly remind teachers to provide reasonable adjustments. She had to organise and chase up materials in accessible formats, always ‘on catch-up’ with the information. She told the Royal Commission she found it ironic the school expected a person with executive function issues to organise, sequence and plan their own learning materials.

Temperance’s first time at university was an ‘okay experience from an accessibility perspective ... not perfect ... but it was a lot better’. In gaining her second degree, however, she experienced abuse ‘on a daily basis’.

Prior to commencing, Temperance gave the university comprehensive information about her disabilities and the reasonable adjustments she needed. She required a screen reader and extra time to prepare for lectures and take exams. She also required lecturers to provide slides, handouts and exams in electronic format in advance so she could read the material using adaptive technology and software.

The university agreed but required Temperance to register for reasonable adjustments each semester, even though her disability is permanent. The university also required her to speak to her lecturers in person and explain her disability and the reasonable adjustments she needed. Temperance ‘struggled a bit’ turning up and introducing herself as ‘the student with a disability’ and ‘hoping they respect that’. She said most of the time they did. ‘But I was an inconvenience a lot of the time, too.’

Nonetheless, most of the time lecturers ‘forgot’ to provide the material in an accessible format beforehand. The lecturer would hand out printed notes and suggest Temperance email them after the lecture and ‘remind them’ to send an electronic copy. She got sick of hearing, ‘Oops, sorry. I forgot ... Oh, you’ll have to sit this one out and do it on your own later.’

'I wasn't able to learn. I wasn't able to participate and do what everyone else was doing.'

Some lecturers told her they were trying 'to save [her] from finding out the hard way' she wouldn't be able to work as a medical professional. At one meeting a staff member asked, 'Should she really be at university with a disability?' Temperance pointed out as it was her second degree, 'it is possible'.

Sometimes the university paid other students to take notes for Temperance. These students were not trained to take notes and the notes often weren't good. Temperance was eventually able to hire a professional note taker. Some lecturers assumed the note taker was her assistant and could organise the reasonable adjustments.

'I had to complain. I had to drive the complaint. I had to take flak for the complaints ... I just became this problem they needed to get rid of and deal with.'

Temperance's mental health deteriorated. She couldn't go to class and was 'shaking and crying'. She started seeing a university counsellor. Around this time Temperance made a complaint to an anti-discrimination commission. '[The university] played a very dirty game,' she said. They questioned her disability and refused to engage or comply. She believes the commission 'either doesn't have powers or doesn't use them'.

When the counselling service handed over Temperance's treatment notes to the university without her consent, it was 'the final straw'. She took the university to court, seeking an apology and for the university to change their processes. The university dragged the matter out for more than 12 months.

'[I was] shocked at the level of games they were playing and how hard they were working to cost me more.'

Eventually Temperance could no longer bear the financial and emotional costs. She settled and signed a non-disclosure agreement.

'I was discriminated against. I had evidence that I was discriminated against. I was not provided an appropriate justice process that did not cost money. And then I was the one who was silenced.'

* This is a de-identified narrative of an experience shared with us in a submission or private session. The person who shared their experience was not a witness. They did not give evidence, take an oath or give an affirmation. Nothing in this narrative represents a finding of the Royal Commission and any views expressed are those of the person, not of the Royal Commission.

4. Strengthening the Disability Discrimination Act

Key points

- The *Disability Discrimination Act 1992* (Cth) (*DDA*) has not achieved its objectives.
- The *DDA* needs to be simple, clear and effective. The definitions of direct discrimination and indirect discrimination need to be simplified.
- The *DDA* needs to better protect and enhance the rights of people to live free from harassment and vilification.
- The *DDA* can do more to promote substantive equality with the introduction of a positive duty to eliminate discrimination, harassment and victimisation and a standalone duty to make adjustments for a person with disability.
- Some defences and exemptions to the *DDA* should be repealed or revised to align with the *Convention on the Rights of Persons with Disabilities*.
- The mechanisms for enforcing rights under the *DDA* need to be clear and more person-centred.

4.1. Introduction

Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.¹

Equality and freedom from discrimination are fundamental human rights.² People with disability experience discrimination in many settings at higher rates than people without disability.³ Many people who shared their stories with us through submissions and private sessions told us about their experiences of discrimination in different settings and contexts.

When the *Disability Discrimination Act 1992* (Cth) (*DDA*) was enacted in 1992, people with disability and their advocates held high expectations the *DDA* would ‘unfurl skeins of change’ for Australian disability rights.⁴ These expectations have not been realised. The *DDA* needs to be refreshed and reformed to more effectively promote equality and greater inclusion of people with disability.

In Chapter 2, ‘Australia’s current implementation of disability rights’, we provided a brief overview of the *DDA*. This chapter considers the *DDA* in more detail. We begin by considering how the *DDA* has operated over its 30 year life-span. We then consider its current operation and focus on particular areas where the *DDA* could be more effective, better implement the *Convention on the Rights of Persons with Disabilities* (*CRPD*), enhance the rights of people with disability to live free from discrimination and promote equality.

This chapter focuses on proposed reforms to the *DDA*. The chapter addresses:

- the introduction of the *DDA* in 1992 and the main changes to the Act over the past 30 years
- simplifying the definitions of discrimination and reasonable adjustments
- incorporating positive duties to eliminate discrimination, harassment and victimisation and better use of action plans
- expanding protections against harassment and vilification
- reconsidering the scope of some exemptions and defences
- examining the disability standards made under the *DDA*.

We consider other issues regarding the *DDA* in other volumes, including:

- In Volume 6, *Enabling autonomy and access*, we consider principles of universal accessibility in the context of the health system.
- In Volume 7, *Inclusive education, employment and housing*, we discuss disability standards relating to education and access to premises; examine inherent requirements; and address the relationship between the *DDA* and the *Fair Work Act 2009* (Cth) (*FWA*).
- In Volume 8, *Criminal justice and people with disability*, we recommend the *DDA* should be amended to expressly cover police provision of ‘services’ to people with disability.

We recognise the *DDA* is part of a suite of Commonwealth anti-discrimination laws and that proposed amendments to the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) with respect to how discrimination complaints are managed and proceedings conducted in court may have implications for the other Commonwealth anti-discrimination laws. We have therefore given careful consideration to the Australian Human Rights Commission’s position paper *Free and Equal: A reform agenda for federal discrimination laws* (*Free and Equal*).⁵

4.2. Development of disability discrimination laws

States and territories

South Australia, New South Wales and Victoria enacted disability discrimination laws prior to the *DDA*.

In 1981, South Australia enacted the *Handicapped Persons Equal Opportunity Act 1981* (SA), which applied to people with physical disability. It made discrimination unlawful in a range of areas such as employment and education.⁶ People with physical disability could pursue their rights in the Handicapped Persons Discrimination Tribunal.⁷

The *Anti-Discrimination Act 1977* (NSW) was amended in 1981 to include discrimination on the ground of ‘physical impairment’⁸ and again in 1982 to include ‘intellectual impairment’.⁹ In 1982, the *Equal Opportunity Act 1977* (Vic) was amended to introduce ‘impairment’ as a ground of discrimination.¹⁰

By the end of 1998, all jurisdictions had enacted disability discrimination laws.¹¹ We briefly refer to the anti-discrimination laws of the states and territories in Chapter 2 of this volume. We do not repeat the discussion here except to note two recent reviews in Western Australia and Queensland.¹² These reviews recommended amendments to respective state discrimination laws to introduce a positive duty to eliminate discrimination. The proposed amendments are similar to reforms we propose to the *DDA*.

National laws

In 1981, the *Human Rights Commission Act 1981* (Cth) established the national Human Rights Commission (HRC).¹³ The HRC could inquire into any act or practice that may have been inconsistent with, or contrary to, any human right.¹⁴ The ‘human rights’ referred to in the Act included those set out in the *United Nations Declaration on the Rights of Mentally Retarded Persons* (UNDRMRP) and the *United Nations Declaration on the Rights of Disabled Persons* (UNDRDP).¹⁵ The HRC conducted research and published discussion papers and reports examining the human rights of people with disability.¹⁶

In 1985, the Australian Government initiated the Handicapped Programs Review, the first national consultation with people with disability, their families and service providers. The *New Directions: Report of the Handicapped Programs Review* recommended the Commonwealth Attorney-General and the HRC consider including the rights of people with disability in a proposed national bill of rights; the immediate appointment of a disability discrimination commissioner; and the introduction of anti-discrimination legislation at a Commonwealth level covering the rights of people with intellectual, physical or psychiatric disabilities.¹⁷

In 1986, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) was enacted. The Human Rights and Equal Opportunity Commission (HREOC) replaced the HRC, but continued to exercise powers to inquire into any act or practice that may have been

inconsistent with or contrary to any human right,¹⁸ by reference to the *UNDRMRP* and the *UNDRDP*.¹⁹ By 1989, HREOC had the power to inquire into discrimination on the ground of 'impairment'²⁰ in employment.²¹

In 1990 the Australian Government received a number of reports supporting the introduction of national disability discrimination laws.²²

Disability Discrimination Act 1992 (Cth)

In late 1992, the Disability Discrimination Bill 1992 (Cth) (DDA Bill) was introduced into the Australian Parliament. The DDA Bill was described as:

the vision [for] a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights.²³

Some acknowledged the DDA Bill represented 'a very positive and significant step forward for Australians with disabilities'. However, others considered the DDA Bill did 'not go far enough in protecting and advancing the rights of people with disabilities' and was 'nowhere near as good as it could have been'.²⁴

On 5 November 1992, the *DDA* received Royal Assent and its first parts came into effect. By 1 March 1993, the remaining provisions had commenced operation.

When the *DDA* was enacted it defined 'disability' expansively to include a wide range of disabilities and also to include past, present, future and imputed disability.²⁵

The *DDA* made discrimination unlawful in the areas of:

- work²⁶
- education²⁷
- access to premises²⁸
- provision of goods, services and facilities²⁹
- provision of accommodation³⁰
- land³¹
- membership of clubs and unincorporated associations³²
- participation in sport³³
- the administration of Commonwealth laws and programs.³⁴

The *DDA* defined 'discrimination' to include 'direct disability discrimination' and 'indirect disability discrimination'. The definitions have since been amended. We outline the current definitions and how the *DDA* operates below.

Disability Discrimination Commissioner

The *DDA* also established the office of the Disability Discrimination Commissioner.³⁵

The Disability Discrimination Commissioner's functions included promoting awareness of the *DDA*, publishing guidelines, reviewing and reporting on enactments concerning the rights of people with disability, and intervening, with a court's leave, in cases involving issues of disability discrimination.³⁶

When the *DDA* commenced, the Disability Discrimination Commissioner was required to inquire into complaints about disability discrimination. Complaints could be made by individuals or on behalf of individuals who were 'aggrieved' by an act of discrimination.³⁷ The Disability Discrimination Commissioner could decline to inquire into some complaints for particular reasons set out by the *DDA*,³⁸ but otherwise conciliated the complaints.³⁹ If the Disability Discrimination Commissioner could not resolve a complaint by conciliation, the complaint was referred to HREOC to conduct an 'inquiry' (generally done by holding a hearing).⁴⁰

HREOC's hearings (1992–2000)

HREOC conducted public hearings across Australia into complaints lodged under all the Commonwealth anti-discrimination laws, including the *DDA*. The Attorney-General appointed part-time hearing commissioners to conduct the HREOC hearings.⁴¹ The hearing commissioners were generally retired judges or senior members of the legal profession, but also included lay people.

HREOC was not a court and its hearings did not have the formality of court proceedings. The parties at a hearing were the complainant (the person making the complaint) and the respondent (the person alleged to have engaged in the discrimination).⁴² The parties were generally expected to appear for themselves, although a person with disability could be represented by an agent,⁴³ and parties could apply to be legally represented.⁴⁴ However, HREOC could not make costs orders. Consequently, parties had to bear their own costs. The rules of evidence did not apply. If HREOC decided a complaint was substantiated it could determine a range of remedies in favour of the complainant, including damages by way of compensation.

However, HREOC's determinations were not 'binding or conclusive' between the parties.⁴⁵ HREOC could not enforce its determinations.

Shortly after the *DDA* was enacted and before it commenced, amendments were made to the *DDA* to assist parties enforce HREOC decisions with respect to individuals, corporations⁴⁶ and Australian Government agencies.⁴⁷ For respondents (other than Australian Government agencies), the *DDA* required HREOC to lodge its determination in the registry of the Federal Court of Australia (Federal Court) as soon as practicable after the determination was made. Upon registration of a determination, it became binding on the parties and had effect as if HREOC's determination was a Federal Court order, subject to the respondent initiating any review.⁴⁸ As discussed below, in 1995 the High Court of Australia decided these provisions were unconstitutional and invalid.⁴⁹

HREOC made over 50 determinations following hearings into complaints of disability discrimination.⁵⁰ HREOC's determinations during this period considered a wide range of issues concerning the lives of people with disability and many addressed systemic issues.

One of HREOC's first public hearings into disability discrimination under the *DDA* was *Scott and Disabled Peoples International (Aust) Ltd v Telstra Corporation Ltd*.⁵¹ Disabled People's International Australia lodged a representative complaint against Telstra on behalf of all Australians who were Deaf or had profound hearing loss, alleging discrimination in the provision of telecommunication services. At the hearing before HREOC, Disabled People's International Australia argued Telstra should provide a tele-typewriter for its Deaf customers in the same way it provided hearing subscribers with a standard telephone headset.⁵² HREOC found Telstra's failure to provide services accessible to customers who were Deaf or had profound hearing loss was indirect discrimination in the provision of services, in breach of section 24 of the *DDA*.⁵³ HREOC determined that Telstra should pay \$600 to purchase a tele-typewriter for each class member who did not qualify for one under another scheme.⁵⁴

Discrimination in schools was often raised in complaints lodged with the Disability Discrimination Commissioner. In *Finney v The Hills Grammar School*, HREOC found the school's refusal to enrol Scarlett Finney was direct discrimination in breach of section 22(1) of the *DDA*.⁵⁵ Scarlett lived with spina bifida. She used a wheelchair and required assistance with personal care at school. HREOC rejected the school's claim that Scarlett's enrolment would impose unjustifiable hardship if it had to accommodate her needs and make modifications to school grounds and buildings.⁵⁶ HREOC determined the school should pay damages of \$37,628 for Scarlett's loss of educational opportunities and \$5,000 for hurt and humiliation.⁵⁷ The school's application for judicial review to the Federal Court was dismissed.⁵⁸

*Maguire v Sydney Organising Committee for the Olympic Games (SOCOG)*⁵⁹ concerned the 2000 Sydney Olympic Games. Mr Maguire lodged a complaint alleging the SOCOG ticketing systems were inaccessible to blind and vision impaired people and this constituted unlawful discrimination. HREOC rejected SOCOG's claim that modifications to its ticketing systems to make the system accessible for blind and vision impaired people would impose an unjustifiable hardship on it.⁶⁰ HREOC found SOCOG had discriminated in breach of the *DDA* and determined SOCOG should make changes to the ticketing system to make it accessible.

Mr Maguire was not satisfied with SOCOG's actions in response to the HREOC determination and lodged a further complaint. At a subsequent hearing, HREOC found SOCOG had only partially complied with its determination that SOCOG should make its website accessible. HREOC determined SOCOG should compensate Mr Maguire with a payment of \$20,000 for the hurt he suffered.⁶¹

A review of HREOC's determinations reveal many complainants with disability succeeded following a hearing. Some hearings resulted in significant awards of compensation.⁶² Two of HREOC's determinations culminated in appeals to the High Court from decisions of the Full Court of the Federal Court following applications of judicial review. The High Court's decisions in those cases have governed the interpretation of the *DDA* over more than two decades.

The first case was *X v Department of Defence*.⁶³ Mr X alleged the Australian Defence Force (ADF) discriminated against him in employment when the ADF discharged him after he tested positive for human immunodeficiency virus (HIV) on the post entry medical check. The ADF argued it was lawful to discharge Mr X because he was unable to perform the inherent requirements of his employment.

HREOC determined Mr X could perform the inherent requirements of his employment because he was able to execute the tasks or skills of a soldier, irrespective of where he was located or deployed.⁶⁴ HREOC found the ADF had breached the *DDA*. The ADF sought judicial review of the decision in the Federal Court. HREOC's determination was confirmed by a single Judge of the Federal Court.⁶⁵ An appeal from that decision to the Full Court of the Federal Court overturned the HREOC's determination.⁶⁶ The Full Court held HREOC had erred in law by taking an unduly narrow approach to assessing whether Mr X could perform the inherent requirements of his role. The Full Court considered that a person could not perform the inherent requirements of a position unless that person could do the work required safely.⁶⁷

Mr X was granted special leave to appeal to the High Court, but his appeal was dismissed.⁶⁸ The High Court decided a person's ability to perform the inherent requirements of a particular employment was not dependent simply on an ability to perform particular tasks. It also required consideration about the context of the work and specifically the employee's ability to perform the tasks safely.⁶⁹ Mr X could not perform the inherent requirement of the particular employment because his disability would expose other employees to a real risk to health and safety or injury because he was HIV positive.⁷⁰ The High Court's decision continues to be the leading authority on 'inherent requirements' and the employment of people with disability.⁷¹

The second case was *Purvis obo Hoggan v New South Wales (Department of Education and Training) (Purvis)*.⁷² While the events occurred in the 1990s, the factual background in *Purvis* reflects many of the themes we have heard in the submissions, private sessions and public hearings concerning disability discrimination in education. The case concerned Daniel Hoggan, who lived with disabilities including intellectual disability, visual difficulties and epilepsy resulting from a severe brain injury he sustained as an infant.⁷³

Daniel wanted to attend his local mainstream high school, starting in 1997.⁷⁴ His initial enrolment application was refused. Daniel's parents appealed through the Department of Education's processes and also made a complaint to HREOC. Following conciliation, it was agreed the Department would 'communicate its decision regarding Daniel's enrolment by 21 February 1997'.⁷⁵

The school's staff, through the Teachers' Federation, opposed Daniel's enrolment. At a staff meeting, 49 teachers voted in favour of a motion 'condemning the Department for placing the staff and Principal in the predicament of making a decision on enrolment without the necessary information'. The motion also disapproved of additional funding being granted for Daniel when a 'special unit' was already in existence at another high school. No teacher voted against the motion and two abstained.⁷⁶

Notwithstanding the teachers' motion, the school accepted Daniel's enrolment and he started high school on 8 April 1997. The school developed a welfare and discipline policy specifically for Daniel. At school, Daniel was supported by two teacher's aides. Between 24 April 1997 and 18 September 1997, Daniel was suspended five times because of his behaviour, which included kicking other students and teacher's aides. The school said this behaviour was inconsistent with Daniel's welfare and discipline policy.⁷⁷

Following Daniel's final suspension, the school proposed he should be educated at home, with the support of the teacher's aides. Daniel would be permitted to join sports lessons and school excursions and a social group or circle of friends would be established to meet with Daniel on a regular basis. Daniel's parents were encouraged to move Daniel to the special unit at another high school. Daniel's parents did not agree to these proposals. They wanted Daniel to attend a mainstream high school.⁷⁸

By December 1997 the Principal decided to exclude Daniel permanently, citing health and safety concerns. The Principal decided Daniel could not operate in a regular high school environment. The Principal said Daniel's 'behaviour was a factor, but it was not the only factor' in making the decision to exclude him.⁷⁹ Daniel was 13 years old.

Daniel's parents made another complaint to HREOC. The complaint could not be conciliated and was referred to a hearing. Between May and November 1999, HREOC conducted the hearing over 23 days.

One of the key issues in *Purvis* was whether Daniel's disability, for the purposes of the *DDA*, included behavioural manifestations. An expert witness at the HREOC hearing described Daniel's behaviours in the following way:

Daniel, like a lot of children, a lot of people in his circumstances, has enormous difficulties with communication so that they don't have access to the same ways that we have of communicating. Quite often their behaviour – his behaviour quite often is a way of expressing himself, particularly when he's finding it very difficult and very emotional, so rather – and it may well appear to us to be inappropriate.

He acts without a view of consequences or an intent on the behaviour, so he is more prone to strike out, to become – it's probably as a last resort. Initially he may withdraw. As he becomes frustrated he may start talking to himself, he may start sort of using offensive words, to isolate himself or – he may isolate himself and use offensive words – become aggressive and push somebody away, strike out at somebody who is not involved, all as a sense of not being able to articulate what the problem is that he's having with his feelings.⁸⁰

In November 2000, HREOC found the Department of Education's decisions to suspend and exclude Daniel discriminated against him, in breach of the *DDA*. The Commissioner found:

Whilst Daniel's inappropriate behaviour cannot be condoned, I accept the submission of the complainant that it must be considered in its context. I agree that

‘the use of a pejorative term such as “violence” was and is not appropriate to describe the behaviour of a child whose behaviour stems from an illness which had caused an injury to his brain.’ A policy intended as a behaviour management strategy in the welfare sense became a vehicle for a form of punishment. By inflexibly following a behaviour-consequence approach, rather than attempting to manage the behaviour, Daniel’s behaviour (which was a symptom of his disability) was being punished.⁸¹

The Department of Education sought judicial review of HREOC’s determination. The Federal Court overturned HREOC’s determination.⁸² Daniel’s parents appealed to the Full Court of the Federal Court⁸³ and then to the High Court.⁸⁴ These appeals were unsuccessful. The High Court delivered its decision in November 2003. Daniel was then 19 years of age.

The High Court’s decision in *Purvis* raised important issues about the *DDA*, including the definition of ‘disability’, the elements of direct discrimination and the duty to accommodate a person with disability. The High Court confirmed the definition of ‘disability’ for the purposes of the *DDA* included ‘the behavioural manifestations’ of a disability.⁸⁵ A majority of the judges confirmed there was nothing in the *DDA* to support the claim that a failure to provide different accommodation or services for a person with disability constitutes ‘less favourable treatment’ of the person for the purpose of section 5 of the *DDA*.⁸⁶ The judges had different views about how ‘direct discrimination’ in section 5(1) of the *DDA* should be interpreted and applied. On this issue, the decision of the majority of the judges has been criticised because it has limited the way the *DDA* operates. We discuss this further below. The High Court’s decision in *Purvis* continues to be the leading authority on direct discrimination under the *DDA*.

Brandy and subsequent reforms

In December 1993, HREOC made a determination that Mr Brandy (among others) had engaged in unlawful race discrimination and he should apologise and pay \$2,500 to the complainant, Mr Bell.⁸⁷ The determination was registered in the Federal Court. Mr Brandy challenged the process, arguing it was unconstitutional.

In 1995, the High Court decided in *Brandy v Human Rights and Equal Opportunity Commission* that for constitutional reasons, the registration of HREOC’s determinations in the Federal Court could not operate to make HREOC’s determinations binding or conclusive on the parties.⁸⁸

This decision resulted in significant legislative changes to the functions and powers of HREOC. The Disability Discrimination Commissioner could no longer inquire into or conciliate complaints and HREOC was no longer empowered to hold hearings or make binding decisions on complaints.⁸⁹ The Commission was also later renamed the Australian Human Rights Commission (AHRC).⁹⁰

Since April 2000, the President of the Commission has been responsible for investigating and conciliating all complaints of ‘unlawful discrimination’, which includes complaints of disability discrimination under the *DDA*.⁹¹ If a complaint cannot be resolved through conciliation, the President must terminate the complaint.⁹² After termination, a complainant may commence a

proceeding seeking relief in either the Federal Circuit and Family Court of Australia⁹³ or the Federal Court.⁹⁴ These are judicial proceedings and the usual court procedural rules and the *Evidence Act 1995* (Cth) apply. The court may order an unsuccessful party to pay the successful party's costs of the proceedings.⁹⁵

Decisions of single Judges of the Federal Circuit and Family Court of Australia or the Federal Court can be appealed. The pathways on appeal vary, but a decision of a single Judge of the Federal Court, for example, will ordinarily be heard by the Full Federal Court consisting of three Judges. An appeal from the Full Federal Court can be made to the High Court, but only if the High Court grants special leave to appeal.

Since 2000, only six appeals have resulted in successful outcomes for persons with disability⁹⁶ and only two have resulted in compensation being awarded to the complainant.⁹⁷ At the time of writing this report, the High Court had not heard an appeal involving the *DDA* since *Purvis*.⁹⁸ Since 2010, there have been six applications for special leave to appeal to the High Court, five of which were filed by the complainants.⁹⁹ All applications for special leave to appeal have been refused.¹⁰⁰

Recent amendments to the *DDA*

There have been few substantive amendments to the *DDA* since 1994. The most significant amendments occurred in August 2009 in response to the High Court's decision in *Purvis*, following the Productivity Commission's *Review of the Disability Discrimination Act 1992* in 2004,¹⁰¹ and in consideration of Australia's ratification of the *CRPD* in July 2008.¹⁰²

The Productivity Commission examined whether the *DDA* had achieved its stated objectives, including any success in promoting community recognition and acceptance of the rights of people with disability.¹⁰³ It found the *DDA* 'appears to have contributed to improvements in community awareness of disability issues and attitudes towards people with disabilities, but there [is] scope for further improvement'.¹⁰⁴ The Productivity Commission made 32 recommendations for amendments or actions in relation to the *DDA*.

The Australian Government accepted 26 of those recommendations either in full, in part or in principle.¹⁰⁵ It rejected the remaining recommendations, included those relating to:

- a no-costs model for disability discrimination proceedings¹⁰⁶
- allowing disability organisations with a 'demonstrated connection to the subject matter of a complaint' to initiate complaints in their own right.¹⁰⁷

2009 amendments

The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) made a number of key changes to the *DDA*. The amendments:

- explicitly recognised the *CRPD*¹⁰⁸

-
- provided that refusal to make ‘reasonable adjustments’ for people with disability can amount to discrimination¹⁰⁹
 - extended the defence of ‘unjustifiable hardship’ and identified matters to be considered when determining whether adjustments imposed unjustifiable hardship¹¹⁰
 - imposed the onus of proving unjustifiable hardship on the person seeking to rely on this defence¹¹¹
 - clarified the meaning of the ‘inherent requirements’ of particular work¹¹²
 - extended the definition of disability to include genetic predisposition to a disability and behaviour that is a symptom or manifestation of a disability¹¹³
 - rewrote the provisions on associates, carers, assistance animals and disability aids¹¹⁴
 - shifted the onus of proving a requirement or condition is reasonable (in the context of indirect discrimination) from the complainant to the alleged discriminator (the respondent)¹¹⁵
 - extended the power to make disability standards for all areas under the *DDA*.¹¹⁶

In December 2022, the *DDA* was amended to include section 58A.¹¹⁷ It is a new provision to work with section 42 of the *DDA* to make victimisation unlawful, in response to a long-standing debate about the Federal Court’s jurisdiction to deal with the criminal offence of victimisation.¹¹⁸

4.3. The *DDA* 30 years on

Current operation of the *DDA*

The *DDA* continues to make discrimination on the ground of disability unlawful in the areas of:

- work¹¹⁹
- education¹²⁰
- access to premises¹²¹
- provision of goods, services and facilities¹²²
- provision of accommodation¹²³
- land¹²⁴
- membership of clubs and unincorporated associations¹²⁵
- participation in sport¹²⁶
- the administration of Commonwealth laws and programs.¹²⁷

In each of these areas, the *DDA* describes the type of conduct, actions or decisions which will constitute discrimination. For example, in the area of employment it is unlawful to discriminate

in all stages from recruitment, the terms and conditions of employment, access to opportunities for promotion, transfer or training or to any other benefits associated with employment, by dismissing the employee or by subjecting the employee to any other detriment.¹²⁸

The scope of the *DDA* is not limited to Australian Government agencies or public bodies. It imposes obligations on individuals, corporations, partnerships, associations and state and territory governments. The *DDA* operates concurrently with state and territory laws that make disability discrimination unlawful.¹²⁹

Discrimination for the purposes of the *DDA* includes both 'direct disability discrimination' (section 5) and 'indirect disability discrimination' (section 6).

Section 5(1) of the *DDA* provides as follows:

For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.¹³⁰

Section 5(2) of the *DDA* provides that a person also discriminates against another person on the ground of disability if:

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

Section 6(1) defines 'indirect disability discrimination' as follows:

For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
- (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.¹³¹

Section 6(2) provides that a person also discriminates against another person on the ground of disability if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

Section 6(3) states that subsections (1) and (2) do not apply if the requirement is reasonable having regard to the circumstances of the case. The burden of proving a requirement or condition is reasonable lies with the respondent.¹³²

The concept of 'reasonable adjustment' is incorporated into the definition of both direct and indirect disability discrimination. The *DDA* defines 'reasonable adjustment' as:

An adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.¹³³

Section 11 of the *DDA* sets out how 'unjustifiable hardship' should be determined. All relevant circumstances must be taken into account. These include, but are not limited to, the nature of the benefit or detriment likely to accrue to, or be suffered by, any person concerned; the effect of the disability of the person concerned; and the financial circumstances and amount of expenditure required to be made by the person subject to the hardship.¹³⁴

The concept of direct discrimination extends to situations where a person with disability uses a carer, assistant, assistance animal or disability aid, meaning it is unlawful to discriminate against a person because they use a carer, assistant, assistance animal or disability aid.¹³⁵

The protections also apply to a person who is an associate of a person with disability.¹³⁶ An associate is defined as:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.¹³⁷

Section 21B of the *DDA* is a general exception to the prohibition of disability discrimination. Section 21B provides that Part 2, Division 1 (which prohibits particular forms of discrimination relating to employment):

does not render it unlawful for a person (the **discriminator**) to discriminate against another person on the ground of a disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.¹³⁸

Section 29A of the *DDA* is in similar terms and creates an exception to forms of discrimination prohibited by Part 2, Division 2 of the Act (such as discrimination in education).

The *DDA* includes an exception to the prohibition of discrimination relating to work. It is not unlawful for a person (for example, an employer) to discriminate on the ground of a disability of another person (for example, an employee) if:

- (a) the discrimination relates to particular work (including promotion or transfer to particular work); and
- (b) because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.¹³⁹

The *DDA* empowers the Attorney-General to make disability standards to expand the protections against discrimination in particular areas.¹⁴⁰ A failure to comply with a standard is unlawful.¹⁴¹ However, where a person acts in compliance with a standard made under a part of the *DDA*, the *DDA* will not apply to the person's act.¹⁴²

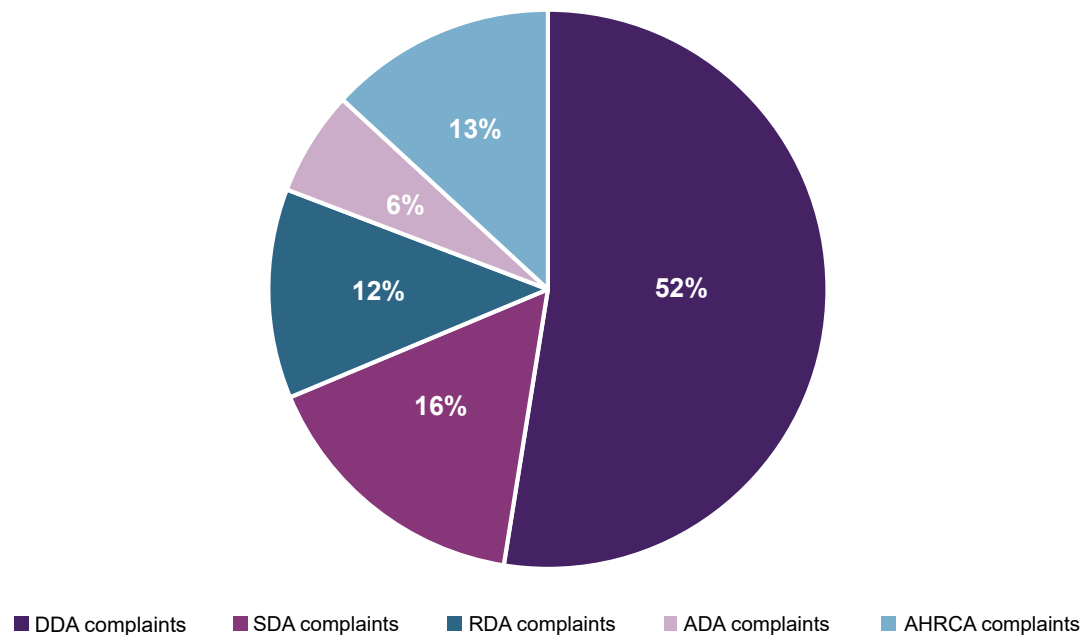
We discuss the existing standards later in this chapter. We also examine particular standards relating to education and access to premises in Volume 7, *Inclusive education, employment and housing*.

Complaints about disability discrimination

As discussed above, complaints alleging disability discrimination in breach of the *DDA* are made to the AHRC. In 2021–22, complaints made under the *DDA* accounted for 52 per cent of all complaints received by the AHRC.¹⁴³ The total of 1,960 complaints under the *DDA* in that year represented a 69 per cent increase on the 1,163 complaints under the *DDA* made in 2020–21.¹⁴⁴ This continues the trend of a steady increase in complaints since 2017–18.¹⁴⁵ Complaints under the *DDA* have consistently represented the largest proportion of complaints made across all discrimination legislation, ranging from 37 to 52 per cent of all complaints between 2017–18 and 2021–22.¹⁴⁶

Figure 4.4.1 reflects the proportion of discrimination complaints received by the AHRC in 2021–22, by reference to the Commonwealth law under which the complaint was made: the *DDA*; the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*); the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*); the *Age Discrimination Act 2004* (Cth) (*Age Discrimination Act*); and the *AHRC Act*.

Figure 4.4.1: Complaints to the AHRC 2021–22



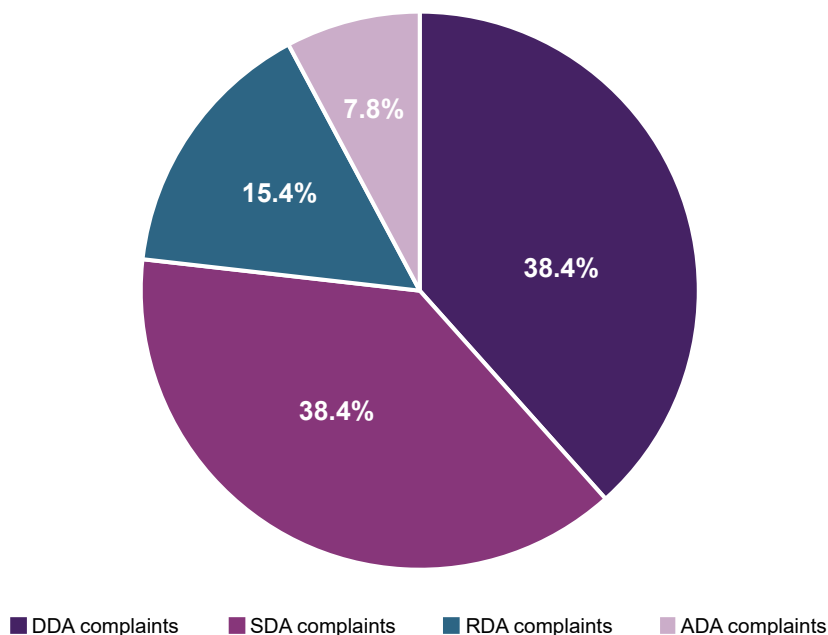
Note: The proportion of complaints listed as received by the Australian Human Rights Commission total 99 per cent, rather than 100 per cent.

Source: Australian Human Rights Commission, 2021–22 complaint statistics, Report, November 2022, p 2.

The main areas for complaints under the *DDA* in 2021–22 were the provision of goods, services and facilities (1,359 complaints) and employment (438 complaints).¹⁴⁷ Employment related complaints made up 22 per cent of all disability discrimination complaints.¹⁴⁸

Figure 4.4.2 shows the proportion of employment related complaints received by the AHRC in 2021–22, by reference to the Commonwealth anti-discrimination law under which the complaint was made.

Figure 4.4.2: Employment related complaints to the AHRC 2021–22



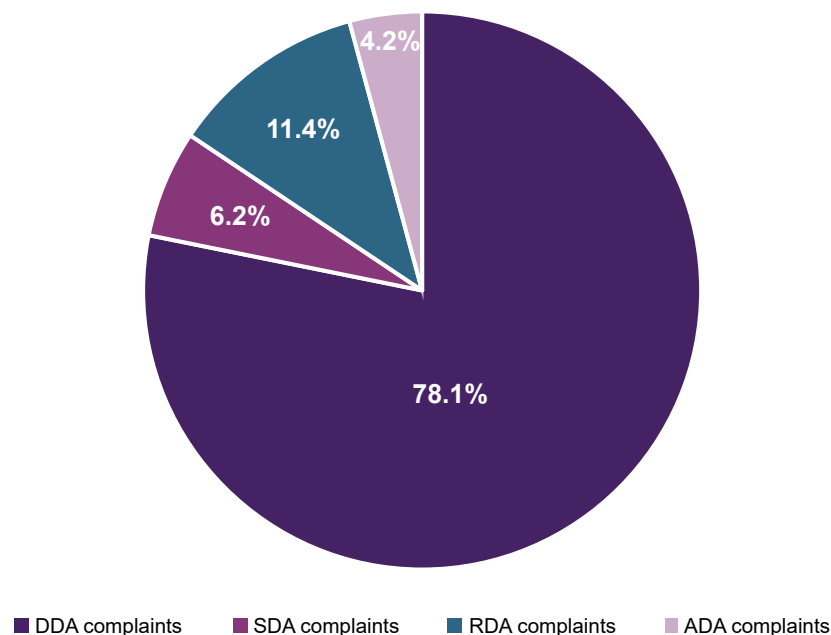
Note: Shares for each Act have been manually calculated by dividing the employment complaints total for each Act by the overall employment complaints total across all Acts.

Source: Australian Human Rights Commission, 2021–22 complaint statistics, Report, November 2022, pp 16, 20, 24, 29.

Disability discrimination complaints comprised 78.1 per cent of all complaints in 2021–22 concerning the provision of goods, services and facilities.¹⁴⁹

Figure 4.4.3 shows the proportion of goods, services and facilities related complaints received by the AHRC in 2021–22, by reference to the Commonwealth anti-discrimination law under which the complaint was made.

Figure 4.4.3: Goods, services and facilities related complaints to AHRC 2021–22



Note: Shares for each Act have been manually calculated by dividing the goods, services and facilities complaints total for each Act by the overall goods, services and facilities complaints total across all Acts.

Source: Australian Human Rights Commission, 2021–22 complaint statistics, Report, November 2022, pp 16, 20, 24, 29.

The highest percentage of complaints under the *DDA* concerned people with mental health and psychosocial disability (31 per cent) followed by medical conditions (26 per cent).¹⁵⁰ Only 3 per cent of complaints concerned discrimination on the ground of intellectual disability.¹⁵¹

For complaints finalised under the *DDA* in 2021–22, 35 per cent were conciliated, 29 per cent were discontinued,¹⁵² 25 per cent were terminated after an inquiry was conducted, 21 per cent were determined to have no reasonable prospect of conciliation, and around 10 per cent were withdrawn.¹⁵³

The AHRC told us the demands on it had substantially increased during the COVID-19 pandemic, caused by an unprecedented number of complaints. The AHRC said:

The persistently high level of complaints under the [*DDA*] reinforces the crucial role played by the Commission in addressing specific instances of disability discrimination and the importance of ongoing support for this work by government. However, the high level of complaints under the [*DDA*] also highlights the need for more effective implementation of the CRPD and law reform.¹⁵⁴

In 2021–22, the AHRC received 1,473 COVID-19 pandemic related complaints. Of the 1,312 complaints that were finalised, more than half (681 complaints) were made under the *DDA*.¹⁵⁵

In 2021–22, the AHRC received 23,200 enquiries (interactions by phone or in writing to obtain more information in relation to a potential complaint), which was a 47 per cent increase from the 15,746 enquiries received in 2020–21. The main issues related to:¹⁵⁶

- the COVID-19 pandemic (25 per cent)
- disability discrimination (14 per cent)
- human rights related issues including immigration and immigration detention (10 per cent)
- general employment matters including harassment and bullying (8.5 per cent)
- discrimination on grounds covered by the *Sex Discrimination Act* (5 per cent)
- racial discrimination including racial hatred (4 per cent).

Perspectives on the effectiveness of the *DDA*

In Public hearing 9, 'Pathways and barriers to open employment for people with disability', Dr Ben Gauntlett, the then Disability Discrimination Commissioner, spoke about the operation of the *DDA*.¹⁵⁷ Dr Gauntlett identified the need for the foundation of Australia's legal system to be 'very clear' in protecting the fundamental rights of people with disability.¹⁵⁸ He said anti-discrimination legislation should be 'fit for purpose for all people with disability to enable them to avail themselves of their rights if needed but also to guide employers as to what is good conduct'.¹⁵⁹ This is to ensure employers 'are comfortable employing people with disability' and having 'constructive' discussions about disability.¹⁶⁰ He said employers should understand the *DDA* so any disputes that arise can be 'resolved amicably and quickly'.¹⁶¹

Dr Gauntlett drew attention to the complaints-based model and the need to interpret the concepts of 'reasonable adjustments' and 'inherent requirements', describing them as 'problematic in nature for people with disability' and calling for their review.¹⁶²

Dr Gauntlett concluded the practical operation of the *DDA* was 'not as effective as we would have hoped'. He was concerned that people with disability 'do not know what their rights are in certain situations' and 'are required to bear the burden of enforcing those rights'.¹⁶³ He argued that representative actions should be available for people with disability and that the AHRC should have the ability to bring actions on behalf of people with disability who are 'especially marginalised'.¹⁶⁴

At Public Hearing 18, 'The human rights of people with disability and making the *Convention on the Rights of Persons with Disabilities* a reality in Australian law, policies and practices', Ms Natalie Wade, founder and Principal Lawyer at Equality Lawyers, expressed concern about what she saw as narrow judicial interpretation of the *DDA*.¹⁶⁵ Ms Wade said there was limited awareness of disability rights in the legal profession. She suggested a legal framework for the protection of the human rights of people with disability is needed. She also said change is needed in the form of 'a legal profession that is (a) more skilled at disability rights law, but also (b) is more accessible and inclusive'.¹⁶⁶

Autism Aspergers Advocacy Australia told us it considers 'the *DDA* is a failure'.¹⁶⁷ It referred to the concern held by the Committee on the Rights of Persons with Disabilities (CRPD Committee) regarding the 'insufficient harmonization of the domestic legal framework' with the *CRPD*.¹⁶⁸ It argued the 'Australian law, especially its [*DDA*], protects and promotes discrimination against people with disability. This is the opposite of safeguarding human rights'.¹⁶⁹

The *CRPD* and the *DDA*

As discussed in Chapter 3, ‘Strengthening protection through an Australian Disability Rights Act’, rights to equality and non-discrimination are included across a range of international human rights treaties and other instruments in addition to the *CRPD*. Article 5 of the *CRPD* sets out the right to equality and non-discrimination, as follows:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.¹⁷⁰

The *CRPD* defines ‘discrimination’ in article 2 to mean:

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

The *DDA* predates the *CRPD*. When the *DDA* was enacted, the Australian Government relied on other international human rights conventions to support its constitutional validity as an exercise of the Australian Parliament’s power to make laws ‘with respect to external affairs’.¹⁷¹ The 2009 amendments to the *DDA* referred to the *CRPD*,¹⁷² but with limited exceptions did not seek to incorporate or adapt articles of the *CRPD* into Australian law, and did not alter the definition of ‘discrimination’ to align with articles 2 and 5 of the *CRPD*.

The AHRC said the fact the *DDA* pre-dates the *CRPD*:

does not preclude it from reflecting some *CRPD* rights, by seeking to ‘promote ... the principles that persons with disabilities have the same fundamental rights as the rest of the community’. However, the scope of protected rights and grounds of discrimination in that Act is much narrower than under international human rights law.¹⁷³

The AHRC argued the *DDA* does not ‘fully implement all of the rights in the *CRPD*’ and the *DDA* does not recognise positive economic, social and cultural rights, or intersectional discrimination in the same way the *CRPD* does.¹⁷⁴

Emeritus Professor Ron McCallum AO, in a research report prepared for the Royal Commission, pointed out that the *DDA* is ‘narrower in its coverage’ than article 5 of the *CRPD*, which requires States Parties:

to recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.¹⁷⁵

The Australian Government’s combined second and third periodic report to the *CRPD* Committee contended that the *DDA* and other Commonwealth and state legislation gives effect to its obligations under international law to recognise and protect the human rights of people with disability.¹⁷⁶ The Australian Government points out that the *DDA* is not the only legislation that gives effect to Australia’s obligations under the *CRPD*.¹⁷⁷

We accept the *DDA* incorporates elements of the *CRPD* into domestic Australian legislation. We also accept that giving effect to the rights recognised in the *CRPD* is not a simple matter of transcribing its articles into domestic legislation. But we think more can and should be done. Chapter 3 recommends the enactment of an Australian Disability Rights Act. This should be accompanied by amendments to the *DDA* to align it more closely to key articles of the *CRPD*.

The amendments should also address one of the principal deficiencies of the *DDA*: the protection of a person’s rights depends on that person being prepared to make and pursue a complaint of discrimination on the ground of disability. Even if the complaint does not reach a court, the complainant must have the personal resources and determination to identify and support the claim. If the claim reaches a court, the barriers faced by the complainant are more formidable and include the risk of an adverse costs order if the complaint is unsuccessful.

As presently drafted, the *DDA* imposes no obligation on and creates little incentive for employers, schools, service providers and others covered by the legislation to take active measures to prevent discrimination on the grounds of disability. It is not enough to rely on a complaints-based system to bring discriminatory conduct to light.

4.4. Defining discrimination and reasonable adjustments

We refer to the definitions of ‘direct’ and ‘indirect’ discrimination set out in sections 5 and 6 of the *DDA* above. For the purposes of the *DDA*, discrimination occurs if:

- a person with disability is treated less favourably compared to the treatment of a person without a disability and a reason for the treatment is the person’s disability (**direct discrimination**)¹⁷⁸
- there is a failure to make reasonable adjustments for the person with disability to avoid direct discrimination (**direct discrimination and adjustments**).¹⁷⁹ A reasonable adjustment is an adjustment to be made by a person, unless making the adjustment would impose an unjustifiable hardship on the person.

- a person with disability cannot comply with an unreasonable requirement or condition imposed on them, being a requirement or condition that disadvantages people with the same disability (**indirect discrimination**)¹⁸⁰
- there is a failure to make reasonable adjustments for the person with disability that enables the person to comply with the requirement or condition (**indirect discrimination and adjustments**).¹⁸¹

Direct discrimination

The conduct element – comparative less favourable treatment

Section 5(1) of the *DDA* requires a comparison of the way a person with disability and a person without the disability are treated and then an inquiry into why the different treatment occurred, where the treatment of the person with disability is less favourable than the treatment of a person without disability in not materially different circumstances.¹⁸²

The first step focuses on the conduct of the person who is alleged to have engaged in discrimination (the discriminator). The question is whether the discriminator treated the person with disability less favourably by comparing a discriminator's treatment of a person without disability. A person's disability may be a past, present, future or imputed disability. Less favourable treatment means any disadvantage, unfair or detrimental treatment of the person with disability, for example terminating a person's employment. The comparison of treatment may be with an actual person who does not have the same disability or in some cases with a hypothetical person who does not have the same disability.

The comparison of treatment must also be undertaken by reference to the particular circumstances. The circumstances for undertaking the comparison must not be materially different. The identification of the circumstances is a key consideration in how direct discrimination operates in section 5(1). In *Purvis*, a majority of judges described how the 'circumstances' should be identified. They said:

In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in circumstances if the person concerned was not disabled ...

The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator'. It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability ... Once the circumstances of the treatment or intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different.

In the present case, the circumstances in which [the student] was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils.¹⁸³

This test has been difficult to apply in practice, particularly when the person's disability or 'manifestations' of the disability, such as a person's behaviour, should be treated as part of the circumstances rather than a consequence of their disability.¹⁸⁴

This 'comparator test', as it is often described, was raised in a number of submissions to the Royal Commission. For example, Victoria Legal Aid said it is restrictive and operates as a significant barrier to clients seeking the protection provided by these laws.¹⁸⁵

Academics have criticised the High Court's decision in *Purvis* and the comparator test.¹⁸⁶ For example, Professor Isabel Karpin and Dr Karen O'Connell of the University of Technology Sydney consider the *Purvis* decision has:

effectively shut down the future possibility of a successful direct discrimination complaint for a student excluded from school on the basis of challenging behaviour. *Purvis* has been applied in discrimination cases since to deny protection to people with disabilities, and it remains the most problematic and the most criticised of discrimination cases because of its narrow reading of direct discrimination law.¹⁸⁷

Victoria Legal Aid said neither the *Equal Opportunity Act 2010* (Vic)¹⁸⁸ nor the *Discrimination Act 1991* (ACT)¹⁸⁹ include a comparator test for a finding of direct discrimination and tribunals have confirmed there is no implied requirement for a comparator test.¹⁹⁰ Victoria Legal Aid suggested simplifying and clarifying the definition of discrimination in the *DDA*, including by removing the comparator test, would promote greater compliance with discrimination laws and assist business and service providers to understand their legal obligations.¹⁹¹

In response to our *Employment issues paper*, the AHRC criticised the comparator test as resulting in 'uncertainty and impracticality' for people with disability.¹⁹² The AHRC said the comparator test may limit Australia's ability to effectively implement its obligations under articles 5(1) and 13 of the *CRPD*, particularly the duty to eliminate barriers that may prevent people with disability from gaining access to the equal protection of the law.¹⁹³ The AHRC referred to previous reviews and recommendations that questioned the utility of the comparator test. These included the NSW Law Reform Commission's 1999 review of the *Anti-Discrimination Act 1977* (NSW); the 2004 Productivity Commission review of the *DDA*; the 2008 *Sex Discrimination Act* inquiry; and a Discussion Paper published by the Attorney-General's Department in 2011.¹⁹⁴

In a submission to the Royal Commission, the Victorian-based Disability Discrimination Legal Service recommended all jurisdictions should ensure their direct discrimination prohibition does not include the comparator test in their anti-discrimination legislation.¹⁹⁵

We agree the comparator test can be complex, difficult and operate as a barrier to people with disability proving they have experienced discrimination. It should be enough for a person with disability to show they have been treated unfavourably or unfairly, without the additional element of proving that a person without the same disability would have been treated more favourably in the same circumstances.

Causation

If less favourable treatment is established, the second step is to ask 'why' the less favourable treatment occurred.¹⁹⁶ The person with disability has to prove on the balance of probabilities their disability was a reason for the respondent's treatment of them.¹⁹⁷ While it is not necessary for a complainant to prove the respondent intended to discriminate, proving that a person's disability is a reason for the respondent's less favourable treatment of them can be difficult.¹⁹⁸ The respondent has to know the complainant has a disability.¹⁹⁹ While the complainant does not have to prove the respondent intended to treat them less favourably, it is not enough for a person to feel they have experienced discrimination, or believe the treatment has occurred because a respondent was ignorant, had unconscious bias or an ableist attitude.²⁰⁰

There is no onus on a respondent to disprove that a person's disability was a reason for the less favourable treatment, but in practice, a court usually expects the respondent to explain why it made its decisions or took action that treated the complainant with disability less favourably. For example, the respondent may say the reason for terminating the complainant's employment was poor performance or redundancy and had nothing to do with disability. It can be difficult to rebut these reasons, when the person with disability who has experienced less favourable treatment does not have access to all the information that informed the respondent's decision.

If a person has not disclosed they have a disability or the discriminator does not know about the disability, it will be extremely difficult if not impossible to show that disability was a reason for the less favourable treatment of the particular complainant.²⁰¹

Even though the onus of proving a causal connection between their disability and the unfavourable treatment is the civil standard (the balance of probabilities), the onus may be very difficult for the person with disability to discharge. We do not consider the onus on a complainant to prove all the elements of direct discrimination in section 5(1) represents a fair balance between complainants and respondents. Legislative precedents suggest alternative approaches to the problem of proving causation. For example, the *FWA* imposes an evidentiary burden on respondents to explain why they made decisions or acted in a particular way.²⁰²

The *DDA* provides that the respondent bears the onus of proving, on the balance of probabilities, unjustifiable hardship or the reasonableness of a condition or requirement (for indirect discrimination). We consider the respondent should also bear the onus of proving on the balance of probabilities that the less favourable treatment occurred for a reason other than the complainant's disability. Since the respondent will almost always have the relevant information, it is best placed to explain its reasons and demonstrate that the complainant's disability was not a reason for the less favourable treatment.²⁰³

Recommendation

Understanding and applying the two-limb test for direct discrimination is complex and difficult. It is a barrier to people with disability seeking protection from discrimination. The definition of direct discrimination should be simple and clear.

There is a compelling case to simplify the definition of direct discrimination in section 5(1) of the *DDA*. There is also a case for modernising the way discrimination is understood. This can be done with two reforms:

- first, to remove the need to prove comparative less favourable treatment²⁰⁴
- second, to mirror the approach used in the *FWA* with a rebuttable presumption, so that the onus rests on the respondent to prove on the balance of probabilities that the reason for the treatment was not disability.²⁰⁵

Recommendation 4.23 Burden of proof in direct discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting new subsections 5(1) and 5(1A). The subsections would read as follows:

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

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

Indirect discrimination

Section 6(1) of the *DDA* provides that indirect discrimination occurs when a person with disability is required to comply with a condition or requirement, which they cannot comply with because of their disability and the condition or requirement disadvantages or is likely to disadvantage a person with disability.²⁰⁶ Indirect discrimination also occurs when a person fails to provide reasonable adjustments that would enable the person with disability to comply with the condition or requirement.²⁰⁷

Direct and indirect discrimination are considered mutually exclusive.²⁰⁸ In *Free and Equal*, the AHRC said the distinction between direct and indirect discrimination is not always clear:

A need to choose which category of discrimination a particular situation falls within also introduces an unnecessary layer of complexity for the Commission in seeking to explain rights and responsibilities, and for people and organisations seeking to understand, use, or comply with the legislation.²⁰⁹

While direct discrimination focuses on the failure to treat people the same way because of their disability, indirect discrimination focuses on whether the same treatment accorded to people with and without disability can amount to discrimination. Indirect discrimination is concerned with the adverse impact or effect of the same treatment on a person with disability.

Section 6(1) of the *DDA* has a number of elements that must be made out before indirect discrimination is established. First, it is necessary to identify the 'requirement or condition'. A 'requirement or condition' is anything that involves 'the notion of compulsion or obligation'.²¹⁰ Courts have emphasised the words 'requirement or condition' should 'cover any form of qualification or prerequisite'.²¹¹ But 'the actual requirement or condition in each instance [is] formulated with some precision'.²¹²

In *Walker v Victoria*²¹³ the Federal Court set out some examples of the types of requirements or conditions considered in previous cases concerning indirect discrimination in education. They were:

- a requirement that Deaf students participate in and receive instruction at school without the assistance of an Auslan interpreter²¹⁴
- a requirement that a student comply with conduct required by the school discipline policy²¹⁵
- a requirement that students use course materials which were provided by the educational institution²¹⁶
- a requirement that students at a school utilise a toilet in another building rather than one in the same building as their classroom.²¹⁷

If the respondent imposes a requirement or condition, the person with disability must prove they cannot comply with that particular requirement or condition. The question is not whether a person with disability can technically, physically or literally comply, but whether that person would suffer serious disadvantage in complying.²¹⁸ For example, if stairs are the only way to access a building, it is plain a person using a wheelchair cannot comply with the requirement to enter the building using stairs. It is not necessary for the person to demonstrate it is impossible to use the stairs.

The next step is to demonstrate other people with the same disability would be disadvantaged by the requirement or condition. This means the person bringing the claim cannot be the only person disadvantaged by the requirement or condition. Sometimes this requires evidence to prove that others would be disadvantaged by the requirement or condition. Sometimes a court is prepared to take 'judicial notice' that others would be disadvantaged,²¹⁹ on the basis the fact is so generally known that every ordinary educated person may be reasonably presumed to be aware of it and evidence of the fact is therefore not needed.²²⁰

If these elements are established, the respondent must prove the requirement or condition was reasonable in all the circumstances, to avoid a finding of indirect discrimination.²²¹ Unlike direct discrimination, the onus is on the respondent to demonstrate the requirement or condition was reasonable at the time it was imposed.

The following matters are relevant to determining whether it was reasonable for the respondent to impose the requirement or condition:

- whether the requirement was necessary or merely convenient in the circumstances²²²
- whether alternatives existed to the particular requirements or conditions²²³
- the cost of providing an alternative²²⁴
- whether the requirements or conditions were imposed while complying with other obligations.²²⁵

Another issue that arises with indirect discrimination is the relationship between reasonableness for the purposes of indirect discrimination and unjustifiable hardship. Even if a condition or requirement is found to be unreasonable, a respondent may still rely on the general defences in sections 21B and 29A of the *DDA* to argue that avoiding the discrimination would impose an unjustifiable hardship.

Recommendation

There needs to be a closer examination of the reasonableness element in indirect discrimination and unjustifiable hardship to remove what appears to be several layers of exceptions or defences. We recommend consideration be given to one test, based on unjustifiable hardship.

Recommendation 4.24 Reforming indirect discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 6(3) to substitute existing subsections 6(3) and (4) as follows:

6(3) Subsection (1) or (2) does not apply if avoiding the discrimination would impose an unjustifiable hardship on the alleged discriminator.

4.5. Reasonable adjustments and the definitions of discrimination

CRPD and adjustments

Article 2 of the *CRPD* defines 'reasonable accommodation' to mean:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.²²⁶

Reasonable accommodation applies at the individual level, in the sense that accommodations are made for a particular person. It is a separate concept from the notion of ensuring a system is universally accessible for all people, including people with disability as described in article 9 of the *CRPD*. We discuss these principles of universal accessibility in the context of the health system in Volume 6, *Enabling autonomy and access* and in the context of the criminal justice system in Volume 8, *Criminal justice and people with disability*.

A number of rights in the *CRPD* oblige States Parties to provide ‘reasonable accommodation’ to persons with disabilities.²²⁷

In their *General comment no. 6 (2018) on equality and non-discrimination (General comment no. 6)*, the CRPD Committee expressed the view that the duty to provide reasonable accommodation is an ‘*ex nunc*’ duty. This means that in the CRPD Committee’s view, the duty arises from the moment there is a need or want for the accommodation, not upon request by the person with disability.²²⁸

The Australian Government partly agreed with this view, stating:

The Australian Government’s understanding is that the duty of ‘reasonable accommodation’ relates to *where an adjustment is needed in a particular case as it relates to an individual*. In this way, it differs from the general accessibility obligations under the Convention.²²⁹

The reference to ‘general accessibility obligations’ is to the general principle identified in Articles 3(f) and 9 of the *CRPD*. Article 3 identifies a number of ‘general principles’ for the purposes of the *CRPD*, including ‘accessibility’.²³⁰ Article 9 is headed ‘Accessibility’ and requires States Parties to:

Take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, and to other facilities and services open or provided to the public, both in urban and rural areas ...²³¹

The CRPD Committee stated, in *General comment no. 2 (2014) Article 9: Accessibility*, that article 9 requires all newly designed objects and products to be fully accessible, whereas pre-existing infrastructure, transportation services and other facilities and services are required to become accessible in accordance with the doctrine of progressive realisation.²³² This means those changes may be made more gradually, but with reference to particular timelines and with the dedication of resources.²³³ In its initial report to the CRPD Committee on compliance with the *CRPD*, the Australian Government pointed to the power to make disability standards under section 31 of the *DDA* as a mechanism through which it can implement the objectives of article 9.²³⁴ We discuss the effectiveness of those standards in Section 4.10 of this chapter, and in Volume 7.

Reasonable adjustments

When the *DDA* was enacted in 1992, some commentators assumed it created an implicit duty to provide accommodation or adjustments to people with disability. It soon became apparent the drafting of the *DDA* had failed to incorporate such a duty.²³⁵ In 2003 the High Court in *Purvis* confirmed the definition of direct discrimination in the *DDA* does not necessarily impose an obligation to accommodate a person's disability where the disability is associated with conduct that would not be acceptable if committed by a person without disability in the same circumstances.²³⁶

During its review of the *DDA* in 2004, the Productivity Commission said 'no issue caused as much comment during this inquiry as "reasonable adjustments"'.²³⁷ It concluded 'the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages.'²³⁸ It recognised 'a duty to make reasonable adjustments would be an important means of creating more substantive equality between people with and without disabilities.'²³⁹ The Productivity Commission recommended:

Recommendation 8.1

The *Disability Discrimination Act 1992* should be amended to include a general duty to make reasonable adjustments.

- Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.
- The person or persons on whom the duty would fall should be identified.
- Examples of how the duty might apply should be included in each area of the Act.²⁴⁰

The Australian Government accepted this recommendation in part. In its response to the review, it acknowledged the 'uncertainty' created by *Purvis* and suggested an amendment would be made to 'return the *DDA* to the situation intended by Parliament when the *DDA* was enacted'. The response also said that until *Purvis*, 'it was generally accepted that reasonable adjustments were necessary to avoid unlawful discrimination.'²⁴¹

Unlike the *CRPD*, the *DDA* does not use the expression 'reasonable accommodation'.²⁴² The *DDA* uses the expression 'reasonable adjustment'. The definitions of direct and indirect discrimination were amended in August 2009 with the intention of making the failure to provide a reasonable adjustment for a person a form of direct or indirect discrimination.²⁴³ The then Attorney-General said the amendments would 'introduce an explicit and positive duty to make reasonable adjustments for people with disability'.²⁴⁴

Subsequent judicial interpretation of sections 5(2) and 6(2) has failed to realise the Productivity Commission's recommendation, the obligations in the *CRPD* or the apparent purpose of the amendments.

Several Federal Court decisions confirm the interpretation of ‘reasonable adjustments’ in the definitions of discrimination in both sections 5(2) and 6(2) of the *DDA* do not operate as explicit and positive duties to make reasonable adjustments for people with disability.

In *Watts v Australian Postal Corporation*,²⁴⁵ Mortimer J (now the Chief Justice of the Federal Court) explained the adjective ‘reasonable’ has no qualitative character, in the sense that the adjustment has to be assessed against a standard of reasonableness.²⁴⁶ The expression ‘reasonable adjustment’ simply means ‘alteration or modification’. Accordingly, an adjustment has nothing to do with whether an adjustment is reasonable, or if a request for an adjustment is reasonable or if a respondent’s response to the request is reasonable.

However, it was apparent from the evidence presented in Public hearing 19, ‘Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability’, that many employers believed a reasonable adjustment was an adjustment that was reasonable or indicated they had acted reasonably to assist a person with disability.²⁴⁷

Justice Mortimer also explained the nature of adjustments. She said an adjustment is made for the person concerned, not an adjustment to the service or facility provided by a respondent.²⁴⁸ She said an adjustment should be enabling or facilitative, in the sense that it enables the person with disability to use the particular service or facility.²⁴⁹ This is significant. It means that a reasonable adjustment is not something that materially changes or alters the way services are delivered, the terms and conditions of employment or how a classroom operates. Rather, the reasonable adjustment is one that enables the person with disability seeking an adjustment to use existing services or do the work required of them.

An adjustment may change over time, it might be flexible and it may take time to implement.²⁵⁰ More than one adjustment might be necessary for the same person.²⁵¹ Whether the adjustment has been made or refused is a question of fact,²⁵² and the assessment of whether there is discrimination will focus on what was, in fact, done or not done, rather than on any ‘duty’.²⁵³

While the 2009 amendments to the *DDA* may have been intended to create a positive duty to provide reasonable adjustments, the Federal Court has held the legislation as drafted did not impose such a duty.²⁵⁴

In *Sklavos v Australasian College of Dermatologists*²⁵⁵ (*Sklavos*) the Full Court of the Federal Court considered the interpretation of section 5(2) and section 6(2) of the *DDA* in the context of a claim of alleged discrimination pursuant to section 19 of the *DDA*. The claim concerned the requirements of the College for admission to practice as a dermatologist.²⁵⁶

Dr Sklavos argued the respondent College’s failure to make reasonable adjustments to enable him to qualify for fellowship of the College was unlawful discrimination.²⁵⁷ Dr Sklavos was required to complete the training requirements and successfully pass the College’s examinations to qualify for fellowship of the College.²⁵⁸ Dr Sklavos alleged his disability, a phobia of undertaking the College examinations, meant he could not pass the examinations. He argued the College should have made adjustments that had the effect of excusing him from passing the examination and granting him fellowship of the College.²⁵⁹ The College refused to

waive the requirement that he pass the examinations but offered Dr Sklavos adjustments to enable him to complete the examinations.²⁶⁰

Both the trial judge and the Full Federal Court examined whether the College had failed to make adjustments in breach of section 5(2) of the *DDA* which required Dr Sklavos to prove the College's alleged failure to make adjustments for him was done because of his disability. The Full Court upheld the trial judge's interpretation of section 5(2) and the finding that the College's refusal to make adjustments sought by Dr Sklavos was not 'because of' Dr Sklavos' disability. There was no causal connection between the refusal to make the adjustments and Dr Sklavos' disability.²⁶¹

Adjustments and indirect discrimination

Indirect discrimination as described in section 6(2) of the *DDA* occurs if a respondent fails or refuses to provide a reasonable adjustment that would enable a person with disability to comply with the particular requirement or condition. This issue also arose in the *Sklavos* case. Dr Sklavos advanced a second argument based on section 6 of the *DDA*. He contended that the College's failure to make adjustments was unreasonable and constituted indirect discrimination in breach of sections 6(1) and 6(3) of the *DDA*. The trial judge also rejected this argument and found the requirement to pass the examinations was reasonable in all the circumstances.²⁶²

The trial judge held that section 6(2) relates to cases where the person with disability is able to comply with a requirement or condition but only if adjustments are made. There were no adjustments that could have been made to enable Dr Sklavos to pass the examinations, so he could not rely on the *DDA*.²⁶³

These reasons were upheld by the Full Court.²⁶⁴

Recommendations

Making reasonable adjustments for a person with disability is necessary to eliminate discrimination and to promote substantive equality and inclusion. It is a core principle of the *CRPD* which suggests the failure to make an adjustment should be recognised as a form of discrimination, not just an element of direct or indirect discrimination.²⁶⁵ The right to a reasonable adjustment is not without limits. The definition of 'reasonable accommodation' in article 2 of the *CRPD* describes adjustments as those that do not impose a 'disproportionate or undue burden'. We accept that unjustifiable hardship should be a consideration in determining whether a particular adjustment should be made for a person with disability.

The *DDA* should be amended to remove 'reasonable adjustments' from the definitions of direct and indirect discrimination. We consider a failure to make an adjustment should constitute a form of discrimination itself, not simply an element of direct or indirect discrimination. The *DDA* should also impose a standalone duty to make adjustments. The focus would then be on whether there has been a refusal to make an adjustment and, if so, whether making the adjustment would impose unjustifiable hardship on the respondent. This approach is consistent with the *CRPD*,²⁶⁶ and in our view, relatively straightforward.

To avoid misunderstanding, the term ‘reasonable adjustments’ should be replaced with ‘adjustments’. This should remove the misconception that reasonableness is an element in deciding whether an adjustment is required.

Recommendation 4.25 Adjustments

The *Disability Discrimination Act 1992* (Cth) should be amended by replacing all references to ‘reasonable adjustments’ with ‘adjustments’.

The failure to make reasonable adjustments should be recognised as a form of unlawful discrimination and not subsumed in the definitions of ‘direct’ or ‘indirect’ discrimination.

Further, we consider there should be a standalone duty to make adjustments for a person or group of persons with disability, which is not confined to the particular areas or settings identified in Part 2 of the *DDA*. The duty to make adjustments should apply generally to all contexts and settings, if and when a person with disability may require adjustments in those contexts and settings.

We recognise this is a significant change, but we do not consider it will place an unrealistic burden on persons, entities or governments.

In order to be practicable, a standalone duty to provide adjustments will necessarily require the duty-holder to have some level of knowledge about the nature of the adjustments needed by the individual. It would also continue to be subject to the unjustifiable hardship defence, which we consider in Section 4.9 of this chapter.

Some duty-holders, such as educational authorities or employers, might be expected to have information about required adjustments from enrolment forms or job applications. Other duty-holders, particularly those less sophisticated or with fewer resources, may need assistance from people with disability to obtain the necessary information.

These issues will require further consideration, both by lawmakers and people and organisations affected by any proposed new duty.

Recommendation 4.26 Standalone duty to make adjustments

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

Duty to make adjustments

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

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

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

4.6. Positive duty to eliminate discrimination

In this section we consider why the *DDA* should impose a positive duty requiring duty-holders to take active measures to eliminate discrimination, harassment and victimisation of people with disability. Achieving substantive equality requires more than making adjustments for one person. Positive action is required to achieve inclusion and remove the systemic barriers in all settings. It means shifting the focus from a reactive model to prevention and elimination of systemic barriers for people with disability more broadly.

Shift towards a positive duty to eliminate discrimination

A number of past reviews and inquiries have examined the role of a positive duty to eliminate discrimination, which we discuss below. Although it is relevant to acknowledge reviews and inquiries that have examined a related and complementary positive duty to promote equality, our focus for the purposes of the *DDA* is on discrimination. We examine the role of a positive duty to promote disability equality and inclusion in Chapter 3.

In its 2004 review, the Productivity Commission recognised the *DDA* included some ‘proactive measures such as disability standards and voluntary action plans’. However the Productivity Commission considered the *DDA* to be ‘a largely reactive Act that relies on complaints and conciliation’ and recommended the inclusion of more proactive measures, such as public inquiries.²⁶⁷

In 2008 the Senate Standing Committee on Legal and Constitutional Affairs examined the effectiveness of the *Sex Discrimination Act* in eliminating discrimination on the basis of sex and promoting gender equality. The Senate Committee considered proposals for a positive duty to be included in the *Sex Discrimination Act*, based on the *Equality Act 2006* (UK).²⁶⁸ The Senate Committee recommended the *Sex Discrimination Act* should be amended to impose a positive duty on public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.²⁶⁹ In its response to the report, the Australian Government ‘noted’ this recommendation and said it would consider it further in light of the findings of another review that was ongoing at the time.²⁷⁰ The recommendation was not revisited or implemented at the time. However, a substantially similar recommendation was made in another report and implemented more recently, as we discuss below.

Since its enactment, section 15 of the *Equal Opportunity Act 2010* (Vic) has required anyone with a duty not to engage in discrimination under the Act to also take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.²⁷¹ The Victorian Government said the inclusion of this positive duty ‘represented a shift to a proactive obligation on duty-holders (such as educational authorities and employers), similar to occupational health and safety legislation’.²⁷² In a submission to the Royal Commission, the Victorian Government suggested ‘[o]ther jurisdictions consider adopting or amending their legislation to incorporate a positive duty on public sector bodies to promote and report on inclusion of people with disability’.²⁷³

In Public hearing 19, Ms Melanie Schleiger from Victoria Legal Aid said:

a positive duty to eliminate discrimination and promote equality is an important mechanism for achieving equality. However, in order to be effective, it must require positive action and an effective enforcement framework.²⁷⁴

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) provides practical guidance on eliminating discrimination, harassment and victimisation.²⁷⁵ Ms Lauren Matthews from VEOHRC said for the employment of people with disability:

The positive duty flips the discussion. It stops asking people with disabilities to do the heavy lifting of having to raise complaints in order to bring about change. It flips the discussion to put the burden and the responsibility back on the place of employment, to work in the preventative space and do the heavy lifting to prevent discrimination from occurring in the workforce.²⁷⁶

In 2016, the AHRC published a report, *Willing to work: National inquiry into employment discrimination against older Australians and Australians with disability*. In that report, the AHRC considered the recommendations made in the 2008 Senate inquiry to adopt a positive duty to prevent discrimination and the existing positive duty under the Victorian *Equal Opportunity Act*. The AHRC noted that submissions to its inquiry supported the introduction of a positive duty to prevent discrimination and promote equality into federal discrimination laws.²⁷⁷ The AHRC recommended the Australian Government consider the benefits of such a positive duty being inserted in Commonwealth discrimination laws.²⁷⁸

In 2020, the AHRC published another report examining discrimination in the employment context, *Respect@Work: Sexual harassment national inquiry* report.²⁷⁹ Submissions to the AHRC's inquiry argued that the lack of a positive duty in the *Sex Discrimination Act* to prevent workplace sexual harassment meant employers placed 'a higher priority on compliance with employment law and work health and safety laws than discrimination law'.²⁸⁰ The AHRC considered this placed a 'heavy onus on individuals to complain'.²⁸¹ The AHRC recommended the *Sex Discrimination Act* be amended to introduce a new duty on employers to eliminate unlawful sex discrimination, sexual harassment and victimisation.²⁸²

The *Sex Discrimination Act* was amended in December 2022 to impose a duty on an employer or a person conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct, including discrimination and harassment.²⁸³

From December 2023, the AHRC will exercise new powers to monitor and assess compliance with the positive duty in the *Sex Discrimination Act*.²⁸⁴ This includes preparing and publishing guidelines for complying with the positive duty and to promote understanding of and public discussion about the positive duty. The AHRC can initiate an inquiry into a person's compliance with the positive duty if it 'reasonably suspects' that a person is not complying.²⁸⁵

The AHRC has also received new powers with respect to systemic discrimination (including on the ground of disability) following amendments to the *AHRC Act* in December 2022.²⁸⁶ Section 35L of the *AHRC Act* states:

(1) The following functions are conferred on the Commission:

(a) to inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination;

(b) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) In this Act:

systemic unlawful discrimination means unlawful discrimination that:

(a) affects a class or group of persons; and

(b) is continuous, repetitive or forms a pattern.

In 2022, the Law Reform Commission of Western Australia's report, *Review of the Equal Opportunity Act 1984 (WA)* and the Queensland Human Rights Commission's report, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991 (Building belonging review report)* also recommended amending their respective states' discrimination laws to introduce a positive duty to prevent discrimination.²⁸⁷

In 2022 the Western Australian Attorney-General stated that the Western Australian Government would commence drafting a new Equal Opportunity Act in response to the recommendations made by the Law Reform Commission of Western Australia.²⁸⁸

In its response to the *Building belonging review* report, the Queensland Government supported the relevant recommendation in principle. It stated 'the introduction of a positive duty would focus on creating cultural change, as well as addressing systemic discrimination issues, rather than relying on individuals to pursue complaints after the fact'.²⁸⁹

The positive duty and disability in other countries

The shift to positive duties, both to prevent or eliminate discrimination and to promote equality, is evident in overseas jurisdictions. The *Equality Act 2010* (UK) introduced the Public Sector Equality Duty to harmonise existing equality duties, such as those relating to race, disability and gender equality duties, and to integrate consideration of equality into the day-to-day business of public authorities.²⁹⁰

Section 42 of the *Human Rights and Equality Act 2014* (Ireland), the Public Sector Equality and Human Rights Duty, applies to all public bodies in Ireland. Public bodies have a responsibility to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans, and to promote equality of opportunity and treatment and protect human rights.²⁹¹

The *Employment Equity Act 1995* (Canada) imposes a positive duty on public organisations, as well as organisations in the private sector with more than 100 employees that operate in federally regulated industries, but only in respect of employment.²⁹² The duty is aimed at achieving workplace equality and acknowledges the need for accommodations via special measures to support ‘differences’.²⁹³

Support for a positive duty in the *DDA*

Witnesses at hearings and submissions have supported the introduction of a positive duty to eliminate discrimination into the *DDA*. At Public hearing 9, the former Disability Discrimination Commissioner, Dr Graeme Innes AM, recommended the inclusion in the *DDA* of a positive duty to prevent discrimination, similar to that which exists in Victoria.²⁹⁴

In its response to our *Safeguards and quality issues paper*, Blind Citizens Australia told us that a:

primary difficulty at present is that the *DDA* is used on a case-by-case basis, to test discrimination claims, rather than providing adequate protection in the first instance which may prevent the discrimination occurring.²⁹⁵

The Victorian-based Disability Discrimination Legal Service (DDLS) recommended the introduction of an enforceable positive duty to eliminate and prevent discrimination.²⁹⁶ This would remedy the reactive nature of the existing complaints-based system and make it more protective. DDLS stated:

The vast majority of Australian jurisdictions’ anti-discrimination legislation does not include an enforceable positive duty to eliminate discrimination or inequality. A positive duty is particularly important as it encourages public and private actors to take meaningful positive action to eliminate discrimination. It is only with a positive duty that can be enforced, that a discrimination framework can truly claim to be protective, preventative, and prophylactic. Without it, the system remains reactionary, focused on compensation and redress, and any positive change to community behaviour is a secondary by-product.²⁹⁷

Victoria Legal Aid recommended in a submission that ‘Commonwealth, state and territory anti-discrimination laws should impose an enforceable positive duty on employers and schools to prevent disability discrimination, supplemented by guidelines for compliance.’²⁹⁸

Legal Aid NSW also supported the introduction of a positive duty on all duty-holders under discrimination laws to take positive measures to eliminate discrimination. It suggested these efforts be complemented by giving additional powers and resources to the AHRC.²⁹⁹

DDLS suggested that if the AHRC had appropriate enforcement powers, this would remedy the issue of the lack of a regulator actively involved in compliance:

Much like with the lack of a positive duty, having a human rights agency that is not involved in regulation is problematic because it exacerbates the problems with a

complaints-based framework. It also fails to utilise the knowledge and experience these agencies have of systemic issues faced by marginalised communities and the best ways to combat these issues.³⁰⁰

In its response to the *Employment issues paper*, the AHRC recommended the Australian Parliament amend the *DDA* to introduce a positive duty to promote substantive equality and eliminate discrimination.³⁰¹ AHRC stressed the positive duty was a more proactive model than defensive anti-discrimination laws. It said creating a positive duty would promote substantive equality and prevent discrimination.³⁰²

Enforcing a positive duty

A positive duty should not rely on a system of individual complaints for its enforcement. Indeed, the very purpose of such a provision is that it does not require an individual to make a complaint. Because the duty's focus is on general practices and policies, the preferable approach to 'enforcement' is to empower the AHRC to conduct investigations and reviews aimed at identifying breaches of the duty.

The Australian Communications Consumer Action Network recommended greater powers should be given to the AHRC to 'perform compliance monitoring and investigations into cases of systemic discrimination against people with disability or systemic failures to meet Standards'.³⁰³

VEOHRC told us:

it will be important to recommend that these changes are accompanied by a full suite of enforcement and compulsion powers to enable equal opportunity and human rights commissions to act to enforce the positive duty effectively.³⁰⁴

The AHRC's powers with respect to systemic discrimination and the positive duty under the *Sex Discrimination Act* (if they were extended to include disability discrimination and harassment) would also be effective and appropriate for enforcing a positive duty with respect to disability. The use of action plans in the *DDA* is another practical way of ensuring compliance with a positive duty to eliminate discrimination.

Recommendations

We recommend the creation of a new, positive duty under the *DDA* to take reasonable and proportionate measures to eliminate all forms of discrimination on the ground of disability, including harassment and victimisation. The duty should apply to all duty-holders under the *DDA*, including public and private sector entities.

Recommendation 4.27 Positive duty to eliminate disability discrimination

The *Disability Discrimination Act 1992* (Cth) should be amended to introduce a positive duty on all duty-holders under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the *Sex Discrimination Act 1984* (Cth):

Duty to eliminate discrimination on the ground of disability

(1) A person must take reasonable and proportionate measures to eliminate all forms of discrimination on the ground of disability.

(2) In determining whether a measure is reasonable and proportionate the following factors must be considered—

- (a) the size of the person's business or operations;
- (b) the nature and circumstances of the person's business or operations;
- (c) the person's resources;
- (d) the person's business, risk management plans and operational priorities;
- (e) the practicability and the cost of the measures;
- (f) whether the person has a disability action plan;
- (g) nature and extent of the person's consultation with any person with disability concerned; and
- (h) all other relevant facts and circumstances.

Other duties not limited or otherwise affected

(3) This section does not limit, or otherwise affect, a duty that a duty-holder has under:

- (a) the *Work Health and Safety Act 2011* (Cth); or
- (b) a law of a State or Territory that deals with work health and safety.

Recommendation 4.28 Systemic discrimination

- a. Division 4A (ss 35A–35K) of the *Australian Human Rights Commission Act 1986* (Cth) should be amended by inserting the words 'or disability discrimination' after 'sex discrimination' where these words appear.
- b. A reference to 'disability discrimination' means any conduct that is unlawful under the *Disability Discrimination Act 1992* (Cth).

4.7. Harassment under the *DDA*

The *DDA* makes harassment of a person with disability and their associates unlawful in only three areas: employment or work; the provision of goods, services and facilities; and education. In employment and work related areas, it is unlawful to harass people with disability who are prospective or current employees, commission agents and contract workers, in relation to a person's disability.³⁰⁵ It is unlawful to harass a person with disability who wants to acquire the goods or services or to make use of the facilities in relation to the disability.³⁰⁶ It is unlawful for a member of staff at an educational institution to harass a prospective or current student with disability in relation to the disability.³⁰⁷

The *DDA* does not define 'harass' or 'harassment'. However, the *Disability Standards for Education 2005* (Cth) (*Education Standards*) require an education provider to develop and implement strategies and programs to prevent harassment or victimisation of a student with disability.³⁰⁸ The *Education Standards* define 'harassment' in relation to a person with disability to:

include an 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 a disability.³⁰⁹

Measures that education providers may take to comply with the *Education Standards* include ensuring that:³¹⁰

- policies, procedures and codes of conduct for staff and students explicitly prohibit harassment and victimisation of students with disabilities, or their associates
- any cases or complaints of harassment or victimisation are handled promptly
- the procedures for handling any cases or complaints of harassment are fair, transparent and accountable.

The 2015 review of the *Education Standards* was undertaken by Urbis, who found the positive duty was not operating as intended. In the *Final Report for the 2015 Review of the Disability Standards for Education 2005*, Urbis said:

A key issue identified in relation to the harassment and victimisation standard was the manner in which the standard was phrased to discourage *negative* behaviour rather than encourage *positive* inclusion. The number of examples of harassment given was relatively low (though still significant enough to be a concern). However, there were many examples of where disability had prevented a student from being positively included in activities.³¹¹

Experiences of harassment

Throughout our hearings, but particularly in Public hearing 28, 'Violence against, and abuse of, people with disability in public places', we heard distressing evidence about the nature

and extent of harassment people with disability around Australia experience, and the impact that this has on them. In many cases, this behaviour caused serious and lasting harm to the person experiencing it.

‘Jenni’ is a woman of short stature.³¹² At Public hearing 28 she described experiencing ‘an ongoing wave of everyday abuse’, saying she could not recall each and every incident because they occur so often.³¹³ Jenni said the frequency and types of abuse she experiences have stayed relatively consistent throughout her life. She has experienced abusive comments, taunts, harassment, intimidation and threats of violence.³¹⁴

Ms Fiona Strahan, also a woman of short stature, said it would be ‘too destructive’ for her if she were to keep a score card of all the incidents of violence and abuse she has experienced.³¹⁵ Ms Maree Jenner, Vice-President of the Short Statured People of Australia (SSPA), said she and other members of the SSPA are commonly subjected to name-calling, jeering and jokes about their height.³¹⁶

Dr Debra Keenahan, an academic, artist and woman of short stature, also said she regularly experiences stares, smirks, comments and laughter, as well as people taking photographs and videos of her. The most common form of verbal abuse she experiences is when people in the community insult her by using the term ‘midget’.³¹⁷

Many people with disability told us that regular harassment, and other forms of abuse they experience in their day-to-day lives, has caused them significant harm. In some cases, people have had to change their daily activities or have withdrawn from participating in the community to avoid being harassed. Mr Tim Marks, a man with disability from Tasmania, said he developed Post Traumatic Stress Disorder (PTSD) after being harassed, threatened and assaulted in public, leaving him in a constant state of hypervigilance.³¹⁸ He now avoids leaving the house after it gets dark and is embarrassed to tell his friends he is scared of leaving the house when they invite him for dinner.³¹⁹

‘Ashleigh’, an artist with a vision impairment and acquired brain injury, told us that after being harassed by a man at a music concert, she has never gone to another concert due to her fear of being separated from her friends and feeling unsafe.³²⁰ Ms Tracy Barrell OAM, a former Paralympian, told us she has to be ‘mentally prepared’ for an ‘onslaught’ of abuse or harassment before she leaves her house and adjusts her routes to avoid places where she thinks she will be harassed, including schools.³²¹

Harassment because of disability also occurs in online forums and can have a pervasive and continuing impact on the person experiencing it. Australia’s eSafety Commissioner, Ms Julie Inman Grant, confirmed that people with disability experience online hate speech at higher levels than the national average,³²² and this abuse disproportionately targets their political views, disability and physical appearance.³²³

Ms Carly Findlay OAM is a Melbourne-based writer, public speaker and activist who was born with a rare skin condition called Ichthyosis. Ms Findlay said she has been subjected to ridicule, harassment and abuse when out in public. This behaviour includes stares, demeaning or

abusive comments, questions about her appearance, promises of a cure, taunts and ridicule. Ms Findlay also gave evidence of the harassment and abuse she experiences online.³²⁴ She recounted the difficulties she experienced in making complaints and requests to have online harassment of her removed, or for some other action to be taken.³²⁵ She also said she and other people with disability should not have to leave online spaces to avoid harassment or vilification:

The online world is my workplace. It is a source of community. It's where disabled people hang out, particularly in the pandemic. I mean, COVID is not over, and there's so many disabled people that are not able to go out and not wanting to go out. And the other thing is, you know, we – we connect with other activists online. We see ourselves in those people. We have opportunities for work. So, no. We – we can't just switch off and we shouldn't have to just switch off.³²⁶

Inadequate protections against harassment

The *DDA* has been ineffective in addressing the harassment experienced by people with disability. None of the experiences described above would be unlawful under the *DDA*. Since April 2000, there have been no cases where a claim of harassment in relation to disability has succeeded under the *DDA*.

Since the *DDA* makes no reference to vilification, it is also ineffective in providing any protection to people with disability who experience vilification in any aspect of life. This is the case unless the conduct can be characterised as some other form of prohibited discrimination.

In its 2004 review of the *DDA*, the Productivity Commission considered whether the *DDA* should include protection from vilification and examined provisions in other legislation, including section 18C of the *Racial Discrimination Act*.³²⁷ It stopped short of recommending an express provision in the *DDA* because of 'constitutional limitations on the Australian Government's power to make vilification of people with disabilities unlawful'.³²⁸ This seems to have been an unduly cautious view, having regard to the Federal Court's decision in *Aldridge v Booth* where a similar argument was raised and rejected in relation to the validity of the provisions prohibiting sexual harassment in the *Sex Discrimination Act*.³²⁹ In any event, Australia's ratification of the *CRPD* and its obligations under article 16(1) to protect people with disability from all forms of violence and abuse would support legislation prohibiting vilification of people with disability.

There are two key reasons why the *DDA* has been ineffective in preventing harassment. First, the existing provisions have been interpreted narrowly and place a heavy onus on the person with disability to prove all the elements necessary to establish unlawful harassment.³³⁰ Under the common law, the conduct must be 'both persistent and harrying'³³¹ or be 'a series of actions causing vexation and worry'.³³² One-off or isolated incidents of harassment are excluded.³³³

The form of harassment must be more than discourteous or unprofessional behaviour.³³⁴ Harassment must be objectively assessed and be of sufficient seriousness, for example being 'deliberately rude'.³³⁵ The person with disability also has to prove the harassment was in relation to their disability, requiring a causal link between the nature of the harassment and the person's disability.³³⁶

Unlike sexual harassment, disability harassment does not include any assessment of whether the conduct was unwelcome to the person with disability or any assessment of whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated in the circumstances.³³⁷ Also unlike sexual harassment, there is no consideration of the circumstances in which the harassment occurs.³³⁸ Notably, the *Sex Discrimination Act* provides that a person's disability is a factor that is taken into account, not for causation, but to determine whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility a person with disability would be offended, humiliated or intimidated in the circumstances by the conduct of a sexual nature.³³⁹

Legal Aid NSW expressed its concern about the exclusion of single incidents of harassment. It said many instances of disability harassment involve single events that do not reach the threshold of persistent, harrying conduct, but are nevertheless serious and have a significant impact on the victim.³⁴⁰ The cumulative impact of regular but separate instances of harassment was demonstrated through the evidence of multiple witnesses at Public hearing 28.

The second reason the *DDA* has been ineffective in responding to the harassment experienced by people with disability is because the *DDA* is limited in its application. As explained, the *DDA* confines the protection from harassment to particular relationships, for example employer to employee, teacher to student, or service provider to a person seeking services.³⁴¹ The 'persistent', serious harassment must occur over time and in the context of those relationships. It is implicit in the way the courts have interpreted 'harassment' that a person with disability will have to experience repeated incidents of abuse, humiliation, intimidation or offence before they can commence legal action to stop the conduct.³⁴²

A person who experiences sexual harassment at work can apply to the Fair Work Commission for a 'stop sexual harassment order'.³⁴³ There is no comparable pathway to seek an order to stop harassment of a person with disability.

Harassment in context

The evidence shows that many people with disability experience harassment in a range of places and circumstances not covered by the *DDA*. This includes harassment in public places and by strangers.³⁴⁴ At Public hearing 28, people with disability shared their experiences of harassment in public places and said they have come to expect some form of abuse and harassment whenever they leave their homes.

The *DDA* assumes harassment occurs between individuals, making it 'unlawful for a person to harass another person'.³⁴⁵ It does not expressly capture harassment being perpetrated by a group of people or directed towards a group of people with disability. We have heard harassment may involve more than one person. People of short stature in particular gave evidence of the types of harassment and abuse they experience from groups of strangers in public.³⁴⁶

Dr Keenahan now avoids walking past places where teenagers congregate, observing that 'teenagers are some of the worst perpetrators of abuse, both in terms of frequency and severity'.³⁴⁷

Professor Emerita Gwynnyth Llewellyn, Co-Director of the Centre of Research Excellence in Disability and Health at the University of Sydney, said discrimination policy and research previously focused on discrimination in organisational and institutional settings. Accordingly, the issues of interpersonal discrimination and violence affecting people with disability have only been researched and discussed publicly over the past 15 years.³⁴⁸ In her view, the types of violence and abuse examined during Public hearing 28 are considerably under-researched in Australia. She referred to the research conducted in Australia that, together with analysis of data gathered in the United Kingdom, ‘form an indicative evidence base on the prevalence of interpersonal discrimination against people with disability’.³⁴⁹ She said such interpersonal violence and discrimination is ‘endemic’ and detrimentally affects the health of people with disability.³⁵⁰ For example, she pointed to the Australian Bureau of Statistics 2016 *Personal Safety Survey*, which found people with disability experienced stalking and harassment within the 12 months prior to the survey at rates 2.49 times higher than people who do not have disability.³⁵¹

Professor Nicole Asquith, Convenor of the Australian Hate Crime Network (AHCN),³⁵² gave evidence about the ‘everyday nature of targeted violence’, referring to violence directed at people with disability.³⁵³ She used the terms ‘ableist violence’ or ‘disablist violence’ to describe this.³⁵⁴ Based on her discussions with people with disability in the AHCN, as well as her review of the limited Australian research available, Professor Asquith believes ‘people with disability in Australia also commonly encounter targeted violence’.³⁵⁵

Recent inquiries have examined the nature and extent of sexual harassment in Australian workplaces and universities and the harm it causes.³⁵⁶ These inquiries have led to significant reforms to the *Sex Discrimination Act* to expand the protections against sexual harassment in employment,³⁵⁷ to introduce new forms of unlawful conduct with respect to harassment on the ground of sex,³⁵⁸ and to prohibit subjecting another person to a workplace environment that is hostile on the ground of sex.³⁵⁹

While these laws apply to people with disability, they do not provide protection from harassment done *in relation to* their disability. The laws do not capture the intersectional nature and experiences of people who experience sexual harassment with other forms of harassment.³⁶⁰

Amending the *DDA*

Reform proposals

We acknowledge recent work done in some jurisdictions to examine potential law reform to extend legal protections to people with disability experiencing harassment and vilification.

In its 2021 report, *Inquiry into anti-vilification protections*, the Victorian Legislative Assembly Legal and Social Issues Committee found persons with disability face ongoing harassment and hate conduct.³⁶¹ It recommended that the Victorian Government extend its anti-vilification laws to include people with disability, among other groups, with the aim of being ‘as inclusive as possible’.³⁶²

The Law Reform Commission of Western Australia's Final Report on the *Review of the Equal Opportunity Act 1984 (WA)*, recommended adopting anti-vilification provisions in the *Equal Opportunity Act* to prohibit vilification on the grounds of disability.³⁶³ Further, the Commission recommended expanding the scope of existing criminal anti-vilification provisions to cover serious or harmful instances of vilification on the basis of disability.³⁶⁴

The Western Australian Government has stated it broadly accepts most of the 163 recommendations made in the report and committed to 'introducing anti-vilification laws and strengthening the victimisation provisions in the Equal Opportunity Act'.³⁶⁵

The government has also flagged its intention to create a 'positive duty on employers to eliminate discrimination, harassment and vilification'.³⁶⁶ A new equal opportunity bill drafted in response to the recommendations is expected to be introduced to the Western Australian Parliament in the second half of 2023.³⁶⁷

Racial Discrimination Act

In submissions following Public hearing 28, Counsel Assisting referred to the protection against offensive, insulting, humiliating or intimidating behaviour in section 18C of the *Racial Discrimination Act*. Counsel Assisting also referred to section 17 of the *Anti-Discrimination Act 1998* (Tas), which prohibits conduct which offends, humiliates, intimidates, insults or ridicules a person on the basis of a particular attribute.³⁶⁸

Section 18C of the *Racial Discrimination Act* provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.

- (3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Section 18D provides a number of exceptions to the prohibition in section 18C, as follows:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Counsel Assisting submitted there was a strong basis to recommend legislation of a kind similar to section 18C of the *Racial Discrimination Act* ought to be included in Australian law, directed at those who offend, intimidate or insult a person based on their disability.³⁶⁹ Counsel Assisting addressed the importance of the law responding to the:

experience of the possible victims for the purposes of deciding whether the impugned conduct meets the statutory threshold because it permits consideration of the history and context within which the conduct takes place.³⁷⁰

In its submissions in reply, the Australian Government stated it:

believes all people are entitled to respect, dignity and the opportunity to participate in society regardless of their disability. While there is no specific prohibition on disability vilification under federal anti-discrimination legislation, the DDA currently makes discrimination and harassment on the basis of disability unlawful in a range of areas of public life.³⁷¹

The Australian Government's submissions otherwise resisted the proposed recommendation on the basis that the hearing had not involved a detailed examination of the *DDA* and no government witnesses were called to give evidence in relation to the work of the Australian Government and the AHRC in relation to the *Free and Equal* project.³⁷² The Australian Government submitted that any recommendations in relation to vilification provisions would be considered in light of the AHRC's final report on the *Free and Equal* project.³⁷³

In the *Free and Equal* discussion paper published in April 2019, the AHRC expressed the view that the 'adequacy of protections against harassment and vilification in federal discrimination law is a matter that warrants consideration of reform'.³⁷⁴ However, the subsequent discussion paper considering a model for positive human rights in Australia made no reference to reforms

relating to protection from harassment or vilification.³⁷⁵ While the *Free and Equal* report on a reform agenda for federal discrimination laws recommended imposing a positive duty to take steps to eliminate discrimination and said this would ‘place greater priority on the prevention of discrimination and harassment’, the report makes no reference to vilification.³⁷⁶ Nor did the report give consideration to sections 18C or 18D so as to suggest reforms proposed by the *Free and Equal* project will involve consideration of those provisions.

Other inquiries have examined the operation of section 18C of the *Racial Discrimination Act* and its efficacy in protecting the rights of marginalised groups. In 2016, the Australian Parliamentary Joint Committee on Human Rights (PJCHR) inquired into whether the operation of Part IIA of the *Racial Discrimination Act* (which contains sections 18C and 18D) imposes unreasonable restrictions upon freedom of speech. In particular, the PJCHR was asked to report on whether, and if so, how, sections 18C and 18D (which provides exceptions to 18C) should be reformed.

The PJCHR produced an extensive report which examined widely varying views in submissions to repeal, reform or leave section 18C in its current form.³⁷⁷ Notwithstanding the varied views among submissions and Committee members themselves, the PJCHR acknowledged section 18C as an ‘important protection against forms of racially discriminatory speech and racism in Australia’ and said it is ‘consistent with Australia’s international human rights obligations’.³⁷⁸

We recognise that section 18C of the *Racial Discrimination Act* has attracted considerable controversy. Nonetheless, it remains law and has an important role in protecting people against various forms of offensive behaviour by public acts on the grounds of race, colour or national or ethnic origin.

The evidence to which we have referred establishes that people with disability require protection against offensive behaviour by public acts and harassment on the ground of disability. We therefore propose that a provision modelled on section 18C of the *Racial Discrimination Act* be incorporated in the *DDA*.

Recommendation

We recommend the *DDA* be amended to include a standalone prohibition on offensive behaviour, in a form modelled on section 18C of the *Racial Discrimination Act*. We expect the amendment would involve an accompanying provision, equivalent to section 18D of the *Racial Discrimination Act*. This provision would not replace sections 35, 37 or 39 of the *DDA*.

Recommendation 4.29 Offensive behaviour

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision:

Section 39A Offensive behaviour because of disability

(1) It is unlawful for a person (the *first person*) to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

4.8. Vilification

Except to the extent the *DDA* addresses discrimination in the form of harassment, the legislation affords no protection to people against vilification by reason of their disability.

The Australian Capital Territory and Tasmania are the only jurisdictions in Australia expressly to prohibit vilification on the basis of disability. The Australian Capital Territory creates a criminal offence of serious vilification as follows:

A person commits an offence if –

- (a) The person intentionally carries out an act; and
- (b) The act is a threatening act; and
- (c) The person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of ... :
 - (i) Disability;

... and

- (d) The act is done other than in private; and
- (e) The person is reckless about whether the act is done other than in private.³⁷⁹

Section 19 of the *Anti-Discrimination Act 1998* (Tas) provides that:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of:

...

- (b) any disability of the person or any member of the group ...

The Victorian Legislative Assembly Legal and Social Issues Committee recommended, in its 2021 report on anti-vilification protections, the extension of Victorian anti-vilification laws to include people with disability. The Committee considered this necessary in light of the ongoing harassment and hate conduct faced by people with disability.³⁸⁰

In its response to the report, the Victorian Government supported this recommendation ‘in principle’,³⁸¹ and advised it would decide the attributes that should be included in an extension to vilification laws through ‘extensive consultation with the Victorian community’.³⁸²

In 2022, the Law Reform Commission of Western Australia recommended amending the *Equal Opportunity Act 1984* (WA) to make vilification on the ground of disability unlawful.³⁸³ The Commission proposed a definition of vilification that focused on the likely effect of vilifying conduct, as follows:

conduct, otherwise than in private, that is likely to:

- Create; promote or increase animosity towards;
- Threaten;
- Seriously abuse; or
- Severely ridicule

a group, or a person as a member of the group.³⁸⁴

The Law Reform Commission of Western Australia did not recommend criminal penalties be imposed for conduct amounting to vilification on the ground of disability. However, it saw ‘potential merit’ in expanding existing criminal anti-vilification laws to cover serious cases of vilification on the basis of disability.³⁸⁵ It pointed out that several Australian jurisdictions impose criminal penalties for vilification of people on grounds, such as race or ethnic origin.³⁸⁶ The Western Australian Government has indicated its willingness to adopt ‘anti-vilification laws and strengthening the victimisation provisions in the Equal Opportunity Act’³⁸⁷ in light of the Law Reform Commission’s recommendations.

On one view, if the *DDA* is amended to include a provision modelled on section 18C of the *Racial Discrimination Act*, there may be little need to add a provision specifically making vilification unlawful. It is perhaps difficult to envisage vilification of people with disability, if ‘vilification’ is defined consistently with existing state and territory laws, would not be caught by a provision modelled on section 18C of the *Racial Discrimination Act*.

Nonetheless, we think it would send a significant message both to people with disability and the wider community if the *DDA* was amended to render vilification of people with disability unlawful. This would be directed at conduct more serious and harmful than conduct likely to offend, insult, humiliate or intimidate a person with disability. Conduct that incites hatred for or threatens violence towards a person with disability or a group of people with disability falls into a different category than intimidating conduct.

Accordingly, we recommend the *DDA* be amended to prohibit vilification of a person or group of people with disability on the ground of their disability or perceived disability. Vilification should be defined to include behaviour that incites hatred for or threatens violence towards a person or group of people with disability.

Recommendations

We recommend the *DDA* be amended to make vilification not done in private on the ground of disability unlawful. The definition of an act not done in private should be the same as that in Recommendation 4.29 in this chapter.

We also recommend that jurisdictions which already have legislation imposing criminal penalties for vilification of people on grounds such as race or ethnic origin be extended to cover vilification of people with disability on the ground of their disability or perceived disability.

Recommendation 4.30 Vilification because of disability

- a. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision as follows:

Section 39C Vilification because of disability

It is unlawful for a person (the *first person*) to do an act otherwise than in private, if:

- (a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;
 - (b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and
 - (c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.
- b. States and territories that already have legislation imposing criminal penalties for vilification of people on grounds that do not include disability should extend the legislation to vilification of people on the ground of disability.

4.9. Lawful exemptions

Not all conduct which could amount to discrimination against people with disability is unlawful. The *DDA* includes a number of exemptions, exceptions or defences to discrimination. The *DDA* permits conduct which might otherwise be discrimination in a number of ways:

- **permanent exemptions**,³⁸⁸ which apply to particular areas of activity or to particular entities. The permanent exemptions include acts done under statutory authority,³⁸⁹ actions done to protect public health in relation to infectious diseases,³⁹⁰ charities,³⁹¹ pensions and allowances,³⁹² immigration,³⁹³ peace keeping services,³⁹⁴ and some aspects concerning use of assistance animals.³⁹⁵

- **temporary exemptions**, which are approved by the AHRC and permit specific conduct by a particular entity for a period not exceeding five years.³⁹⁶ The AHRC has developed guidelines for the determination of exemption applications.³⁹⁷ According to its website, since 1996 the AHRC has granted or ‘granted-in-part’ 45 applications and refused 13 applications. One application was withdrawn.³⁹⁸ The majority of applications have related to wheelchair accessibility and captioning in the provision of services.³⁹⁹ For the purpose of this chapter we have not examined these temporary exemptions. We consider the AHRC’s power to grant temporary exemptions with conditions to be an important power, but it should be exercised consistently with the principles articulated in the *CRPD*.
- **special measures** adopted for the benefit of people with disability⁴⁰⁰
- when avoiding discrimination or making an adjustment would impose **unjustifiable hardship**⁴⁰¹
- acting in accordance with **a disability standard** in place at the time of the discrimination.⁴⁰² Disability standards are made by the Commonwealth Attorney-General and are legally binding. We have addressed the standards in Section 4.10 below. It is unlawful to breach a standard. However, compliance with the standards provides a ‘defence’ to a more general claim of discrimination under Part 2 of the *DDA*.⁴⁰³
- where a person’s disability causes them to be unable to do the **inherent requirements** of the particular work.⁴⁰⁴ We examine inherent requirements in detail in Chapter 6, ‘Open and inclusive employment’ of Volume 7.

The exemptions in the *DDA* also have direct operation in the *FWA*. We address the relationship between the *FWA* and the *DDA* in Chapter 6, ‘Open and inclusive employment’ of Volume 7, which examines employment and economic participation for people with disability.

We do not examine all the permanent exemptions, defences or exceptions in the *DDA* in this part. Instead, we focus on particular exemptions warranting reconsideration by the Australian Government. Some have operated for 30 years and the extent to which these exemptions are compatible with the *CRPD* should be considered.

Exemptions and the *CRPD*

As discussed in Chapter 1, ‘Australia’s international human rights obligations regarding people with disability’ and Chapter 3, a number of international human rights instruments recognise certain limitations can be placed on human rights. In Public hearing 18, Counsel Assisting submitted the *CRPD* differed from other international human rights conventions because it does not include an ‘override’ provision expressly authorising States to limit rights (or specific rights) where necessary in pursuit of some other interest.⁴⁰⁵ Even so, as Counsel Assisting submitted, rights recognised in the *CRPD* are not absolute. The *CRPD* does not state that the rights should be protected irrespective of the impact on other persons’ rights or the imposition of a disproportionate burden on the duty-holder.⁴⁰⁶

The Australian Government considers discrimination is permissible if the conduct reflects 'legitimate differential treatment'.⁴⁰⁷ This means the differential treatment must be: (a) aimed at achieving a purpose which is legitimate; (b) based on reasonable and objective criteria; and (c) proportionate to the aim to be achieved.⁴⁰⁸ This is the approach commonly used to limit civil and political human rights and is consistent with international human rights law. For example, the *International Covenant on Civil and Political Rights* protects freedom of speech, but also allows for civil remedies for defamation where a person's reputation is harmed without just cause.⁴⁰⁹

As noted in Chapter 3, human rights legislation in Victoria, Queensland and the Australian Capital Territory are subject to limitations.⁴¹⁰ The AHRC's *Free and Equal* position paper on a Commonwealth Human Rights Act similarly proposes a limitations clause.⁴¹¹ Likewise, in Chapter 3 we recommend a clause in the Disability Rights Act requiring that rights in the Act be subject only to such limitations that are reasonable and justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors (to be specified in the Act).

The absence of general or specific 'limitation' provisions calls for nuance when assessing any limitation on *CRPD* rights, including the circumstances in which conduct disadvantaging people with disability might be permissible. We agree with Counsel Assisting's submission that in implementing (and imposing any limitations on) a particular human right, the right must be considered in its own terms by ascertaining the scope of the right and the extent to which States can, consistent with the *CRPD*, elect to limit the scope of the right.⁴¹² The *DDA*'s exemptions should be framed to be clear and precise about any limitation on the rights of people with disability.

Permanent exemptions

The 2004 Productivity Commission report reviewed the exemptions in the *DDA* and made seven findings and six recommendations.⁴¹³

The AHRC's *Free and Equal* paper discussed permanent exemptions and recommended that 'all permanent exemptions under federal discrimination laws be reviewed on a periodic basis to ensure they remain appropriate'.⁴¹⁴ The *Free and Equal* project provides an opportunity to undertake a comprehensive review of the *DDA* exemptions and assess their consistency with the *CRPD*.⁴¹⁵

We do not address all the permanent exemptions, but focus on exemptions of particular significance to the lives of people with disability.

Special measures

If action is taken as a 'special measure' within the meaning of the *DDA*, it will not be unlawful discrimination. Generally, a special measure might preference a particular group with the purpose of redressing historical disadvantage or accelerating equality. It may take the form of quotas or targeted programs.⁴¹⁶ A special measure is intended to be temporary and should

not continue once the objective has been achieved. Special measures for people with disability may, however, need to be permanent ‘depending on context and circumstances, including by virtue of a particular impairment or the structural barriers of society’.⁴¹⁷

A special measure is akin to an adjustment or reasonable accommodation. However, adjustments are made for individuals in particular circumstances, while special measures are intended to address systemic issues or barriers to equality generally.

Article 5(4) of the *CRPD* states:

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

Section 45 of the *DDA* recognises special measures may be used subject to the conditions set out in that section, as follows:

(1) This Part does not render it unlawful to do an act that is reasonably intended to:

(a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or

(b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:

(i) employment, education, accommodation, clubs or sport; or

(ii) the provision of goods, services, facilities or land; or

(iii) the making available of facilities; or

(iv) the administration of Commonwealth laws and programs; or

(v) their capacity to live independently; or

(c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:

(i) employment, education, accommodation, clubs or sport; or

(ii) the provision of goods, services, facilities or land; or

(iii) the making available of facilities; or

(iv) the administration of Commonwealth laws and programs; or

(v) their capacity to live independently.

(2) However, subsection (1) does not apply:

- (a) in relation to discrimination in implementing a measure referred to in that subsection if the discrimination is not necessary for implementing the measure; or
- (b) in relation to the rates of salary or wages paid to persons with disabilities.

Note: For discrimination in relation to the rates of salary or wages paid to persons with disabilities, see paragraphs 47(1)(c) and (d).

If the effect of the special measure is to give more favourable treatment to a particular group of people with disability, it will not be unlawful. For example, if a university implemented a targeted program to increase the number of students with intellectual disability but not students with physical disability, a person with physical disability could not contend they had experienced unlawful discrimination.

The more controversial aspect of special measures is when action taken has the effect of limiting a person's rights. In *General comment no. 6*, the CRPD Committee said:

Specific measures adopted by States parties under article 5 (4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discrimination against persons with disabilities. Thus, States parties must consult closely with and actively involve representative organizations of persons with disabilities when they adopt specific measures.⁴¹⁸

There have been very few cases concerning section 45 of the *DDA* but the Federal Court has been alive to how a special measure may be characterised. In *Nojin v Commonwealth of Australia (Nojin)* the Full Federal Court said care must be taken not to apply section 45 in a manner that undermines the object and purposes of the *DDA*.⁴¹⁹ In *Nojin*, the issue concerned the way wages were determined by the Business Services Wage Assessment Tool (BSWAT) for people with intellectual disability working in Australian Disability Enterprises. The Commonwealth argued the use of the BSWAT amounted to a special measure. The Full Court rejected the argument, finding the BSWAT was not a 'reasonable' measure for the purposes of section 45 of the *DDA* and therefore not a special measure.⁴²⁰

Migration

I am very worried about my future. I hope that I can find a permanent place to live. I just want to live a life without harassment and to be treated with respect and dignity.⁴²¹

Section 52 of the *DDA* provides a blanket exemption in relation to the *Migration Act 1958* (Cth) (*Migration Act*), the *Migration Regulations 1994* (Cth) (*Migration Regulations*) and decisions about visas to enter and remain in Australia.⁴²² This means that in the operation of either the *Migration Act* or the *Migration Regulations*, the objectives of non-discrimination and protections against discrimination contained in the *DDA* do not apply.

The exemption to the *DDA* has allowed lawmakers to introduce criteria that effectively discriminate against people with disability wishing to enter Australia. These are usually in the form of 'health criteria' or health requirements which are contained in the *Migration Regulations*.⁴²³ Much has been written on their reach and scope.⁴²⁴ However, for the purposes of the present discussion we note the following points.

First, all people who want to enter Australia must comply with the health requirements that differ depending on the visa being sought. For example, short-stay tourists do not face extensive health requirements.⁴²⁵

In contrast, prospective permanent migrants face quite stringent requirements.⁴²⁶ These are set out in the form of Public Interest Criteria (PIC) contained in Schedule 4 of the *Migration Regulations*. The PIC do not expressly refer to people with disability. However PIC 4005 and 4007 stipulate that a visa applicant must be 'free from a disease or condition' that will be likely to 'require health care or community services' resulting in a 'significant cost to the Australian community', or 'prejudice the access of an Australian citizen or permanent resident to health care or community services'.⁴²⁷ The cost threshold is set at \$51,000.⁴²⁸ A person's application may be referred to a Medical Officer of the Commonwealth to assess and provide an opinion or estimate in relation to the 'significant cost' criterion, using a hypothetical person test.⁴²⁹ The Minister may waive the PIC 4007 requirements if all other criteria are satisfied. Ninety-six per cent of waiver applications are granted.⁴³⁰

Second, health requirements are designed to prevent the spread of infectious diseases and to minimise pressure on Australia's health system. However, current health requirements do not differentiate between 'disease' and 'condition'.⁴³¹ This means they do not distinguish between persons suffering from infectious diseases and persons with disability.

Third, an aspiring migrant will be refused entry where their disability would impose a significant cost on the Australian community or prejudice access by Australian citizens to health or community care.⁴³² The cost threshold is currently set at \$51,000.⁴³³ The original threshold was \$40,000.⁴³⁴

Fourth, existing health requirements do not consider any contributions which a person with disability or their family would make if admitted into Australia.⁴³⁵

Fifth, if a family member fails the health requirement due to disability, then consequently, the entire family will be refused entry into the country.⁴³⁶ For example, where a child's disability fails the health requirements on the grounds of cost, the parents and siblings will also be refused entry. This raises the concern that families may be forced to separate to increase their chances of successful migration into Australia.

Finally, the Minister is empowered, with respect to some classes of visas, to waive the health requirements.⁴³⁷

These points illustrate the way health requirements adversely impact people with disability, especially the inability to offset against costs and the use of medical services by considering the potential contributions a person or their family would make. Further, the lack of consideration of the contributions of aspiring migrants deprives the Australian community of the benefits that come from including migrants with disability and their families.

In a submission to the Royal Commission, the Sydney Centre for International Law (SCIL) criticised the health requirements as they apply to potential migrants to Australia and their families.⁴³⁸ The SCIL said since the enactment of the *Immigration Restriction Act 1901* (Cth), the Australian Government has placed some form of health requirement on persons seeking to enter Australia. Many countries similarly maintain health requirements for permanent and temporary immigrants to prevent the spread of contagious disease, a timely example being those operating during the COVID-19 pandemic. The submission from SCIL illustrates the adverse impacts of the health rules on migrants who have a child with disability.⁴³⁹

At Public hearing 29, 'The experience of violence against, abuse, neglect and exploitation of people with disability from culturally and linguistically diverse communities', we heard from some people with disability who require a visa to remain in Australia. The uncertainty of their visa status operates as a barrier to inclusion and participation in many areas of their life, including access to health, employment, financial and disability support services, including the National Disability Insurance Scheme (NDIS).

'Mr Rahman' gave evidence about his experiences after seeking asylum in Australia in 2013.⁴⁴⁰ He was born with a severe spinal condition, congenital short stature and severe kyphoscoliosis, which is a chest deformity that restricts his lungs. He also lives with poor physical health, depression and anxiety, and PTSD.⁴⁴¹ Mr Rahman described his experiences in immigration detention and the barriers he experienced in accessing support and assistance while on a bridging visa.⁴⁴²

At the time of Public hearing 29, Mr Rahman received a Centrelink payment of \$550 per fortnight,⁴⁴³ which is approximately half what he would be entitled to as a permanent resident or citizen receiving the Disability Support Pension (DSP).⁴⁴⁴ Despite his visa conditions permitting him to work, Mr Rahman cannot work because of his disability.⁴⁴⁵ He is also ineligible for the NDIS.⁴⁴⁶ As a consequence of being unable to work and being ineligible because of his migration status for the same level of social supports (DSP and NDIS) as other people with disability, Mr Rahman lives in a perpetual state of poverty, chronic pain and uncertainty about his future.⁴⁴⁷

In 2004, the Productivity Commission found the *Migration Act* and its regulations were 'appropriate', but may be 'wider than necessary' in scope. It recommended the Act be reviewed. The Productivity Commission recommended the law be amended to ensure it 'exempts only those provisions which deal with issuing entry and migration visas to Australia' from the operation of the *DDA* and 'does not exempt administrative processes under the Act and its regulations'.⁴⁴⁸ This was one of a minority of Productivity Commission recommendations not acted upon in the 2009 amendments to the *DDA*.

The 2010 report of the House of Representatives Joint Standing Committee on Migration, *Enabling Australia: Inquiry Into the Migration Treatment of Disability*, recorded the experiences of people with disability who were adversely affected by the health criteria.⁴⁴⁹ In particular, it found families with a child with disability are especially vulnerable to visa refusal or rejection.

In its *Concluding observations on the combined second and third periodic reports of Australia* in 2019, the CRPD Committee recommended Australia:

Review and amend its migration laws and policies to ensure that persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum and, especially, remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the Migration Act 1958.⁴⁵⁰

In 2021, the CRPD Committee considered the case of *Sherlock v Australia*. The CRPD Committee found the health criteria in PIC 4006A, set out in the *Migration Regulations*, contravened articles 5 and 18 of the *CRPD* because they impermissibly discriminate against persons with disabilities.⁴⁵¹

The Australian Government Department of Home Affairs is responsible for administering, not making, Australia's migration laws. Ms Cheryl-anne Moy, then Deputy Secretary Immigration and Settlement Services, Department of Home Affairs gave evidence at Public hearing 29. She described how the Department of Home Affairs assesses the circumstances of people with disability wishing to enter or migrate to Australia against the PIC.⁴⁵²

As noted above, the PIC do not expressly refer to people with disability but are likely to affect many, if not most, of them because of the economic threshold they impose upon a person's access to health care or community services.

During Public hearing 29, Ms Moy accepted that historically Australia's immigration system health requirements for permanent migrants or temporary visitors have been directed to managing infectious and contagious diseases.⁴⁵³ Ms Moy explained 'the *Migration Act* does not specify that a disability has any impact on someone's ability to gain a visa'. Rather, it is the 'health cost' of the disability that is considered.⁴⁵⁴

Ms Moy told us she was not aware of any review of section 52 of the *DDA*, but said the Department of Home Affairs was willing to participate in consultation processes regarding any proposed changes to that part of the *DDA*.⁴⁵⁵ Ms Moy said the section should be reviewed in terms of the *CRPD*. She said the main advice to the Australian Government on any change to section 52 would come from the Attorney-General's Department and the Department of Health, but that the Department of Home Affairs would be open and willing to discuss the impacts of any such changes.⁴⁵⁶

Recommendation

At Public hearing 29, Counsel Assisting submitted the Royal Commission should recommend the Australian Government consider repealing section 52 of the *DDA*.⁴⁵⁷ In proposing this recommendation, Counsel Assisting referred to similar recommendations to review and amend Australian migration laws made by the CRPD Committee in its *Concluding observations on the combined second and third periodic reports of Australia*.⁴⁵⁸

In reply, the Australian Government submitted that it was 'willing to participate in consultation processes regarding proposed changes to section 52 of the [*DDA*]'.⁴⁵⁹ Since we have not received evidence about the consequences of a repeal of section 52 of the *DDA*, we consider it appropriate to propose the Australian Government undertake a review of section 52 and related laws authorising discrimination against people with disability in the context of migration.

Recommendation 4.31 Disability discrimination and migration law

- a. The Australian Government should initiate a review of the operation of section 52 of the *Migration Act 1958* (Cth), insofar as it authorises discrimination against people with disability seeking to enter Australia temporarily or permanently. The review should consider changes to the legislation and migration practices to eliminate or minimise the discrimination.
- b. The review should be conducted with particular reference to the rights recognised by the *Convention on the Rights of Persons with Disabilities* and the *Concluding observations on the combined second and third periodic reports of Australia* made by the United Nations Committee on the Rights of Persons with Disabilities.

Unjustifiable hardship

Some of the exemptions, defences or exceptions in the *DDA* operate on a case by case basis. It means that the particular circumstances will be material to determining whether conduct amounts to unlawful discrimination. We focus on the exception of unjustifiable hardship. Another exception relevant to discrimination in employment, known as the 'inherent requirements' exception, is examined in Chapter 6 of Volume 7.

Section 11 of the *DDA* describes unjustifiable hardship as follows:

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the **first person**) would be an **unjustifiable hardship**, all relevant circumstances of the particular case must be taken into account, including the following:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.⁴⁶⁰

Section 11 of the *DDA* has always identified the matters to be taken into account in determining whether a hardship would be unjustifiable. However, section 11 has been amended in certain respects.⁴⁶¹

In 2004, the Productivity Commission expressed the view that an unjustifiable hardship defence in the *DDA* is appropriate, noting 'it helps to promote adjustments for people with disabilities that produce benefits for the community as a whole, while limiting requirements that would impose excessive costs on persons or organisations'.⁴⁶² The Productivity Commission thought the defence was too limited and recommended an unjustifiable hardship defence should be available in all areas of the *DDA* that make discrimination on the ground of disability unlawful.⁴⁶³ The recommendation was accepted and the amendments were made to the *DDA* by the enactment of sections 21B and 29A in August 2009.⁴⁶⁴

Unjustifiable hardship applies in two ways.

First, it is determinative of whether an adjustment is a 'reasonable adjustment' for the purpose of the definitions of 'direct' and 'indirect' discrimination.⁴⁶⁵ A reasonable adjustment (or, as we have proposed, an 'adjustment') is any alteration or modification that does not impose unjustifiable hardship on the person required to make the adjustment.⁴⁶⁶ If an adjustment would impose unjustifiable hardship on a respondent, no finding of direct discrimination can be made. Similarly, if an adjustment to enable a person with disability to comply with a condition or a requirement would impose unjustifiable hardship on a respondent, no finding of indirect discrimination can be made.

Second, unjustifiable hardship applies more generally. In the area of employment and work, section 21B of the *DDA* permits discrimination if the actions required of an employer to avoid the discrimination would impose an unjustifiable hardship. For the other areas, such as education, accommodation, the provision of goods services and facilities, membership of a club, land, sport or the administration of Commonwealth laws and programs, section 29A of the *DDA* also permits discrimination if the actions required to avoid the discrimination would impose an unjustifiable hardship.

Unjustifiable hardship also applies as a defence to obligations under the three disability standards to which we refer at Section 4.10 of this chapter.⁴⁶⁷

The Productivity Commission found unjustifiable hardship is best determined through broad criteria that can be applied flexibly to individual cases.⁴⁶⁸ Unjustifiable hardship is to be determined having regard to all of the relevant circumstances and, as the terms of section 11 of the *DDA* make apparent, involves evaluative and impressionistic judgments.⁴⁶⁹ While the concept assumes there must be some hardship to avoid a finding of discrimination, the inquiry is not focused on the degree of hardship a respondent must experience before it is ‘unjustifiable’.

The inquiry required by section 11 of the *DDA* is factual, but not all the criteria identified in the section need to be given the same weight. The factors to consider go beyond the expense incurred in making an adjustment.⁴⁷⁰

From the perspective of a person with disability, unjustifiable hardship usually arises only when a complaint of discrimination is lodged. Reliance on the defence occurs after the complaint is made and the focus of the evidence thereafter is on proving the hardship. In the context of litigation, the person with disability is often disadvantaged in responding to or challenging the claimed unjustifiable hardship. For example, they will not know if and when the respondent, such as a service provider, considered unjustifiable hardship when designing the service. Nor will the person with disability know what factors were considered or whether any measures were taken to ameliorate the risk of unjustifiable hardship; whether other legal or policy obligations are relevant; what records exist; the duration of the hardship; and what alternatives were available to avoid hardship.

Recommendation

We recommend section 11 of the *DDA* be amended to include additional factors that must be taken into account in determining whether a hardship imposed on a respondent would be an unjustifiable hardship. These factors include:

- the extent of consultation with any person with disability
- available alternative measures to eliminate or reduce hardship.

Second, this recommendation includes a new section 11(1A) to build transparency into the assessment of unjustifiable hardship. It does so by adding a requirement that the respondent must:

- create documents recording its consideration (if any) of factors set out in the legislation
- provide reasons for contending that unjustifiable hardship existed at the relevant time (if so requested).

Recommendation 4.32 Unjustifiable hardship

Section 11 of the *Disability Discrimination Act 1992* (Cth) should be amended by inserting the new subsections 11(1)(aa), 11(1)(ab) and 11(1A) as follows:

11 Unjustifiable hardship

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the *first person*) would be an *unjustifiable hardship*, all relevant circumstances of the particular case must be taken into account, including the following:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;

(aa) the nature and extent of the first person's consultations with any person with disability concerned;

(ab) the first person's consideration of all available and appropriate alternative measures or actions;

(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(1A) The person relying on unjustifiable hardship must:

(a) create and retain all documents recording the person's consideration (if any) of each of the factors in subsection (1); and

(b) provide reasons to the person concerned, if so requested, for contending that unjustifiable hardship existed at the time of the alleged unlawful discrimination.

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

4.10. Disability Standards

There are currently three disability standards in operation: the *Disability Standards for Accessible Public Transport 2002* (Cth) (*Transport Standards*), the *Disability Standards for Education 2005* (Cth) (*Education Standards*) and the *Disability (Access to Premises — Buildings) Standards 2010* (Cth) (*Premises Standards*). The disability standards are made by the Attorney-General and are subordinate instruments, intended to supplement, not amend, the substantive provisions of the *DDA*.

Section 32 of the *DDA* makes it unlawful to contravene a disability standard.⁴⁷¹ Section 33 specifies that general exemptions under the *DDA* do not apply to contraventions of a disability standard.⁴⁷² Section 34 provides it is not discriminatory to act in accordance with a standard, in effect providing a form of defence to an allegation of contravention of section 22 (discrimination with respect to education), section 23 (discrimination with respect to access to premises) or section 24 (discrimination with respect to transport services).⁴⁷³

A person may make a complaint to the AHRC about an alleged contravention of a disability standard. In 2018–19, 8 per cent of disability discrimination complaints to the AHRC were about disability standards.⁴⁷⁴ In 2021–22, however, only 3 per cent of disability discrimination complaints to the AHRC were about disability standards.⁴⁷⁵ However, this decrease in proportion may have been in part driven by a significant increase in the number of complaints under the *DDA*, which are counted separately to complaints in relation to contravention of standards. In the case of complaints under the *DDA* made by the person with disability aggrieved, this increased from 1,609 in 2018–19 to 3,729 in 2021–22.⁴⁷⁶

In 2004, the Productivity Commission considered that a clear advantage of the standards is they provide a degree of certainty for stakeholders who need to know what actions would be regarded as complying with the *DDA*. It also found a potential shortcoming is that the standards can be inflexible, thereby imposing higher costs and requiring constant updating to keep them in line with technological developments.⁴⁷⁷

Section 67(1)(e) of the *DDA* requires the AHRC to monitor the operation of standards and report to the Attorney-General.⁴⁷⁸ There are no other regulatory arrangements or reporting requirements in place to monitor compliance with the standards. The AHRC has recently found the current review and enforcement processes are ‘not sufficient to ensure standards are effective’. It suggested further consideration be given to the AHRC having ‘an oversight role with regulatory powers to enforce compliance’.⁴⁷⁹

Disability Standards for Accessible Public Transport 2002

The Royal Commission has heard accessible public transport for people with disability promotes inclusion and enhances a person’s ability to engage in education and employment, use services and participate in community life.

A number of cases have been brought claiming unlawful discrimination arising out of lack of compliance with the *Transport Standards*, commonly relating to buses,⁴⁸⁰ rail,⁴⁸¹ taxis,⁴⁸² or airlines.⁴⁸³ Key issues that have arisen in those cases include the requirement for the

complainant to have suffered grievance beyond that of an ordinary member of the public due to the breach of the standards;⁴⁸⁴ there being a public (rather than a personal) interest aspect to the claim (namely, the motive to eliminate discrimination against people with disabilities in the field of public transport);⁴⁸⁵ and the breach being the result of ‘persistent human failing’ rather than mechanical failure.⁴⁸⁶

Blind Citizens Australia told us transport discrimination and accessibility is a particular concern for people with disability living in rural and regional areas of Australia. Transport can also be problematic in urban areas, although improvements are slowly being made.⁴⁸⁷

In November 2022, the Royal Commission conducted two workshops focused on the experiences of people with disability with air travel. Over 60 participants attended the sessions, including representatives from disability organisations. People with disability reported that they often encounter inaccessible facilities and services at airports and face unhelpful practices and systems adopted by airlines. The attendees made suggestions for a more inclusive travel industry, including legislative reform.⁴⁸⁸

The *Transport Standards* commenced on 23 October 2002 with the objective of removing discrimination on the basis of disability from public transport services over a 30-year period. The *Transport Standards* are accompanied by Guidelines.⁴⁸⁹ The *Transport Standards* impose obligations on public transport operators and providers of public transport services including buses, coaches, trains, trams (including light rail), ferries, taxis, rideshare and airlines. Public transport infrastructure is also covered, including bus stops, train stations, tram and light rail stops, ferry terminals and airports. The *Transport Standards* operate in conjunction with other laws, regulations and codes that apply to public transport. Adherence to the *Transport Standards* does not create an exemption from other statutory requirements, including fire or safety regulations.⁴⁹⁰

The *Transport Standards* are currently under review for the fourth time. A discussion paper was released on 22 December 2022 and public consultation continued until 30 June 2023.⁴⁹¹ As the discussion paper notes, previous reviews have already identified a number of barriers impacting the efficiency and effectiveness of the *Transport Standards*.⁴⁹² The barriers include a lack of clarity with certain requirements and misalignment or inconsistency with other standards or regulations. Previous reviews have recognised the difficulties with meeting compliance target dates in the *Transport Standards*.⁴⁹³

One of the most significant weaknesses in the *Transport Standards* is the lack of national reporting requirements on progress in meeting compliance targets and the lack of a specific government entity to monitor compliance.⁴⁹⁴

Disability Standards for Education 2005

Over the course of the Royal Commission’s work, we have examined the *Education Standards*.⁴⁹⁵ Volume 7 discusses inclusive education in detail.

In the *Report of Public hearing 7: Barriers experienced by students with disability in accessing and obtaining a safe, quality and inclusive school education and consequent life course impacts*, Commissioners addressed the *DDA* and the *Education Standards* with respect to 'reasonable adjustments'.⁴⁹⁶ Commissioners identified the following matters for further inquiry:

- The Royal Commission will consider further measures that build the skills of educators in supporting students with disability, including awareness of the *DDA* and the *Education Standards*, implementation of reasonable adjustments, and responding to behaviours of concern.
- The Royal Commission will consider ways to strengthen and more effectively enforce obligations of educators in respect of enrolment of students with disability, as set out in the *DDA* and the *Education Standards*.
- The Royal Commission will further consider mechanisms by which the obligations to make reasonable adjustments, as set out in the *DDA* and the *Education Standards*, could be strengthened and more effectively enforced, including improving awareness and understanding of these obligations among educators.⁴⁹⁷

The *Education Standards* commenced in August 2005. They elaborate on an education provider's legal obligations under sections 22 and 37 of the *DDA*.⁴⁹⁸ The *Education Standards* cover enrolment, participation, curriculum (its development, accreditation and delivery), student support services, harassment and victimisation.⁴⁹⁹ The *Education Standards* apply to preschools, kindergartens, government and private schools, Technical and Further Education providers and other vocational education and training providers, adult education providers, and higher education institutions, including universities.⁵⁰⁰

The primary focus of the *Education Standards*, together with the *Disability Standards for Education 2005 Guidance Notes*,⁵⁰¹ is on promoting formal equality, where participation for a student with disability is 'on the same basis' as a student without disability.⁵⁰²

The *Education Standards* have been reviewed three times; in 2010, 2015 and 2020.⁵⁰³ A reoccurring concern arising from submissions to those reviews from stakeholders was the lack of understanding or awareness of the *Education Standards* among students with disability, their parents and education providers.⁵⁰⁴ This is consistent with submissions we received.⁵⁰⁵

The final report for the third review was published in March 2021. It made 13 recommendations about the *Education Standards*.⁵⁰⁶ The Australian Government has not published a response to individual recommendations. However, the Australian Government Department of Education's website says it is 'working closely with state and territory governments and education authorities to implement the recommendations'.⁵⁰⁷ This work is being undertaken with 'help and advice from people with disability and educators', including First Nations people with disability.⁵⁰⁸ We discuss the reviews of the *Education Standards*, including recommendations made in those reviews, further in Volume 7.

The *Education Standards* have also been considered in a number of Federal Court proceedings, including in cases concerning:

- provision of a teacher's aide⁵⁰⁹
- individual education plans⁵¹⁰
- speech pathology programs⁵¹¹
- consultation with parents⁵¹²
- provision of appropriate facilities⁵¹³
- modification of testing arrangements⁵¹⁴
- physical restraint of students.⁵¹⁵

The Federal Court has generally interpreted the *Education Standards* narrowly.⁵¹⁶ The Court has also expressed the view that applicants may misunderstand the function of the *Education Standards*.⁵¹⁷ In any event, it is rare for an applicant to establish a contravention of the *Education Standards*.⁵¹⁸

We examine particular challenges arising from the operation and interpretation of the *Education Standards* in detail, and make recommendations to improve their efficacy, in of Volume 7.

Disability (Access to Premises – Buildings) Standards 2010

The *Premises Standards* commenced on 1 May 2011.⁵¹⁹ The *Premises Standards* expand on section 23 of the *DDA* with respect to premises and buildings generally and are supplemented by guidelines issued by the AHRC.⁵²⁰

The objects of the *Premises Standards* are set out in clause 1.3:

- (a) to ensure that dignified, equitable, costeffective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability; and
- (b) to give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of that access, to the extent covered by these Standards, will not be unlawful under the Act.

We examine the importance of accessible homes, buildings and places in detail in Volume 7. At Public hearing 26, 'Homelessness, including experience in boarding houses, hostels and other arrangements', Nicola 'Nik' Moorhouse described the struggle to find accommodation in Newcastle that was both within their budget and met their accessibility needs.⁵²¹ At the same hearing, 'Claudia' told us about the barriers for her to find affordable and accessible accommodation.⁵²² Claudia considered her apartment 'accessible' despite a heavy front door that poses considerable difficulty to open when she is using her wheelchair.⁵²³

Vision Australia told us the *Premises Standards* have provided little benefit for people who are blind or have low vision. For example, they ‘do not require new technology such as touchscreen-based lift destination control systems to be accessible, nor do they require rooms within buildings to include tactile or braille signage’.⁵²⁴

In the latest review of the *Premises Standards*, the Department of Industry, Science, Energy and Resources identified a number of ‘opportunities for action’. In light of the interaction between the *Premises Standards*, the National Construction Code (NCC) and the other disability standards (particularly the *Transport Standards*), the Department recommended the implementation of a process, in consultation with the Australian Building Codes Office, to more quickly align the *Premises Standards* with the NCC.⁵²⁵ It also recommended the Australian Government amend the *Premises Standards* to reflect all recent updates to the other standards.⁵²⁶ The Department recommended the creation of a baseline assessment of premises to ensure the effectiveness of the *Premises Standards* can be measured in the future,⁵²⁷ and updating the AHRC’s guidelines and other guidance materials to ensure all parties are aware of rights and responsibilities under the *Premises Standards*.⁵²⁸

4.11. Other reforms

There are many reforms that could be made to the *DDA* to better protect and promote the rights of people with disability. It is not the Royal Commission’s intention to address every possible reform and we acknowledge the AHRC’s recommendations in *Free and Equal*. The AHRC’s work identifies a number of important issues, including intersectional experiences of discrimination.

The following is intended to identify some matters in addition to those addressed above that the Australian Government may consider to strengthen the *DDA*.

Objects of the *DDA*

Section 3 of the *DDA* pre-dates the *CRPD*. One of the amendments made in 2009 included an express reference to the *CRPD* as a source of legislative power for the *DDA* (see section 12(8)(ba)).⁵²⁹ However, section 3 was not amended to make express reference to the *CRPD*. The proposed amendment adopts a similar approach to the objects clause of the *Age Discrimination Act*.

Recommendation

Section 3 should include a reference to the *CRPD* in the objects. Our suggested amendment is to insert a new section 3(d).

Recommendation 4.33 Reference to the *Convention on the Rights of Persons with Disabilities*

The *Disability Discrimination Act 1992* (Cth) should be amended to insert a new subsection 3(d) as follows:

(d) to give effect to Australia's obligations under the Disabilities Convention.

Interpreting the *DDA*

Section 12(8) of the *DDA* refers to the *CRPD* as one of the international instruments allowing the Australian Parliament to rely on the external affairs power to enact the *DDA*.⁵³⁰ In *Watts v Australian Postal Corporation*,⁵³¹ Mortimer J said if the 2009 amendments to the *DDA* were made 'in pursuance of Australia's international obligations' under the *CRPD*, the interpretation of the *DDA* provisions consistent with the *CRPD* should be preferred, insofar as the text and context otherwise allow.⁵³²

Recommendation

We consider the *DDA* would benefit from the inclusion of an express provision stating the *DDA* should be interpreted in a manner that advances the rights of people with disability by reference to each of the conventions referred to in section 12(8) of the *DDA*. That section refers to the *Discrimination (Employment and Occupation) Convention*,⁵³³ the *International Covenant on Civil and Political Rights*,⁵³⁴ the *CRPD*,⁵³⁵ and the *International Covenant on Economic, Social and Cultural Rights*.⁵³⁶

Recommendation 4.34 Interpretation of the *Disability Discrimination Act 1992* (Cth)

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new subsection 4(3):

(3) This Act must be interpreted in a way that is beneficial to a person or persons with disability, to the extent it is possible to do so consistently with—

(a) the objects of this Act

(b) the Convention

- (c) the Covenant on Civil and Political Rights
- (d) the Disabilities Convention
- (e) the International Covenant on Economic, Social and Cultural Rights.

AHRC Act

We have heard the enforcement of rights under the *DDA* and the disability standards requires the person who has experienced discrimination to initiate action by making a complaint to the AHRC. The process involves investigation, conciliation and then proceedings in a court. In the context of litigation, it is rare for an applicant to establish contravention of the *DDA* or the various disability standards.⁵³⁷

The remedies available under section 46PO(4) of the *AHRC Act* are limited to outcomes for the particular individual. The available remedies do not extend to a court order to make an education provider make structural changes to achieve inclusive education. The remedies are not directed at achieving 'substantive equality', except that the court may order a respondent (for example, an education provider) to perform any reasonable act or course of conduct to redress any loss or damage suffered by a student with disability who has made the claim.⁵³⁸

At Public hearing 19, we heard about some of the barriers experienced by people with disability seeking to exercise their rights when they experienced discrimination. These included:

- deciding whether to use a federal law avenue, like the *DDA* or *FWA* or a state or territory avenue (such as the *Equal Opportunity Act 2010* in Victoria)⁵³⁹
- when and if to seek the assistance of the Fair Work Ombudsman⁵⁴⁰
- the different timeframes for making a complaint or application for each legal avenue⁵⁴¹
- how long the processes might take⁵⁴²
- whether there is an option of conciliation or mediation in private⁵⁴³
- whether a person needs legal representation⁵⁴⁴
- the burden of proof⁵⁴⁵
- the cost of taking action and the risk of having to pay costs if the claim is unsuccessful⁵⁴⁶
- uncertainty about the remedies available, including reinstatement to a job, compensation,⁵⁴⁷ an apology, a statement of service, an agreement to provide training or a change in employer.⁵⁴⁸

Counsel Assisting submitted that, for employees with disability, there may be specific legal remedies to address unfair or discriminatory treatment because of disability.⁵⁴⁹ As we have acknowledged, the AHRC is currently addressing these issues as part of its *Free and Equal* project.

Endnotes

- 1 *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited* (1993) 46 FCR 301, p 326.
- 2 *Universal Declaration on Human Rights*, GA Res 217A (III) (10 December 1948), arts 1, 2; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 2(3); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 3(b), 3(e).
- 3 'Justice' and 'safety' domain data in Centre of Research Excellence in Disability and Health, *Disability and Wellbeing Monitoring Framework: Baseline indicator data for Australians aged 18-64 years*, 2022, p 44.
- 4 Lorna Hallahan, *Disability in Australia: Shadows, struggles and successes*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, pp 70–73.
- 5 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021; Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022. The Australian Human Rights Commission's proposals address all the federal discrimination laws including the *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Australian Human Rights Commission Act 1986* (Cth) and *Age Discrimination Act 2004* (Cth). The Australian Human Rights Commission's proposals are not limited to the *Disability Discrimination Act 1992* (Cth).
- 6 *Handicapped Persons Equal Opportunity Act 1981* (SA) pt IV div 1, ss 24–28 (employment), 29 (associations), 30 (qualifying bodies), 32 (education), 33 (goods and services), 34 (accommodation), 36 (victimisations), 54 (discriminatory advertisements).
- 7 *Handicapped Persons Equal Opportunity Act 1981* (SA) pt VIII.
- 8 *Anti-Discrimination (Amendment) Act 1981* (NSW) sch 1 s 3.
- 9 *Anti-Discrimination (Amendment) Act 1982* (NSW) sch 1 s 4.
- 10 *Equal Opportunity (Discrimination against Disabled Persons) Act 1982* (Vic).
- 11 See Australian Government Solicitor, *Research report: Report on the key elements of the legislative framework affecting people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, pp 258–69 for an overview of the state and territory discrimination laws.
- 12 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Final report, May 2022; Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, Final report, July 2022.
- 13 *Human Rights Commission Act 1981* (Cth) s 6.
- 14 *Human Rights Commission Act 1981* (Cth) s 9.
- 15 *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (20 December 1971); *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX) (9 December 1975); *Human Rights Commission Act 1981* (Cth) s 3: definitions of 'human right' and 'declarations' explicitly refer to both the *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled Persons*.
- 16 Human Rights Commission, *Proposed A.C.T. Mental Health Ordinance 1981*, Report, No. 2, October 1982; Human Rights Commission, *Testamentary guardianship in the Australian Capital Territory*, Report, No. 3, April 1983; Human Rights Commission, *Human rights, family migration and disabled family members*, Report, No. 22, November 1986. See also Human Rights Commission, *Epilepsy and human rights*, Occasional paper, No. 7, October 1984; Human Rights Commission, *Legal and ethical aspects of the management of newborns with severe disabilities*, Occasional paper, No. 10, August 1985; Human Rights Commission, *The treatment of disabled persons in social security and taxation law*, Occasional paper, No. 11, January 1986; Human Rights Commission, *Ethical and legal issues in guardianship options for intellectually disadvantaged people*, Monograph series, No. 2, 1986; Human Rights Commission, *Ethical and legal issues in guardianship options for intellectual disadvantaged people*, Discussion paper, No. 4, November 1983; Human Rights Commission, *Guardianship and the rights of intellectually disadvantaged people*, Discussion draft paper, No. 6, November 1984; Human

- Rights Commission, *Affirmative action for people with disabilities*, Discussion paper, No. 11, October 1986; Human Rights Commission, *Rights of hearing-impaired people in the workplace*, Discussion paper, No. 12, October 1986; Human Rights Commission, *Alternative accommodation for intellectually disadvantaged persons: A study in human rights and discrimination*, Discussion paper, No. 15, November 1986.
- 17 Australian Government, *Handicapped Programs Review, New Directions: Report of the Handicapped Programs Review*, Final report, 1985, p 123.
 - 18 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(f).
 - 19 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3: definitions of 'human rights' and 'declarations' explicitly refer to both the *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (20 December 1971) and the *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX) (9 December 1975).
 - 20 Defined to include 'loss of bodily function, disease, or disfigurement'.
 - 21 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 31. See also International Labour Organisation, *Convention concerning Discrimination in Respect of Employment and Occupation*, ILO Convention No. 111 (4 June 1958); *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) regs 3, 4(iv).
 - 22 Chris Ronalds, *National employment initiatives for people with disabilities: A discussion paper*, Discussion paper, 1990. See also Chris Ronalds, *National employment initiatives for people with disabilities: Report of the National Consultations with People with Disabilities*, Final report, 1991; Maureen Shelley for the Disability Advisory Council of Australia, *National disability discrimination legislation: report of the national consultations with people with a disability*, Final report, 1991.
 - 23 Commonwealth, *Parliamentary debates*, House of Representatives, 26 May 1992, p 2755 (Brian Howe, Deputy Prime Minister and Minister for Health, Housing and Community Services).
 - 24 Commonwealth, *Parliamentary debates*, Senate, 7 October 1992, pp 1316 (Meg Lees), 1323 (Christabel Chamarette). See also Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects', (1993), vol 19(1) *Melbourne University Law Review* 211, pp 223–25.
 - 25 *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'disability').
 - 26 *Disability Discrimination Act 1992* (Cth) pt 2 div 1, ss 15–21.
 - 27 *Disability Discrimination Act 1992* (Cth) s 22.
 - 28 *Disability Discrimination Act 1992* (Cth) s 23.
 - 29 *Disability Discrimination Act 1992* (Cth) s 24.
 - 30 *Disability Discrimination Act 1992* (Cth) s 25.
 - 31 *Disability Discrimination Act 1992* (Cth) s 26.
 - 32 *Disability Discrimination Act 1992* (Cth) s 27.
 - 33 *Disability Discrimination Act 1992* (Cth) s 28.
 - 34 *Disability Discrimination Act 1992* (Cth) s 29.
 - 35 *Disability Discrimination Act 1992* (Cth) s 113.
 - 36 *Disability Discrimination Act 1992* (Cth) s 67, as enacted. See 'Summary of Interventions by the Australian Human Rights Commission', *Australian Human Rights Commission*, web page. <<https://humanrights.gov.au/our-work/legal/summary-interventions-australian-human-rights-commission>>
 - 37 *Disability Discrimination Act 1992* (Cth) s 69(1), as enacted.
 - 38 *Disability Discrimination Act 1992* (Cth) s 71(2), as enacted.
 - 39 *Disability Discrimination Act 1992* (Cth) s 67(1)(a), as enacted.
 - 40 *Disability Discrimination Act 1992* (Cth) s 76, as enacted.
 - 41 *Disability Discrimination Act 1992* (Cth) s 77, as enacted.
 - 42 *Disability Discrimination Act 1992* (Cth) s 84, as enacted.
 - 43 *Disability Discrimination Act 1992* (Cth) s 85(1), as enacted.
 - 44 *Disability Discrimination Act 1992* (Cth) s 85(2)(b), as enacted.
 - 45 *Disability Discrimination Act 1992* (Cth) s 103(2), as enacted.
 - 46 *Disability Discrimination Act 1992* (Cth) s 104A, as inserted by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).
 - 47 *Disability Discrimination Act 1992* (Cth) ss 106A–D.
 - 48 *Disability Discrimination Act 1992* (Cth) ss 104B–C.
 - 49 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, pp 259–60.

50 HREOC decisions are available online on Austlii, *Human Rights and Equal Opportunity Commission*, web page, 13 December 2018. <<http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HREOCA/>>

51 *Geoffrey Scott & Disabled Peoples International (Aust) Ltd v Telstra Corporation Ltd* [1995] HREOCA 24 (6 September 1995).

52 *Geoffrey Scott & Disabled Peoples International (Aust) Ltd v Telstra Corporation Ltd* [1995] HREOCA 24 (6 September 1995), [3].

53 *Geoffrey Scott & Disabled Peoples International (Aust) Ltd v Telstra Corporation Ltd* [1995] HREOCA 24 (6 September 1995), [68].

54 Michelle Hannon, 'Indirect Discrimination and the Disability Discrimination Act 1992 (Cth): Scott v Telstra Corporation Limited', (1996), vol 3(1), *Australian Journal of Human Rights*, p 171.

55 *Finney v The Hills Grammar School* [1999] HREOCA 14 (20 July 1999).

56 *Finney v The Hills Grammar School* [1999] HREOCA 14 (20 July 1999), [7.6].

57 *Scott and Bernadette Finney on behalf of Scarlett Finney v The Hills Grammar School* [2000] HREOCA 23 (13 June 2000).

58 *The Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306.

59 *Maguire v Sydney Organising Committee for the Olympic Games (SOCOG)* [1999] HREOCA 26 (18 October 1999).

60 *Maguire v Sydney Organising Committee for the Olympic Games (SOCOG)* [1999] HREOCA 26 (18 October 1999).

61 *Maguire v Sydney Organising Committee for the Olympic Games* (2000) HREOC No. H 99/115 (18 November 2000).

62 In *McNeil v Commonwealth* [1995] HREOCA 9 (27 February 1995), the complainant was awarded \$50,900.00. In *Melvin v Northside Community Service Incorporated* [1996] HREOCA 20 (19 July 1996), the complainant was awarded \$56,692.80. In *Garity v Commonwealth Bank of Australia* [1999] HREOCA 2 (25 January 1999), the complainant was awarded \$153,500.00.

63 *X v Department of Defence* [1995] HREOCA 16 (29 June 1995).

64 *X v Department of Defence* [1995] HREOCA 16 (29 June 1995), [5] (Findings).

65 *Commonwealth of Australia v Honourable Carter QC Member of Human Rights & Equal Opportunity Commission* (1996) 70 FCR 76. The Court found the Commissioner's characterisation of the inherent requirements of employment for the purposes of s 15(4), as being limited to the physical capacity to execute the tasks or skills of the particular employment, to be too narrow. However, even applying a broader characterisation of inherent requirements, including regard to safety considerations, did not lead to a different result.

66 *Commonwealth of Australia v HREOC* (1998) 76 FCR 513, p 550.

67 *Commonwealth of Australia v HREOC* (1998) 76 FCR 513, p 549.

68 *X v Commonwealth* (1999) 200 CLR 177.

69 *X v Commonwealth* (1999) 200 CLR 177, p 187 [30].

70 *X v Commonwealth* (1999) 200 CLR 177, pp 200 [72], 210 [109].

71 See for example *Findley v MSS Security Pty Ltd* [2017] FCCA 2898, [58]; *Cucanic v IGA Distribution (Vic) Pty Ltd* [2004] FCA 1226, [21]; *Smith v SBP Employment Solutions Pty Ltd (No.2)* [2019] FCCA 3318, [66].

72 *Purvis obo Hoggan v State of New South Wales (Department of Education and Training)* (2001) EOC 93-117.

73 *Purvis obo Hoggan v State of New South Wales (Department of Education and Training)* (2001) EOC 93-117, [2.2].

74 A chronology is included in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, pp 175–79.

75 *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47 (13 November 2000), [2.5.1].

76 *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47 (13 November 2000), [2.5.2].

77 *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47 (13 November 2000), [2.5.3], [2.5.5].

78 *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47 (13 November 2000), [2.5.7].

79 *Purvis v State of New South Wales (Department of Education Training)* (2003) 217 CLR 92, [169].

- 80 *Purvis obo Hoggan v State of New South Wales (Department of Education and Training)* (2001) EOC 93-117, [2.2].
- 81 *Purvis obo Hoggan v State of New South Wales (Department of Education and Training)* (2001) EOC 93-117, [5.13].
- 82 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.
- 83 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237.
- 84 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.
- 85 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 98 [5] (Gleeson CJ), 105 [27], 116-117 [67] (McHugh and Kirby JJ), 156-157 [209-11] (Gummow, Hayne and Heydon JJ).
- 86 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 145 [170] (McHugh and Kirby JJ), 159 [218] (Gummow, Hayne and Heydon JJ).
- 87 *Bell v ATSIC & Gray & Brandy* (1993) HREOCA 25 (22 December 1993).
- 88 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, [23-24].
- 89 *Human Rights Legislation Amendment Act (No. 1) 1999* (Cth) s 21, repealing *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 67(1)(a), (b).
- 90 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) s 2(1) (items 7-10), sch 3.
- 91 See *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'unlawful discrimination').
- 92 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(b).
- 93 Formerly the Federal Magistrates' Court, then Federal Circuit Court of Australia before merging with the Family Court of Australia and now the Federal Circuit and Family Court of Australia (Division 2).
- 94 *Australian Human Rights Commission Act 1986* (Cth) s 46PO. There have been some changes to the complaint handling procedures under the *Australian Human Rights Commission Act 1986* (Cth): see *Human Rights Legislation Amendment Act 2017* (Cth) ss 46PH and 46PO(3A), which expanded the grounds on which the president may terminate a complaint and added new provisions requiring the applicant to seek the court's leave to commence proceedings in some cases.
- 95 Australian Human Rights Commission, 'Costs Awards' in *Federal Discrimination Law Online*, 2009, Ch 8, p 1 [8.1.1].
- 96 *Catholic Education Office v Clarke* (2004) 138 FCR 121; *Hurst v State of Queensland* (2006) 151 FCR 562; *Nojin v Commonwealth* (2012) 208 FCR 1; *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207; *Hinton v Alpha Westmead Private Hospital* (2016) 242 FCR 1; *Ryan v Commissioner of Police, NSW Police Force* (2022) 290 FCR 369.
- 97 *Catholic Education Office v Clarke* (2004) 138 FCR 121, where the applicant was awarded \$20,000 in damages, with a further \$6,000 in interest; *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, where the applicant was awarded \$10,000 in compensatory damages.
- 98 *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1 was a High Court appeal that originated under the *Anti-Discrimination Act 1998* (Tas). The High Court appeal was concerned with the issue of state tribunals exercising federal judicial power and the plurality did not address the substantive issues with respect to the *Disability Discrimination Act 1992* (Cth): *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1, pp 13-14 [48-50].
- 99 Generally speaking, a party dissatisfied with a decision of an intermediate appellate court such as the Full Federal Court can only appeal to the High Court if that court grants 'special leave to appeal'. An appeal to the High Court is not available as a right.
- 100 *Varas v Fairfield City Council* [2010] HCATrans 18 (12 February 2010); *Devers v Kindilan* [2011] HCASL 18 (9 February 2011); *Zoltaszek v Downer EDI Engineering Pty Limited* [2012] HCASL 42 (29 February 2012); *Commonwealth of Australia and Anor v Prior, Commonwealth of Australia v Nojin and Anor* [2013] HCATrans 101 (10 May 2013); *Sklavos v Australasian College of Dermatologists* [2018] HCASL 7 (7 February 2018); *Beau Connor (by his litigation representative Peter Connor) v State of Queensland (Department of Education and Training)* [2021] HCASL 129 (5 August 2021).
- 101 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004. The Productivity Commission's final report was received by the

Australian Government on 5 May 2004 and was tabled in parliament on 14 July 2004.

102 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
 UNTS 3 (entered into force 3 May 2008). The *CRPD* was ratified by the Australian Government on
 17 July 2008 and entered into force in Australia on 16 August 2008.

103 *Disability Discrimination Act 1992* (Cth) s 3(c).

104 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)*, Final inquiry
 report, Report no. 30, vol 1, April 2004, p 283 [Finding 10.18].

105 Australian Government, Response to the Productivity Commission's report: *Review of the
 Disability Discrimination Act 1992*, January 2005. For the recommendations the government
 rejected, see p 11 concerning Recommendation 12.2; pp 11–12 concerning Recommendation
 12.3; p 13 concerning Recommendation 12.5; p 14 concerning Recommendation 13.4; and p 15
 concerning Recommendation 13.5.

106 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)*, Final inquiry
 report, Report no. 30, vol 1, April 2004, p 396 [Recommendation 13.4].

107 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)*, Final inquiry
 report, Report no. 30, vol 1, April 2004, p 401 [Recommendation 13.5].

108 *Disability Discrimination Act 1992* (Cth) ss 4(1), 12(8). Section 12(8) now reads: 'provisions have
 effect in relation to discrimination against a person with a disability to the extent that the provisions
 give effect to the Disabilities Convention', as inserted by the *Disability Discrimination and Other
 Human Rights Legislation Amendment Act 2009* (Cth) sch 2 items 4, 20.

109 *Disability Discrimination Act 1992* (Cth) ss 5(2)–(3), 6(2), as amended by *Disability Discrimination
 and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 17. These
 amendments were in near full alignment with Recommendation 8.1 of the Productivity
 Commission Report.

110 *Disability Discrimination Act 1992* (Cth) ss 11, 21B, 29A, as amended and inserted by *Disability
 Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 items 18,
 41, 60. These amendments were in full alignment with Recommendations 8.2 and 8.3 of the
 Productivity Commission Report.

111 *Disability Discrimination Act 1992* (Cth) s 11(2), as amended by *Disability Discrimination and
 Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 18.

112 *Disability Discrimination Act 1992* (Cth) s 21A, as inserted by *Disability Discrimination and Other
 Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 41; *Disability Discrimination Act
 1992* (Cth) ss 21A, 6(3)–(4), as amended by *Disability Discrimination and Other Human Rights
 Legislation Amendment Act 2009* (Cth) sch 2 item 17. These amendments were in full alignment
 with Recommendation 8.4 of the Productivity Commission Report.

113 *Disability Discrimination Act 1992* (Cth) s 4(1), as inserted by *Disability Discrimination and Other
 Human Rights Legislation Amendment Act 2009* (Cth) sch 2 items 5, 6. This amendment was in
 full alignment with Recommendation 11.1 of the Productivity Commission Report.

114 *Disability Discrimination Act 1992* (Cth) ss 7–9, as amended by *Disability Discrimination and
 Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 17. See *Mulligan v
 Virgin Australia Pty Ltd* (2015) 234 FCR 207, [137–49], where the Full Federal Court ruled that
 the effect of these amendments is that an assistance animal should be regarded as part of an
 individual's disability, and, therefore, the proper comparator is a person without a disability and
 therefore without a dog, not a person without a disability and with a dog. This finding resulted in a
 successful verdict for a person with disability.

115 *Disability Discrimination Act 1992* (Cth) ss 6(3)–(4), as amended by *Disability Discrimination
 and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 17. This amendment
 was in full alignment with the relevant part of Recommendation 11.3 of the Productivity
 Commission Report.

116 *Disability Discrimination Act 1992* (Cth) ss 31(1), (3), as amended by *Disability Discrimination and
 Other Human Rights Legislation Amendment Act 2009* (Cth) items 61–62; *Disability Discrimination
 Act 1992* (Cth) ss 6(3)–6(4), amended by *Disability Discrimination and Other Human Rights
 Legislation Amendment Act 2009* (Cth) sch 2 item 17. These amendments were in full alignment
 with Recommendation 14.3 of the Productivity Commission Report.

117 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth)
 sch 7, item 12.

118 See *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen*

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- v Monash University* (2016) 244 FCR 424; *Winters v Fogarty* [2017] FCA 51, [24]–[34]; *Hazledine v Arthur J Gallagher Australia & Co (Aus) Limited* [2017] FCA 575; *Tropoulos v Journey Lawyers Pty Ltd* (2019) 287 IR 363.
- 119 *Disability Discrimination Act 1992* (Cth) ss 15–21.
- 120 *Disability Discrimination Act 1992* (Cth) s 22.
- 121 *Disability Discrimination Act 1992* (Cth) s 23.
- 122 *Disability Discrimination Act 1992* (Cth) s 24.
- 123 *Disability Discrimination Act 1992* (Cth) s 25.
- 124 *Disability Discrimination Act 1992* (Cth) s 26.
- 125 *Disability Discrimination Act 1992* (Cth) s 27.
- 126 *Disability Discrimination Act 1992* (Cth) s 28.
- 127 *Disability Discrimination Act 1992* (Cth) s 29.
- 128 *Disability Discrimination Act 1992* (Cth) ss 15(1–2).
- 129 *Disability Discrimination Act 1992* (Cth) s 13.
- 130 *Disability Discrimination Act 1992* (Cth) s 5(1) (emphasis in original).
- 131 *Disability Discrimination Act 1992* (Cth) s 6(1) (emphasis in original).
- 132 *Disability Discrimination Act 1992* (Cth) s 6(4).
- 133 *Disability Discrimination Act 1992* (Cth) s 4(1).
- 134 *Disability Discrimination Act 1992* (Cth) ss 11(1)(a)–(c).
- 135 *Disability Discrimination Act 1992* (Cth) ss 8–9. See also *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, p 247 [149].
- 136 *Disability Discrimination Act 1992* (Cth) s 7. See *Burns v Media Options Group Pty Ltd* [2013] FCCA 79; *Ryan v Dennis and Dennis Deals Pty Ltd* [1998] HREOCA 36; *Tsikos v Austin Health* (2022) 314 IR 269.
- 137 *Disability Discrimination Act 1992* (Cth) s 4 [definition of ‘associate’].
- 138 *Disability Discrimination Act 1992* (Cth) s 21B (emphasis in original).
- 139 *Disability Discrimination Act 1992* (Cth) s 21A(1). See s 21A(2) for the factors to be taken into account in determining whether the employee would be able to carry out the inherent requirements of the particular work.
- 140 *Disability Discrimination Act 1992* (Cth) s 31.
- 141 *Disability Discrimination Act 1992* (Cth) s 32.
- 142 *Disability Discrimination Act 1992* (Cth) s 34.
- 143 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 2.
- 144 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 12.
- 145 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 12.
- 146 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 12.
- 147 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 16.
- 148 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 2.
- 149 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, pp 16, 20, 24, 29.
- 150 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, pp 14–15.
- 151 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, pp 14–15.
- 152 A complaint may be discontinued in circumstances where the president’s delegate is satisfied the complainant no longer wishes the commission to continue its inquiry. This may occur after the complainant has received information from the respondent or been provided with information or a preliminary assessment of the complaint.
- 153 A complaint is withdrawn where a complainant withdraws due to personal circumstances or where they decide not to proceed after reviewing information from the respondent or being provided with information about the law or a preliminary assessment of the complaint. See Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, pp 17–18.
- 154 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203_02, pp 15–16.
- 155 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, pp 3–4.

156 Australian Human Rights Commission, *2021–22 complaint statistics*, Report, November 2022, p 2.
 157 Exhibit 9-24, ‘Statement of Dr Ben Gauntlett’, 3 December 2020; Transcript, Ben Gauntlett,
 Public hearing 9, 11 December 2020, P-387 [45] – P-414 [38].
 158 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-400 [45–47].
 159 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-401 [23–27].
 160 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-401 [37–39].
 161 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-403 [2–5].
 162 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-402 [6–10].
 163 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-402 [43–46].
 164 Transcript, Ben Gauntlett, Public hearing 9, 11 December 2020, P-402 [46] – P-403 [2].
 165 Transcript, Natalie Wade, Public hearing 18, 8 November 2021, P-49.
 166 Transcript, Natalie Wade, Public hearing 18, 8 November 2021, P-50 [30–33].
 167 Autism Aspergers Advocacy Australia, Submission in response to *Quality and safeguards issues*
paper, 8 February 2021, ISS.001.00543_01, p 2.
 168 Autism Aspergers Advocacy Australia, Submission in response to *Quality and safeguards issues*
paper, 8 February 2021, ISS.001.00543_01, p 3.
 169 Autism Aspergers Advocacy Australia, Submission in response to *Quality and safeguards issues*
paper, 8 February 2021, ISS.001.00543_01, p 3.
 170 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515
 UNTS 3 (entered into force 3 May 2008), art 5.
 171 See *Disability Discrimination Act 1992* (Cth) s 12(8); *Australian Constitution* s 51(xxix).
 172 *Disability Discrimination Act 1992* (Cth) ss 4(1), 12(8). Section 12(8) now reads ‘provisions have
 effect in relation to discrimination against a person with a disability to the extent that the provisions
 give effect to the Disabilities Convention’, as inserted by *Disability Discrimination and Other*
Human Rights Legislation Amendment Act 2009 (Cth) sch 2 items 4, 20.
 173 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203_02, p 18.
 174 Australian Human Rights Commission, Submission, 23 December 2022, SUB.001.03203_02, p 18.
 175 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An*
assessment of Australia’s level of compliance, Report prepared for the Royal Commission into
 Violence, Abuse, Neglect and Exploitation of People with Disability, July 2020, p 23. See also
 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report*
of Australia, adopted by the Committee at its tenth session (2-13 September 2013), CRPD/C/
 AUS/CO/1, (21 October 2013), [14–15]; Committee on the Rights of Persons with Disabilities,
Concluding observations on the combined second and third periodic reports of Australia, 22nd
 sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [9–10].
 176 In its combined second and third periodic report to the Convention on the Rights of Persons with
 Disability Committee for the purpose of the Committee’s 2019 review, the Australian Government
 explained the ways in which the *Convention on the Rights of Persons with Disability* has been
 explicitly incorporated into law through Commonwealth, state and territory legislation included
 in the *Disability Discrimination Act 1992* (Cth). See Committee on the Rights of Persons with
 Disabilities, *Combined second and third periodic reports submitted by Australia under article 35*
of the Convention, due in 2018, UN Doc CRPD/C/AUS/2-3 (5 February 2019).
 177 Transcript, Sue Robertson and Andrew Walter, Public hearing 18, 9 November 2021, P-169 [6–30].
 178 *Disability Discrimination Act 1992* (Cth) s 5(1).
 179 *Disability Discrimination Act 1992* (Cth) s 5(2).
 180 *Disability Discrimination Act 1992* (Cth) s 6(1).
 181 *Disability Discrimination Act 1992* (Cth) s 6(2).
 182 For a brief analysis of direct discrimination under the *Disability Discrimination Act 1992* (Cth), see
 Australian Government Solicitor, *Report on the key elements of the legislative framework affecting*
people with disability, Report prepared for the Royal Commission into Violence, Abuse, Neglect
 and Exploitation of People with Disability, December 2020, pp 278–80.
 183 *Purvis v New South Wales* (2003) 217 CLR 92, 160–61 [223–25], 175 [273] (emphasis in original).
 184 *Purvis v New South Wales* (2003) 217 CLR 92, 100–101.
 185 Victoria Legal Aid, Submission, 30 April 2020, SUB.001.00215_01, p 13.
 186 See for example Kate Rattigan, ‘*Purvis v New South Wales* (Department of Education & Training):
 A case for amending the Disability Discrimination Act 1992’, (2004), vol 28 (2), *Melbourne*
University Law Review; Jacob Campbell, ‘Using anti-discrimination law as a tool of exclusion:

- A critical analysis of the Disability Discrimination Act 1992 and *Purvis v NSW*, (2005), vol 5, *Macquarie Law Journal*; Susan Roberts, 'The inequality of treating unequals equally: The future of direct discrimination under the Disability Discrimination Act 1992 (Cth)?', paper, ANU Public Law Weekend, Canberra, November 2004; Lee Ann Basser & Melinda Jones, 'The *Disability Discrimination Act 1992* (Cth): A three-dimensional approach to operationalising human rights', (2002), vol 26 (2), *Melbourne University Law Review*; Margaret Thornton, 'Disabling discrimination legislation: The High Court and judicial activism', (2009), vol 15 (1), *Australian Journal of Human Rights*; Belinda Smith, 'From Wardley to Purvis – How far has Australian anti-discrimination law come in 30 years?', (2008), vol 21, *Australian Journal of Labour Law*; Elizabeth Dickson, 'Disability discrimination in education: *Purvis v New South Wales (Department of Education and Training)*, amendment of the education provisions of the *Disability Discrimination Act 1992* (Cth) and the formulation of disability standards for education', (2005), vol 24 (1), *University of Queensland Law Journal*; Colin Campbell, 'A hard case making bad law: *Purvis v New South Wales* and the role of the comparator under the Disability Discrimination Act 1992 (Cth)', (2007), vol 35 (1), *Federal Law Review*; Samantha Edwards, '*Purvis* in the High Court: Behaviour, disability and the meaning of direct discrimination', (2004), vol 26 (4), *Sydney Law Review*; Angelo Capuano, 'Post-pandemic workplace design and the plight of employees with invisible disabilities: Is Australian labour law and anti-discrimination legislation equipped to address new and emerging workplace inequalities?', (2022), vol 45 (2), *UNSW Law Journal*, p 892.
- 187 Isabel Karpin & Karen O'Connell, 'Stigmatising the "normal": The legal regulation of behaviour as a disability', (2015), vol 38 (4), *UNSW Law Journal*, pp 1477–78.
- 188 *Equal Opportunity Act 2019* (Vic) s 8 provides: 'Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'. See also *Tsikos v Austin Health* (2022) 314 IR 269, pp 284–85 [44–47], affirmed on appeal in *Austin Health v Tsikos* [2023] VSCA 82, [77]–[91].
- 189 *Discrimination Act 1991* (ACT) s 8(2) provides: 'A person **directly** discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes'. (Emphasis in original).
- 190 Victoria Legal Aid, Submission, 30 April 2020, SUB.001.00215_01, p 13.
- 191 Victoria Legal Aid, Submission, 30 April 2020, SUB.001.00215_01, p 13 [Recommendation 7].
- 192 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 34 [145].
- 193 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 35 [146].
- 194 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 35 [147], citing New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Final inquiry report, Report no. 92, November 1999 [3.31–3.34], [3.51–3.52]; Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, pp 305–312; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp xiii [Recommendation 5], pp 20–22, 147–48; Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion paper, September 2011, p 10 [27].
- 195 Disability Discrimination Legal Service, Submission, 27 October 2020 SUB.100.01006_01, pp 87–89 [354–357], 98–99 [406–408] [Recommendation 17].
- 196 *Purvis v New South Wales* (2003) 217 CLR 92, 163 [236].
- 197 *Disability Discrimination Act 1992* (Cth) s 10.
- 198 Loretta De Plevitz, 'Briginshaw Standard of Proof in anti-discrimination law: Pointing with a wavering Finger', (2003), vol 27, *Melbourne University Law Review*.
- 199 *Tate v Rafin* (2001) EOC 93-125, 75, 226; *New South Wales (Department of Education and Training) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199, [35].
- 200 *White v Westworth* [1996] HREOCA 22; *Shying v ANSTO* [1996] HREOCA 13. See also *Sharma v Legal Aid Queensland* (2001) 112 IR 124, 137 [60]; *Sharma v Legal Aid (Qld)* (2002) 115 IR 91.
- 201 *Tate v Rafin* (2001) EOC 93-125, 75, 226; *New South Wales (Department of Education and Training) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, [35].
- 202 *Fair Work Act 2009* (Cth) s 361.

203 We also note *Fair Work Act 2009* (Cth) ss 351(1), 361 impose a shared burden of proof. For example, if a person with physical or mental disability is dismissed from their employment (which is in and of itself adverse), the employer is presumed to have engaged in adverse action and bears the onus of proving that a person's disability was not the reason for the dismissal. The rebuttable presumption requires the employer to explain why the dismissal occurred. For a summary of the approach, see 'Rebuttable presumption as to reason or intent', *Fair Work Commission*, web page. <www.fwc.gov.au/rebuttable-presumption-reason-or-intent>

204 See *Tsikos v Austin Health* (2022) 314 IR 269, pp 284–85, [44–47]. See also Queensland Human Rights Commission, *Building belonging: Review of Queensland Anti-Discrimination Act 1991*, Final report, July 2022, p 110 [Recommendation 3.3]; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111 final report, May 2022, pp 54–55 [Recommendation 5].

205 See *Fair Work Act 2009* (Cth) ss 351, 361.

206 *Disability Discrimination Act 1992* (Cth) s 6(1).

207 *Disability Discrimination Act 1992* (Cth) s 6(2).

208 *Waters v Public Transport Commission* (1991) 173 CLR 349, p 393, *Australian Medical Council v Wilson, Hastings & Morgan (Constituting the HREOC)* (1996) 68 FCR 46, p 55; *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 [13–16].

209 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 229.

210 *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, p 577 [56].

211 *Waters v Public Transport Corporation* (1991) 173 CLR 349, pp 393, 406–07; *Catholic Education Office v Clarke* (2004) 138 FCR 121, p 143 [103]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110]; *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 474 [107]; *Trindall v NSW Commissioner of Police* [2005] FMCA 2, [175].

212 *Waters v Public Transport Corporation* (1991) 173 CLR 349, p 393.

213 *Walker v Victoria* (2011) 279 ALR 284, pp 313–15 [190–92].

214 *Catholic Education Office v Clarke* (2004) 138 FCR 121; *Hurst v Queensland* (2006) 151 FCR 562.

215 *Minns v New South Wales* [2002] FMCA 60, [247].

216 *Hinchliffe v University of Sydney* (2004) 186 FLR 376.

217 *Travers v New South Wales* (2001) 163 FLR 99.

218 *Clarke v Catholic Education Office* (2003) 202 ALR 340, pp 352–53 [49]; upheld on appeal *Catholic Education Officer v Clarke* (2004) 138 FCR 121; *Hurst v Queensland* (2006) 151 FCR 562, pp 580 [106–108], 585 [134].

219 *Howe v Qantas Airways Ltd* (2004) 188 FLR 1, p 147 [117]; *Rawcliffe v Northern Sydney Central Coast Area Health Service* [2007] FMCA 931, [86–87]. See also *Mrs G Dobson v 1) North Cumbria Integrated Care NHS Foundation Trust 2) Working Families – Intervenor*, (2021): UKEAT/0220/19/LA(V).

220 *Holland v Jones* (1917) 23 CLR 149, p 153.

221 *Ryan v Commissioner of Police (NSW) (No 2)* (2021) 303 IR 140, pp 196–97 [250]; *Forest v Queensland Health* (2007) 161 FCR 152; *Nojin v Commonwealth of Australia* (2012) 208 FCR 1; *Daghlian v Australian Postal Corporation* [2003] FCA 759.

222 *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, pp 263–64.

223 *Waters v Public Transport Corporation* (1991) 173 CLR 349, pp 378, 395.

224 *Waters v Public Transport Corporation* (1991) 173 CLR 349, p 378.

225 *Waters v Public Transport Corporation* (1991) 173 CLR 349, p 395. See also *Daghlian v Australian Postal Corporation* [2003] FCA 759, [111]. In the context of the *Disability Discrimination Act 1992* (Cth), the full court of the Federal Court has provided a confirmation and summary of the principles to be applied to assessing 'reasonableness' that is likely to be relevant in the context of the *Racial Discrimination Act 1975* (Cth). See *Catholic Education Office v Clarke* (2004) 138 FCR 121, [115].

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

227 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), arts 5, 14, 24.

- 228 Exhibit 5.19.8, EXP.0003.0003.0337; Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, CRPD/C/CG/6, (28 April 2018), [24]. See also Committee on the Rights of Persons with Disabilities, *General comment no. 2 (2014), Article 9: Accessibility*, CRPD/C/GC/2, (22 May 2014), [26].
- 229 Exhibit 18-20, CTD.9999.0007.0001, [29] (emphasis added). See also Exhibit 18-21, CTD.9999.0030.0001, [60–61].
- 230 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 3(f).
- 231 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 9.
- 232 Committee on the Rights of Persons with Disabilities, *General comment no. 2 (2014), article 9: Accessibility*, CRPD/C/GC/2, (22 May 2014), [24].
- 233 See, Brynhildur G Flovenz, 'The implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights' in Gerard Quinn (ed), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, Brill Publishing, 2009, pp 257–78.
- 234 Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial reports submitted by States parties under article 35 of the Convention – Australia*, UN Doc CRPD/C/AUS/1, (3 December 2010), pp 13–14. See also Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2020, pp 37–40.
- 235 *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93; *Commonwealth v Humphries* (1998) 86 FCR 324, p 335.
- 236 *Purvis v New South Wales* (2003) 217 CLR 92, pp 159 [217–218], 161–62 [225–31].
- 237 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 185.
- 238 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 193.
- 239 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 193.
- 240 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, pp xlix, 196 [Recommendation 8.1].
- 241 Australian Government Attorney-General's Department, 'Government's response to the Productivity Commission's Review of the Disability Discrimination Act 1992', January 2005, p 2.
- 242 The *Disability Discrimination Act 1992* (Cth) defines 'accommodation'. There has been confusion about whether or not the concept of 'accommodation' is intended to be a reference to housing or tenancies: *State of New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 79.
- 243 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 17.
- 244 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).
- 245 *Watts v Australian Postal Corporation* (2014) 222 FCR 220.
- 246 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 228 [22], [27].
- 247 See Submissions of Counsel Assisting the Royal Commission following Public hearing 19, 7 January 2022 (amended on 9 March 2022), pp 90 [298], 92 [303].
- 248 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 228 [23].
- 249 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 228 [23].
- 250 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, pp 228 [24], 230 [32].
- 251 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 229 [26].
- 252 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 275 [232–33].
- 253 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 275 [233]. See also *State of New South Wales (Department of Justice – Corrective Services) v Huntley* [2017] FCA 581, [102], [141–49]; *Tropoulos v Journey Lawyers Pty Ltd* (2019) 287 IR 363, pp 428–29 [161–63], p 433 [174].
- 254 *Watts v Australian Postal Corporation* (2014) 222 FCR 220, p 275 [233].
- 255 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247.

256 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, pp 254–55 [22].
 257 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, p 251 [7].
 258 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, pp 249–50 [1-3].
 259 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, p 260 [48].
 260 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, p 250 [5].
 261 See also *Varasdi v State of Victoria* [2018] FCA 1655, [31]–[33]; *Tropoulos v Journey Lawyers Pty Ltd* (2019) 287 IR 363, p 420 [140]; *Connor v State of Queensland (Department of Education and Training)* (No 3) [2020] FCA 455, [260–65]; *Ponraj v Wycombe Services Pty Ltd* [2023] FCA 118, [92–100], [116–17].
 262 *Sklavos v Australian College of Dermatologists* (2014) 256 FCR 247, p 273 [102].
 263 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, p 266 [76].
 264 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, pp 267 [81], 268 [84], 271–72 [97–102], [104].
 265 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 5(3).
 266 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 2.
 267 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)*, Final inquiry report, Report no. 30, vol 1, April 2004, p 41.
 268 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Final inquiry report, December 2008, Chapter 9.
 269 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Final inquiry report, December 2008, p 164 [Recommendation 40].
 270 Australian Government, Response to Australian Senate Standing Committee on Legal and Constitutional Affairs’ report: *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, p 20.
 271 *Equal Opportunity Act 2010* (Vic) s 15(1), (2). See also *Equal Opportunity Bill 2010* (Vic), Explanatory memorandum, 10 March 2010; Dominique Allen, ‘An evaluation of the mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’, (2020), vol 44 (2), *Melbourne University Law Review*, pp 459–501.
 272 Victorian Government, Submission in response to *Education and learning issues paper*, 6 May 2020, ISS.001.00155, p 13.
 273 Victorian Government, Submission, October 2022, SUB.100.02450_02, p 33 [Recommendation 3].
 274 Exhibit 19-3, ‘Statement of Melanie Schleiger’, November 2021, at p 21.
 275 See ‘Positive duty’, *Victorian Equal Opportunity & Human Rights Commission* web page. <www.humanrights.vic.gov.au/for-organisations/positive-duty/>. This summarises ‘six minimum standards that organisations must meet to comply with their positive duty to eliminate discrimination, sexual harassment and victimisation’.
 276 Transcript, Lauren Matthews, Public hearing 19, 25 November 2021, P-394 [17–21]; Exhibit 19-35, ‘Joint statement of Emily Howie and Lauren Matthews, 2 August 2021.’
 277 Exhibit 19-39.20, CTD.5000.0002.4516, p 333.
 278 Exhibit 19-39.20, CTD.5000.0002.4516, p 334 [Recommendation 49].
 279 Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces*, Final inquiry report, January 2020.
 280 Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces*, Final inquiry report, January 2020, p 28.
 281 Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces*, Final inquiry report, January 2020, p 28.
 282 Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces*, Final inquiry report, January 2020, p 44 [Recommendation 17].
 283 *Sex Discrimination Act 1984* (Cth) s 47C.
 284 *Australian Human Rights Commission Act 1986* (Cth) div 4A, s 35A–K (‘Functions relating to positive duty in relation to sex discrimination’).
 285 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) s 23, inserting s 35B.

- 286 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 3.
- 287 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111 Final report, May 2022, Recommendation 121; Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, Final report, July 2022 [Recommendation 15.1].
- 288 Western Australia, *Parliamentary debates*, Legislative Assembly, 16 August 2022, p 1 (John Quigley, Attorney-General).
- 289 Queensland Government, Response to Queensland Human Rights Commission's report: *Building belonging – Review of Queensland's Anti-Discrimination Act 1991*, 2 April 2023, p 18.
- 290 *Equality Act 2010* (UK) s 149.
- 291 *Human Rights and Equality Act 2014* (Ireland) s 24.
- 292 *Employment Equity Act* SC 1995, c 44, s 5(b).
- 293 *Employment Equity Act* SC 1995, c 44, s 2.
- 294 Exhibit 19-1, 'Statement of Graeme Innes', 30 June 2021, at [91(c)].
- 295 Blind Citizens Australia, Submission in response to *Safeguards and quality issues paper*, 24 February 2021, ISS.001.00560_01, p 8.
- 296 Disability Discrimination Legal Service, Submission, 27 October 2020, SUB.100.01006_01, p 8 [Recommendation 15].
- 297 Disability Discrimination Legal Service, Submission, 27 October 2020, SUB.100.01006_01, p 85.
- 298 Victoria Legal Aid, Submission, 30 April 2020, SUB.001.00215_01, p 9 [Recommendation 1].
- 299 Legal Aid NSW, Submission, 18 June 2020, SUB.100.00766, p 19.
- 300 Disability Discrimination Legal Service, Submission, 27 October 2020, SUB.100.01006_01, p 86.
- 301 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 34 [Recommendation 5].
- 302 Australian Human Rights Commission, Submission in response to *Employment issues paper*, 24 September 2020, ISS.001.00459, p 33.
- 303 Australian Communications Consumer Action Network, Submission in response to *Promoting inclusion issues paper*, 1 April 2021, ISS.001.00605_01, p 6 [Recommendation 5].
- 304 Exhibit 19-35, 'Joint statement of Emily Howie and Lauren Matthews', 2 August 2021, p 31.
- 305 *Disability Discrimination Act 1992* (Cth) s 35.
- 306 *Disability Discrimination Act 1992* (Cth) s 39.
- 307 *Disability Discrimination Act 1992* (Cth) s 37.
- 308 *Disability Standards for Education 2005* (Cth) cl 8.1.
- 309 *Disability Standards for Education 2005* (Cth) cl 8.1.
- 310 *Disability Standards for Education 2005* (Cth) cls 8.3.1, 8.5.
- 311 Urbis, *2015 Review of the Disability Standards for Education 2005*, Final report, July 2015, p 35 [3.9.2.1] (emphasis in original).
- 312 Name changed to protect identity.
- 313 Name changed to protect identity. Transcript, 'Jenni', Public hearing 28, 11 October 2022, P-88 [14–15].
- 314 Exhibit 28-5, 'Statement of "Jenni"', 12 September 2022, at [8].
- 315 Exhibit 28-4, 'Statement of Fiona Strahan', 12 September 2022, at [13].
- 316 Exhibit 28-7, 'Statement of Maree Jenner', 17 September 2022, at [39].
- 317 Exhibit 28-1, 'Statement of Debra Keenahan', 12 September 2022, at [16–17].
- 318 Transcript, Tim Marks, Public hearing 28, 12 October 2022, P-187 [10–13], P-191 [12–16].
- 319 Transcript, Tim Marks, Public hearing 28, 12 October 2022, P-190 [35–39].
- 320 Name changed to protect identity. Transcript, 'Ashleigh', Public hearing 28, 12 October 2022, P-201 [35–41].
- 321 Exhibit 28-2, 'Statement of Tracy Barrell', 13 September 2022, at [73–74].
- 322 Exhibit 28-38, 'Statement of Julie Inman Grant', 16 September 2022, at [97(a)].
- 323 Exhibit 28-38, 'Statement of Julie Inman Grant', 16 September 2022, at [97(b)].
- 324 Exhibit 28-36, 'Statement of Carly Findlay', 28 September 2022, at [23–64].
- 325 Exhibit 28-36, 'Statement of Carly Findlay', 28 September 2022, at [34], [38–40].
- 326 Transcript, Carly Findlay, Public hearing 28, 14 October 2022, P-327 [19–24].
- 327 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, pp 321–22.

Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 325 [Finding 11.8].

Aldridge v Booth (1988) 80 ALR 1, pp 12–18.

Connor v State of Queensland (Department of Education and Training) (No 3) [2020] FCA 455, [15].

Sluggett v Commonwealth of Australia [2011] FMCA 609, [674].

Berry v State of South Australia [2017] FCA 702, [11].

McCormack v Commonwealth of Australia [2007] FMCA 1245, [75]; *Clack v Command Recruitment Group Pty Ltd* [2010] FMCA 42, [107], [109]; *Sluggett v Commonwealth* [2011] FMCA 609, [135]; *Berry v South Australia* [2017] FCA 702, [11]; *Penhall-Jones v New South Wales (No 2)* [2008] FMCA 832, [39]; *Gluyas v Commonwealth of Australia* [2004] FMCA 224, [23]; *Maxworthy v Shaw* [2010] FMCA 1014, [112].

Sluggett v Commonwealth of Australia [2011] FMCA 609, [674]; upheld on appeal in *Sluggett v Commonwealth of Australia* [2012] FCA 963.

Mrs J, on behalf of herself and AJ v a School [1998] HREOCA 9, [4.4].

McCormack v Commonwealth [2007] FMCA 1245, [105], [177]; *Penhall-Jones v New South Wales (No 2)* [2008] FMCA 832, [20].

See *Sex Discrimination Act 1984* (Cth) s 28A.

See *Sex Discrimination Act 1984* (Cth) s 28AA.

See *Sex Discrimination Act 1984* (Cth) ss 28A(1A)(c), 28AA(2)(c).

Legal Aid NSW, Submission, 18 June 2020, SUB.100.00766, p 24.

Disability Discrimination Act 1992 (Cth) ss 35, 37, 39.

McCormack v Commonwealth [2007] FMCA 1245, p [75]; *Sluggett v Commonwealth of Australia* [2011] FMCA 609, [138].

See *Fair Work Act 2009* (Cth) pt 3.5A, in particular, s 527F.

King v Gosewisch [2008] FMCA 1221, [92]–[106].

See *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39.

See, for example, Exhibit 28-7, ‘Statement of Maree Jenner’, 17 September 2022, at [45]; Exhibit 28-4, ‘Statement of Fiona Strahan’, 12 September 2022, at [15–17]; Exhibit 28-6, ‘Statement of Peta Stamell’, 16 September 2022, at [18–19].

Exhibit 28-1, ‘Statement of Debra Keenahan’, 12 September 2022, at [54].

Transcript, Gwynnyth Llewellyn, Public hearing 28, 11 October 2022, P-136.

Exhibit 28-8, ‘Statement of Gwynnyth Llewellyn’, 22 September 2022, at [17].

Exhibit 28-8, ‘Statement of Gwynnyth Llewellyn’, 22 September 2022, at [69].

Exhibit 28-8, ‘Statement of Gwynnyth Llewellyn’, 22 September 2022, at [28(b)].

Exhibit 28-14, ‘Statement of Nicole Asquith’, 23 September 2022, at [3–10].

Transcript, Nicole Asquith, Public hearing 28, 12 October 2022, P-164.

Exhibit 28-14, ‘Statement of Nicole Asquith’, 23 September 2022, at [25–27].

Exhibit 28-14, ‘Statement of Nicole Asquith’, 23 September 2022, at [64].

Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces*, National survey, November 2022; Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces*, Report, March 2022; Australian Human Rights Commission, *Set the standard: Report on the independent review into Commonwealth parliamentary workplaces*, Final report, November 2021; Australian Human Rights Commission, *Change the course: National report on sexual assault and sexual harassment at Australian universities*, Report, August 2017.

Sex Discrimination Act 1984 (Cth) s 28B.

Sex Discrimination Act 1984 (Cth) s 28AA.

Sex Discrimination Act 1984 (Cth) s 28M.

See also *Violence and Harassment Convention*, adopted 21 June 2019, C190 (entered into force 25 June 2021).

Victorian Legislative Assembly Legal and Social Issues Committee, *Inquiry into anti-vilification protections*, Final report, March 2021, p 51.

Victorian Legislative Assembly Legal and Social Issues Committee, *Inquiry into anti-vilification protections*, Final report, March 2021, pp xv, 58 [Recommendation 1(f)].

- 363 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final report, May 2022, pp 229–30 [Recommendation 114]. The Western Australia Law Reform Commission also recommended replacing the term ‘impairment’ with ‘disability’ in the *Equal Opportunity Act 1984 (WA)* [Recommendation 21] and aligning it with the definition of ‘disability’ in the *DDA* [Recommendation 22].
- 364 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final report, May 2022, pp 229–30 [Recommendation 115].
- 365 Western Australia, *Parliamentary debates*, Legislative Assembly, 24 May 2023, p 4 (John Quigley, Attorney-General).
- 366 Western Australia, *Parliamentary debates*, Legislative Assembly, 16 August 2022, p 1 (John Quigley, Attorney-General).
- 367 Western Australia, *Parliamentary debates*, Legislative Assembly, 24 May 2023, p 4 (John Quigley, Attorney-General).
- 368 Section 16(k) of the *Anti-Discrimination Act 1998* (Tas) refers to ‘disability’ as the relevant attribute. Disability is, in turn, defined in section 3 of the Act.
- 369 Submissions of Counsel Assisting the Royal Commission following Public hearing 28, 9 December 2022, pp 79 [293] – 84 [304].
- 370 Submissions of Counsel Assisting the Royal Commission following Public hearing 28, 9 December 2022, p 82 [300].
- 371 Submissions by the Australian Government in response to Counsel Assisting’s submissions in Public hearing 28, 23 December 2022, SUBM.0047.0001.0103, [8].
- 372 Submissions by the Australian Government in response to Counsel Assisting’s submissions in Public hearing 28, 23 December 2022, SUBM.0047.0001.0103, [9].
- 373 Submissions by the Australian Government in response to Counsel Assisting’s submissions in Public hearing 28, 23 December 2022, SUBM.0047.0001.0103, [10].
- 374 Australian Human Rights Commission, *Free and Equal: Priorities for federal discrimination law reform*, Discussion paper, April 2019, p 17.
- 375 Australian Human Rights Commission, *Free and Equal: A model for positive human rights reform in Australia*, Discussion paper, August 2019.
- 376 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 78.
- 377 Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Inquiry report, 28 February 2017, pp 12–46.
- 378 Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Inquiry report, 28 February 2017, p 47 [2.126].
- 379 *Criminal Code 2002* (ACT) s 750(1). Section 750(2) defines the terms used in s 750(1).
- 380 Victorian Legislative Assembly Legal and Social Issues Committee, *Inquiry into anti-vilification protections*, Final report, March 2021, pp xv, 51, 58 [Recommendation 1(f)].
- 381 Victorian Government, Response to Legislative Assembly and Social Issue Committee report: *Inquiry into Anti-Vilification Protections*, September 2021.
- 382 Victorian Government, Response to Legislative Assembly and Social Issue Committee report: *Inquiry into Anti-Vilification Protections*, September 2021.
- 383 Law Reform Commission of Western Australia, *Project III: Review of the Equal Opportunity Act 1984 (WA)*, Final report, May 2022, pp 229–30.
- 384 Law Reform Commission of Western Australia, *Project III: Review of the Equal Opportunity Act 1984 (WA)*, Final report, May 2022, p 229 [6.5.2].
- 385 Law Reform Commission of Western Australia, *Project III: Review of the Equal Opportunity Act 1984 (WA)*, Final Report, May 2022, p 230 [6.5.3].
- 386 *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code 2002* (ACT) s 750(1).
- 387 Western Australia, *Parliamentary debates*, Legislative Assembly, 24 May 2023, p 4 (John Quigley, Attorney-General).
- 388 *Disability Discrimination Act 1992* (Cth) pt 2, div 5.

389 *Disability Discrimination Act 1992* (Cth) s 47.
 390 *Disability Discrimination Act 1992* (Cth) s 48.
 391 *Disability Discrimination Act 1992* (Cth) s 49.
 392 *Disability Discrimination Act 1992* (Cth) s 51.
 393 *Disability Discrimination Act 1992* (Cth) s 52.
 394 *Disability Discrimination Act 1992* (Cth) ss 53–54.
 395 *Disability Discrimination Act 1992* (Cth) s 54A.
 396 *Disability Discrimination Act 1992* (Cth) s 55.
 397 ‘Temporary exemptions under the Disability Discrimination Act 1992 (Cth)’, *Australian Human Rights Commission*, web page. <humanrights.gov.au/our-work/legal/temporary-exemptions-under-disability-discrimination-act-1992-cth>
 398 ‘Exemption applications under the Disability Discrimination Act 1992 (Cth)’, *Australian Human Rights Commission*, web page. <humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth-current>
 399 For example, see the applications of transport bodies such as the Australasian Railway Association, Queensland Rail Limited, Tiger Airways and the repeated joint applications of the free-to-air networks, including ABC TV, SBS Television, Network Ten, Channel Nine and Seven Network; ‘Exemption applications under the Disability Discrimination Act 1992 (Cth)’, *Australian Human Rights Commission*, web page. <humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth-current>
 400 *Disability Discrimination Act 1992* (Cth) s 45.
 401 *Disability Discrimination Act 1992* (Cth) ss 21B, 29A.
 402 *Disability Discrimination Act 1992* (Cth) s 34.
 403 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) cl 34: ‘Disability standards are intended to be a standard which if abided by would protect a person from any other action under this Bill relating to action covered by those standards’. See also *Jones (by his next friend Jones) v Victoria (Department of Education and Early Childhood Development)* (2014) 145 ALD 619, [14–16]. However, the *Education Standards* do not provide any defence to harassment. Harassment means an action taken in relation to a person’s disability that is reasonably likely to humiliate, offend, intimidate or distress the person: *Disability Standards for Education 2005* (Cth) s 8.1.
 404 *Disability Discrimination Act 1992* (Cth) s 21A.
 405 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, SUBM.0022.0001.0026, pp 40 [135] – 41 [138]; for example, see Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI\GEN\1\ Rev.1 (10 November 1989), [13] with respect to the *International Covenant on Civil and Political Rights* stating ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’; see also Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights*, UN Doc E/C.12/GC/20 (2 July 2009), [13].
 406 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, SUBM.0022.0001.0026, pp 41 [139] – 43 [151].
 407 Exhibit 18-20, CTD.9999.0007.0001, [24]. See also Australian Government, Submission to the Committee on the Rights of Persons with Disabilities on Draft General Comment No. 6, November 2017.
 408 Exhibit 18-20, CTD.9999.0007.0001, [24]; Exhibit 18-21, CTD.9999.0030.0001, [26]–[35].
 409 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 26.
 410 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13; *Human Rights Act 2004* (ACT) s 28.
 411 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, Position paper, December 2022, pp 24, 254–56.
 412 Submissions of Counsel Assisting the Royal Commission following Public hearing 18, 14 December 2021, p 43 [151].
 413 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, pp 327–64. See pp LXV–LXVI for a list of Findings 12.1–12.7 and pp LI–LII for a list of Recommendations 12.1–12.6.

- 414 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021, p 272.
- 415 Compare, Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984*, Report no. 216, 1992; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, Report no. 98, 1992; Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Final report, ALRC Report 69, July 1994.
- 416 The Committee on the Rights of Persons with Disabilities identified examples of specific measures, including outreach and support programs, allocation or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as respite care and technological aids. See Committee on the Rights of Persons with Disabilities, *General comment No. 6: Equality and non-discrimination*, UN Doc CRPD/C/GC/6, (26 April 2018), [29–31].
- 417 Committee on the Rights of Persons with Disabilities, *General comment No. 6. Equality and non-discrimination*, UN Doc CRPD/C/GC/6, (26 April 2018), [29].
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- 426 *Migration Regulations 1994* (Cth) sch 4, Public interest criterion 4005.
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- 429 Exhibit 29-022, ‘Statement of Cheryl-anne Moy’, 5 October 2022, at [13], [16], [17].
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- 433 Exhibit 29-022, ‘Statement of Cheryl-anne Moy’, 5 October 2022, at [13(b)(i)].
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460 *Disability Discrimination Act 1992* (Cth) s 11 (emphasis in original).

461 The original form of s 11 did not include consideration of the availability of financial and other assistance to the first person; action plans were only relevant to the provision of services or facilities. Unjustifiable hardship was not a defence to employment (other than recruitment or termination), education (other than enrolment), the administration of Commonwealth laws and programs, sport and land. At the time, there was also no provision for reasonable adjustments and section 11 did not apply to former section 5(2).

462 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 205 [Finding 8.2].

463 Productivity Commission, *Review of the Disability Discrimination Act 1992*, Final inquiry report, Report no. 30, vol 1, April 2004, p 211 [Recommendation 8.2].

464 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 items 41, 60.

465 *Disability Discrimination Act 1992* (Cth) s 4.

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509 *Sievwright v State of Victoria (Department of Education and Training)* [2012] FCA 118; *Abela v State of Victoria (Department of Education and Training)* [2013] FCA 832.

510 *Sievwright v State of Victoria (Department of Education and Training)* [2012] FCA 118; *Abela v State of Victoria (Department of Education and Training)* [2013] FCA 832.

511 *Sievwright v State of Victoria (Department of Education and Training)* [2012] FCA 118; *Abela v State of Victoria (Department of Education and Training)* [2013] FCA 832.

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513 *Kiefel v Victoria* [2013] FCA 1398.

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516 See for example *Sievwright v State of Victoria (Department of Education and Training)* [2012] FCA 118, [227–44]; *Abela v State of Victoria (Department of Education and Training)* [2013] FCA 832, [141–67]; *Kiefel v Victoria* [2013] FCA 1398, [233–56].

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518 All applications on substantive matters under the *Education Standards* have been dismissed, with the applicant made to pay costs. See for example *Purvis v New South Wales* [2003] HCA 62; *Mason v MLC* [2009] FMCA 570; *Walker v State of Victoria* [2011] FCA 258; *Denton v State of Victoria* [2011] FCA 854; *McKenna-Reid v Rigo* [2011] FCA 883; *Lewis v State of Victoria (Department of Education and Training)* [2019] FCA 714; *Izzo v Victoria (Department of Education and Training)* [2020] FCA 770; *Harvey v Dioceses of Sale Catholic Education Ltd (St Joseph's Primary School Wonthaggi) (No 2)* [2021] FCA 1102.

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- 535 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Defined as ‘Disabilities Convention’ in the *Disability Discrimination Act 1992* (Cth) s 4.
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- 541 Exhibit 19-4, ‘Statement of Kairstien Wilson’, 12 July 2021, at [15]; Submissions of Counsel Assisting the Royal Commission following Public hearing 19, 7 January 2022 (amended on 9 March 2022), p 164 [587].
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Acronyms and abbreviations

Below is the list of acronyms and abbreviations used in this volume.

ACT HRA – Human Rights Act 2004 (ACT)

ADF – Australian Defence Force

ADS – Australia’s Disability Strategy 2021–2031

AGD – Australian Government Attorney-General’s Department

Age Discrimination Act – Age Discrimination Act 2004 (Cth)

AHCN – Australian Hate Crime Network

AHRC – Australian Human Rights Commission

AHRC Act – Australian Human Rights Commission Act 1986 (Cth)

BSWAT – Business Services Wage Assessment Tool

COVID-19 – Coronavirus disease, discovered in 2019

CRPD – Convention on the Rights of Persons with Disabilities

CRPD Committee – Committee on the Rights of Persons with Disabilities

CRU – Community Residential Unit

Cth – Commonwealth

DDA – Disability Discrimination Act 1992 (Cth)

DDA Bill – Disability Discrimination Bill 1992 (Cth)

DDLS – Disability Discrimination Legal Service

DRA – Disability Rights Act

DSA – Disability Services Act 1986 (Cth)

DSP – Disability Support Pension

DSS – Australian Government Department of Social Services

Education Standards – Disability Standards for Education 2005 (Cth)

EHRC – United Kingdom Equality and Human Rights Commission

Equality Act – Equality Act 2010 (UK)

ESG – Environmental, social and corporate governance

Federal Circuit and Family Court – Federal Circuit and Family Court of Australia

Federal Court – Federal Court of Australia

Free and Equal – Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Position paper, December 2021

FWA – Fair Work Act 2009 (Cth)

Guiding Principles – United Nations Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

HIV – Human immunodeficiency virus

HRC – Human Rights Commission. Australia’s first human rights commission, established in 1981. It later became the Human Rights and Equal Opportunity Commission (HREOC), which later became the Australian Human Rights Commission (AHRC).

HREOC – Australian Human Rights and Equal Opportunity Commission

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

LGBTIQA+ – Lesbian, gay, bisexual, transgender, intersex, queer, asexual and other sexually or gender diverse people

LGBTQA+ – Lesbian, gay, bisexual, transgender, queer, asexual and other sexually or gender diverse people

Migration Act – Migration Act 1958 (Cth)

Migration Regulations – Migration Regulations 1994 (Cth)

NDIA – National Disability Insurance Agency

NDIS – National Disability Insurance Scheme

NDIS Act – National Disability Insurance Scheme Act 2013 (Cth)

NDIS Commission – NDIS Quality and Safeguards Commission

NSDS – National Standards for Disability Services

OPCAT – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

PIC – Public Interest Criteria

PJCHR – Parliamentary Joint Committee on Human Rights

PJCHR inquiry – An inquiry into the scope and effectiveness of Australia’s Human Rights Framework and National Human Rights Action Plan, undertaken by the Parliamentary Joint Committee on Human Rights

Premises Standards – Disability (Access to Premises — Buildings) Standards 2010 (Cth)

Public Governance Act – Public Governance, Performance and Accountability Act 2013 (Cth)

Purvis – Purvis obo Hoggan v State of New South Wales (Department of Education and Training) (2001) EOC 93-117

Qld HRA – Human Rights Act 2019 (Qld)

Racial Discrimination Act – Racial Discrimination Act 1975 (Cth)

Regulatory Powers Act – Regulatory Powers (Standard Provisions) Act 2014 (Cth)

Royal Commission – Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Sex Discrimination Act – Sex Discrimination Act 1984 (Cth)

SOCOG – Sydney Organising Committee for the Olympic Games

Transport Standards – Disability Standards for Accessible Public Transport 2002 (Cth)

UN – United Nations

UNDRDP – United Nations Declaration on the Rights of Disabled Persons

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNDRMRP – United Nations Declaration on the Rights of Mentally Retarded Persons

UNESCAP – United Nations Economic and Social Commission for Asia and the Pacific

VCLT – Vienna Convention on the Law of Treaties

VEOHRC – Victorian Equal Opportunity and Human Rights Commission

Victorian Charter – Charter of Human Rights and Responsibilities Act 2006 (Vic)



Royal Commission
into Violence, Abuse, Neglect and
Exploitation of People with Disability