



Addressing discrimination to prevent violence, abuse, neglect and exploitation

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

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Executive Summary

Victoria Legal Aid (VLA) provides free legal assistance to thousands of people with disability every year experiencing financial hardship. For example, in the 2018/2019 financial year, one in four of Victoria Legal Aid's clients disclosed having a disability or mental health issue.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**The Commission**) is an historic opportunity to establish strong legal protections to safeguard the fundamental human rights of people with disability, as enshrined in the United Nations Convention on the Rights of Persons with Disability.

The focus in this submission is on discrimination against people with disability in education and employment which can both constitute violence, abuse, neglect and exploitation and result in these harms. Disability discrimination represents 40% of the work of VLA's Equality Law Program, which has given 331 advices on disability discrimination in education and 1,879 advices on disability discrimination in employment over the last five years.

Discrimination experienced by people with disability also includes racial discrimination, sexuality discrimination, and all the other unlawful conduct covered under Australia's anti-discrimination laws. A recent national survey found that people with disability are more likely than those without disability to have been sexually harassed.¹ Not only does this discrimination have a significant impact on the mental health and wellbeing of people with disability, it also impacts on their ability to complete their education and to maintain their employment.

VLA considers that a key measure to prevent people with disability from experiencing violence, abuse, neglect and exploitation is to strengthen and enforce discrimination protections in Australia. Australia's anti-discrimination laws should be a means of ensuring that duty holders are taking steps to create an inclusive society that supports the independence of people with disability. Currently our system is not working in terms of preventing or addressing discrimination, with relatively low numbers of people making complaints and complaints rarely addressing the cause of the discrimination. In this submission we make recommendations that go to best practice in reporting, investigating and responding to violence, abuse, neglect and exploitation, in the form of discrimination.

First, we address reforms common to both education and employment settings, highlighting the need to empower our human rights commissions across Australian jurisdictions to enforce anti-discrimination laws to remove the unfair burden on individuals to bring these protections to life. Australia needs to impose a clear obligation on employers and education providers to take proactive steps to prevent discrimination, violence, abuse, neglect and exploitation from occurring. In this section we also address ways in which the individual complaint system could be strengthened by clarifying legal protections, addressing prohibitive costs provisions, and shifting the burden of proof to be shared with respondents. We then outline a series of reforms specific to the education sector, addressing many of the issues contained in the Education and Learning Issues Paper. Finally, we address reforms

¹ Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces* (2018) 8.

specific to employment including both barriers to entering the workforce and abuse and neglect at work often resulting in a loss of employment.

We welcome the opportunity to contribute further to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability after the provision of the interim report. We intend to provide a more detailed, comprehensive submission to the Commission after the interim report is released, based on our practice experience, particularly in relation to prisons, corrective services and the justice system, the National Disability Insurance Scheme, economic participation, and the intersection with other systems (e.g. mental health systems).

Summary of recommendations

- Recommendation 1: 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.
- Recommendation 2: The Fair Work Ombudsman should expand its role in this area to utilise its existing enforcement powers to bring more complaints on behalf of people who experience discrimination because of disability, or other protected attributes.
- Recommendation 3: Commonwealth, state and territory human rights commissions should be granted the power to conduct own motion investigations and enforcement actions without requiring an individual complaint to be made.
- Recommendation 4: Commonwealth, state and territory human rights commissions should be granted increased powers and resources to effectively address disability discrimination including greater investigation powers, the power to enter into enforceable undertakings, and the power to issue compliance notices.
- Recommendation 5: Commonwealth, state and territory anti-discrimination laws should be amended to include a costs rule which provides that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.
- Recommendation 6: Commonwealth, state and territory anti-discrimination legislation should be amended to shift the burden of proof to the employer once the employee has established a prima facie case.
- Recommendation 7: The definitions of discrimination in the *Disability Discrimination Act 1992* (Cth) should be simplified by removing the comparator test.
- Recommendation 8: The *Disability Discrimination Act 1992* (Cth) should be amended to provide a standalone reasonable adjustments protection following the model adopted in Victoria.
- Recommendation 9: State, territory and Commonwealth discrimination legislation should be amended to require a school to provide within seven days of a request written proof of the number of enrolment places available at the school, the number of existing students seeking re-enrolment, and the number of students in the catchment area seeking to enrol.

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- Recommendation 10: Each state and territory should create a body designated to receive and resolve complaints against independent schools by prospective and current parents and students.
- Recommendation 11: Commonwealth, state and territory discrimination laws should be amended to expressly require schools to consider less restrictive means available when considering whether seclusion is justifiable under an exception available under the relevant act.
- Recommendation 12: The Disability Standards for Education 2005 should be amended to be more prescriptive and specific about obligations of education providers to make reasonable adjustments, particularly around students with cognitive and intellectual disabilities and mental health conditions.
- Recommendation 13: States and territories governments should provide annual training to teachers regarding their obligations under anti-discrimination laws and the Standards, and how to identify and implement adjustments for students with disability.
- Recommendation 14: Commonwealth, state and territory anti-discrimination laws should be amended to require that the relevant department be notified when a student with disability is suspended for more than five days.
- Recommendation 15: Commonwealth, state and territory anti-discrimination laws should be amended to expressly provide that it is unlawful discrimination to expel a student with disability unless alternative local schooling has been arranged and is commencing within three months.
- Recommendation 16: Commonwealth, state and territory discrimination laws should be amended to expressly confirm that providers of tertiary placements are providing a service to students and are therefore required to make reasonable adjustments.
- Recommendation 17: Commonwealth, state and territory discrimination laws should be amended to create a clear obligation for tertiary institutions to take all reasonable steps to find a placement provider that can make reasonable adjustments for a student with disability.
- Recommendation 18: Relevant exceptions in Commonwealth, state and territory anti-discrimination laws should be amended to:
- (a) Provide that the student's best interests are the primary consideration; and
 - (b) Prevent schools from relying on exceptions to discriminate against a student with disability if reasonable

adjustments were not actively identified and implemented first.

- Recommendation 19: States and territories should increase funding available to schools to train staff and to identify and implement reasonable adjustments for students with disability.
- Recommendation 20: The *Disability Discrimination Act 1992* (Cth), state and territory discrimination laws should be amended to require employers to make interview notes for all interviewees available to an individual interviewee on request.
- Recommendation 21: The *Disability Discrimination Act 1992* (Cth), state and territory discrimination law prohibitions on requesting discriminatory information should be strengthened by providing limiting a reasonable request for medical information to:
- (a) the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and
 - (b) circumstances where there is evidence that the medical information requested is required.
- Recommendation 22: The *Disability Discrimination Act 1992* (Cth) reasonable adjustments provision should be strengthened by providing greater clarity as to what adjustments may be reasonable, including clear examples.
- Recommendation 23: Commonwealth, state and territory discrimination legislation should be amended to extend the time limit for bringing a complaint to six years.
- Recommendation 24: There should be express protection of witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made under anti-discrimination laws.
- Recommendation 25: The *Fair Work Act 2009* (Cth) should be amended to expressly prohibit indirect discrimination, to expressly require employers to make reasonable adjustments for employees with disability, and to define key terms such as “disability” and “discriminates”.
- Recommendation 26: The *Fair Work Act 2009* (Cth) should be amended to state that the definition of “disability” includes characteristics or manifestations of a disability, in line with the *Disability Discrimination Act 1992* (Cth).

1. Issues common to both education and employment discrimination

1.1 Preventing disability discrimination

People with disability who experience discrimination do not complain

A significant weakness of Australian disability discrimination law is its reliance on a complaints-based system, where individuals with disability must hold discriminators to account. In our experience, this is particularly flawed in situations of workplace discrimination where complainants and witnesses are often financially dependent on the discriminator and are discouraged from making a complaint, by the potential repercussions within their workplace and industry.

Research confirms that the majority of people with complaints of discrimination and harassment under Australian discrimination law do not report the conduct or make a complaint.² Even where people with disability are legally represented, the burden of enforcing their rights is often so great that they either accept a poor settlement or simply walk away rather than pursue legal proceedings.

In the context of workplace discrimination against Australians with disability, it is our experience that clients are particularly deterred by:

- Fear of negative reputational consequences and of being punished at work;
- Difficulties proving the conduct, due to factors including lack of access to documents and other information held by the employer, and witness reluctance to give evidence. These problems have been referred to as the employer's "monopoly on knowledge";³ and
- The poor cost-benefit of litigation (even if the complaint is successful) due to the significant time, energy and cost involved in pursuing a complaint of discrimination, the fact that compensation payments are usually low and the risk of an adverse costs order, particularly in the federal jurisdiction, in the event that the proceeding is unsuccessful.

This can lead to people with disability enduring the hardship, abuse and exploitation they experience in the workplace without raising their legal rights.

Many people with disability also decide not to proceed with their discrimination claims due to the negative impact on their mental health, as outlined by Claire's story below.

² See, eg, Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces* (2018) which confirmed that while 1 in 3 people experience sexual harassment at work in the last 5 years, less than 1 in 5 people who experience harassment take action, and only 1 in 100 make a legal complaint to the AHRC or equivalent state or territory agency.

³ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 180; Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6(1) *Industrial Law Journal* 212, 213. See also Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 583.

Too unwell to take it further – Claire’s story

“I informed my bosses in the job interview that I suffered from depression and chronic Post Traumatic Stress Disorder (PTSD). I was asked how this would affect my employment, and I told them that it would not affect my ability to deal with customers, but if someone is rude or aggressive to me I can become tearful and upset. They said that was fine and they could accommodate this. However during the time I worked for the company one of the bosses behaved in an abusive and derogatory way towards me. He shouted and swore at me on many occasions. I quit because I could not take the abuse anymore.

I put in a discrimination complaint and went to conciliation. The process was horrible and although my bosses did not deny all of the allegations, we couldn’t get them to put a reasonable offer. I settled for a very low amount, which only covered the things I was already entitled to.

I was not mentally capable to take this matter any further, even though I knew I had a very strong claim. I knew in my heart that if I fought this matter I would have won. I was not capable of taking this matter further as my PTSD was exacerbated by my boss’ treatment of me. I also desperately needed the money to help my daughter with her school studies.

Thinking about this matter still upsets me today because I know I should have fought it. But I am not a monetary person. I have never had a lot of money. This outcome would have been very different if there was a third party helping me and investigating the discrimination. Their help and support would have made me feel more confident and most definitely I would have taken this further. This whole process was totally overwhelming for me. People with PTSD feel things very strongly. This whole experience has changed my life. I have not worked since. I am too scared to work anywhere else because my ex bosses made me feel worthless.”

The barriers are similar in an education context, where it is our experience that students with disability are particularly deterred by:

- The lack of clarity around what constitutes a reasonable adjustment and, as a consequence, the uncertainty in relation to the merit of a claim;
- Difficulty proving the conduct when a student may have limited capability of giving evidence about violence, abuse, neglect or exploitation at school and the parents were not present to witness it; and
- The poor cost-benefit of litigation when a claim is frequently brought after a relationship has irrevocably broken down with the school and the loss of the student’s education cannot be meaningfully repaired by compensation.

Discrimination complaints do not prevent future violence, abuse, neglect or exploitation

In our practice experience, another key flaw in the current reliance on individual complaints is that when an outcome is obtained as a result of a discrimination complaint, it rarely requires the employer or school to take preventative systemic action. This could include conducting proper training or staff consultation, or implementing a policy or other measures

to prevent discrimination occurring again in the future.⁴ Further, consequences are rarely visible as the vast majority of claims resolve with a confidential settlement agreement. This means that discrimination claims seldom act as a visible warning or example to others and rarely result in steps being taken to reduce the risk of violence, neglect, abuse or exploitation occurring again in future.

Employers and schools are not required to prevent discrimination occurring

In our practice, we see many employers who have failed to put any policies or training in place to attempt to prevent discrimination. We also see employers who have failed to address the risk of ongoing discrimination in the workplace even after becoming aware that it has occurred.

Many of our recommendations outlined below seek to address these core barriers to enforcing discrimination law and preventing violence, neglect, abuse and exploitation.

Positive obligations for duty holders to prevent discrimination

Our Commonwealth, state and territory discrimination laws have a key role to play in protecting workers and students from violence, neglect, abuse or exploitation. The Victorian *Equal Opportunity Act 2010* (Vic) (**Victorian Act**) imposes a positive duty on employers, schools and other duty holders to take reasonable and proportionate measures to eliminate disability discrimination as far as possible.⁵ Unfortunately, this positive duty is currently only enforceable through an investigation by the Victorian Equal Opportunity and Human Rights Commission (**Victorian Commission**), which does not presently have the powers to compel compliance.

Commonwealth, state and territory discrimination laws should be amended to:

- Impose a positive duty on employers and schools to eliminate disability discrimination as far as possible.
- Empower human rights commissions to make guidelines for compliance which must be taken into account in any application under anti-discrimination law and must be reviewed regularly.⁶
- Enable the positive duty to be enforced by the relevant human rights commission with the suite of powers discussed below.

Through preventing discrimination, human rights commissions and regulators can ensure that people with disability are not denied access to educational and employment opportunities, which can be enabling factors for understanding rights and for financial security. Access to inclusive education and employment reduces the risk of a range of harms, including exploitation by employers, and predatory lending practices.

⁴ These kinds of outcomes are very rarely obtained at hearing, and despite Victoria Legal Aid pushing for these outcomes in settlements we are only able to obtain them approximately 25% of the time.

⁵ *Equal Opportunity Act 2010* (Vic) s 15.

⁶ The Australian Human Rights Commission currently has the power to make guidelines under both the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) but they are not enforceable.

Recommendation 1: 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.

Empowering our regulators to enforce discrimination laws

The most significant reform we propose in a disability discrimination context, with the greatest potential for systemic impact, is to empower and properly resource the Fair Work Ombudsman (**FWO**), the Australian Human Rights Commission (**AHRC**), and state and territory commissions (**human rights commissions**) to investigate and act on breaches of discrimination law in their respective jurisdictions.

More Fair Work Ombudsman enforcement

Under subsection 682(1)(f) of the *Fair Work Act 2009* (Cth) (**FWA**), the FWO has the power to bring complaints on behalf of people with disability and has done so on a few occasions to date in relation to discrimination matters. However, the number of prosecutions is extremely low in comparison to the prevalence of discrimination, and the FWO has only used its enforcement powers to prosecute discrimination of any kind six times in the last 10 years.⁷ The FWO's enforcement role in this area should be increased through provision of greater resources and priority status being given to discrimination investigations.

Investigations and enforcement by human rights commissions

Additionally, human rights commissions should be given investigatory and enforcement powers over discrimination matters. Specifically, we consider that human rights commissions should be empowered and resourced to commence an investigation regarding an alleged breach of the law without requiring an individual to lodge a complaint (an "own-motion investigation" function). In addition to this, human rights commissions should be empowered to agree to enforceable undertakings, issue compliance notices, and issue administrative penalties.

Need for greater enforcement powers

It is necessary for both the FWO and human rights commissions to have enforcement powers because the FWA and discrimination laws operate in different ways. For example, in some cases the discriminatory treatment will be connected to breaches of other employment obligations regulated by the FWA, so it is appropriate for the FWO to respond to all of these issues, rather than require the issuing of separate proceedings by two separate regulators. In other cases, the disability discrimination may occur in education, or another non-employment related area, which is outside the scope of the FWO.

⁷ See litigation outcomes listed on: 'Litigation', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation>>. In ascending date order to discrimination related prosecutions are: *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* [2012] FCA 30; *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479; *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509; *Fair Work Ombudsman v Theravanish Investments Pty Ltd & Ors* [2014] FCCA 1170; *Fair Work Ombudsman v Yenida Pty Ltd & Anor* [2017] FCCA 2299; *Fair Work Ombudsman v Yenida Pty Ltd & Anor* [2018] FCCA 1342.

Enabling a regulator to enforce compliance with the law is a standard practice in other statutory regimes, including workplace safety, privacy, environmental protection, animal welfare and consumer affairs. The introduction of these compliance functions would remove the burden of enforcing discrimination laws from a person with disability and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation. Further, empowering human rights commissions to enforce compliance with discrimination laws would recognise the significance of disability discrimination as unlawful behaviour that can result in substantial harm to a person's health, safety and future successes, as well as on the broader community. Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive and productive, and will have better public health outcomes.⁸

Recommendation 2: The Fair Work Ombudsman should expand its role in this area to utilise its existing enforcement powers to bring more complaints on behalf of people who experience discrimination because of disability, or other protected attributes.

Recommendation 3: Commonwealth, state and territory human rights commissions should be granted the power to conduct own motion investigations and enforcement actions without requiring an individual complaint to be made.

Recommendation 4: Commonwealth, state and territory human rights commissions should be granted increased powers and resources to effectively address disability discrimination including greater investigation powers, the power to enter into enforceable undertakings and the power to issue compliance notices.

1.2 Redress for victims of discrimination

Until discrimination is eliminated from Australian workplaces and schools, individual complaints will always be a key feature of our regulatory system. In overseas jurisdictions that have a positive duty to address discrimination and a regulatory body with a range of enforcement powers, such as Sweden, the vast majority of individual claims still settle without enforcement activity from the regulator. Any reforms to our discrimination laws should consider ways in which our individual complaints system can better prevent and address violence, neglect, abuse or exploitation of people with disability.

Reduce the risk of prohibitive costs orders

It is our practice experience that many clients will not pursue a potentially meritorious claim of discrimination under the *Disability Discrimination Act 1992* (Cth) (**DDA**) for fear of incurring an adverse costs order. This is a significant disincentive, particularly noting the traditional power imbalance between many complainants and respondents (especially in the area of employment) and the respondents' "monopoly on knowledge".

⁸ See, eg: Richard G. Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009); VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (Report, 2007); Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (Occasional Paper, June 2010).

While there is discretion not to award costs under Commonwealth discrimination law, it is clear that the courts do not consider discrimination claims to warrant any departure from the ordinary rule in that jurisdiction that costs will follow the event.⁹ The approach to costs under Commonwealth discrimination laws is contrary to the approach to legal costs in the relevant provisions of the FWA and state and territory discrimination laws. Under the Victorian Act, for example, costs may be ordered at the Tribunal stage but only where one party has unreasonably caused the other to incur unnecessary costs. The Victorian Civil and Administrative Tribunal has ruled that costs orders should not be made lightly in the discrimination jurisdiction so as not to deter applicants, including people with disability, from using the method of redress provided by discrimination law.¹⁰ Unfortunately, however, the reality is that the failure to reward successful applicants with a favourable costs order is having the opposite effect.

Just as the presumption that costs follow the event discourages meritorious applicants from pursuing their discrimination complaint to hearing due to the significant financial risk, the presumption that the parties bear their own costs discourages meritorious applicants because an award of compensation is extremely unlikely to cover their legal costs.

For example, in a case under Victorian discrimination law, the applicant was awarded \$100,000 in compensation for a meritorious claim but incurred approximately \$140,000 worth of legal fees. Justice Garde declined to award more than a small portion of the applicant's costs, leaving the applicant with little or no benefit from her claim despite the stress, time, and resources that went into achieving the successful outcome.¹¹

Contrast this with the outcome in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, where the applicant was awarded over \$130,000 in compensation and the respondent was ordered to pay her legal costs which were in excess of \$220,000. If that case were brought in a "no cost" jurisdiction the applicant would have been left almost \$100,000 out of pocket despite winning her case. Notably, at first instance in this case the applicant was awarded a much lower amount of compensation and ordered to pay the respondent's legal costs due to a Calderbank offer. As outlined by Member Fitzpatrick in a different discrimination case heard by the Queensland Civil and Administrative Tribunal, "it is not in the interests of justice that [the applicant] suffer the complete erosion of her award of compensation by legal costs necessarily incurred in successfully bringing her claim".¹²

We submit that the potential deterrent effect of a presumption that parties will bear their own costs can be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in discrimination cases in the United States.¹³ The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considers of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. Under section 43 of

⁹ *Hollingdale v North Coast Area Health Service (No.2)* [2006] FMCA 585 (Driver FM).

¹⁰ *Tan v Xenos* [2008] VCAT 1273 (Judge Harbison V-P).

¹¹ *GLS v PLP (Human Rights)* [2013] VCAT 1367.

¹² *Bell v Queensland* [2015] QCAT 369.

¹³ *Christianberg Garment Co v EEOC*, 434 US 4012 (1978).

the *Federal Court of Australia Act 1976* (Cth) and section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) the courts' costs powers are subject to any restrictions placed by other Acts. The *Australian Human Rights Commission Act 1986* (Cth) and state and territory laws could be amended to insert a provision adopting this approach. This would have a significant impact on the issues outlined above including the current low number of discrimination complaints and the lack of visibility of the impact of discrimination and enforcement of anti-discrimination laws.

Recommendation 5: Commonwealth, state and territory anti-discrimination laws should be amended to include a costs rule which provides that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

Share the burden of proving discrimination

The significant power imbalance resulting from the respondent's monopoly on knowledge is recognised by the General Protections provisions in the FWA. Under section 361 of the FWA an employer has the burden of proving a non-discriminatory reason for an action taken in a General Protections claim. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) outlines that this section "recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason".

The courts have held that this first requires the applicant to establish a prima facie case that the discriminatory conduct occurred before the burden of proof shifts.¹⁴ This approach is in line with the approach of comparative jurisdictions such as the United Kingdom to the employer's monopoly on knowledge.¹⁵ Our experience is that shifting the burden of proof to the employer improves the prospect of the matter resolving by agreement at a mediation as well as at hearing. This is because an employee can shift the focus of a mediation to what evidence the employer has that its actions were lawful, rather than focussing solely on the limited evidence available to the employee.

However, currently it remains the case under the DDA and state and territory laws that the burden of proving discrimination rests with the applicant. In our view, shifting the burden of proof is key to addressing disability discrimination in our community. As outlined above, our experience shows that people with disability who suffer even the most severe discrimination regularly decide not to make a formal complaint due to difficulty proving the conduct. This power imbalance is particularly apparent where a victim of discrimination has also been subjected to violence, abuse, neglect or exploitation, and where their ability to prove this seriously harmful conduct is hampered by requiring them to make a case without access to information in the respondent's possession.

Unfortunately, section 361 of the FWA has been interpreted very restrictively, so applicants have been unable to enjoy its full potential benefit. The High Court has held that the

¹⁴ *Stephens v Australian Postal Corporation* [2014] FCA 732.

¹⁵ *Sex Discrimination Act 1975* (UK) c 65, ss 63A, 66A; *Race Relations Act 1976* (UK) c 74, ss 54A, 57ZA; *Disability Discrimination Act 1995* (UK) c 50, s 17A(1C); *Race Relations (Northern Ireland) Order 1997* (NI 6) SR 2003/341, art 52A; *Sex Discrimination (Northern Ireland) Order 1976* NI 15, arts 63A, 66A.

subjective reason of the decision-maker is determinative,¹⁶ which means that discrimination that is unconscious or justified after the fact is likely to be lawful, so long as the reason provided for the impugned conduct is credible. The approach taken by the courts under the DDA is more appropriate, where a discriminatory motive is not necessary to prove unlawful discrimination, and the court will look beyond the stated reason to the real reason for the treatment.¹⁷

Recommendation 6: Commonwealth, state and territory anti-discrimination legislation should be amended to shift the burden of proof to the employer once the employee has established a prima facie case.

Remove the comparator test

The DDA requires that a comparator be identified in order to establish that direct discrimination has occurred. In other words, an applicant must show that another person without their disability, in circumstances which are otherwise not materially different to theirs, would have been treated more favourably than they were. This requirement is restrictive and operates as a significant detriment and barrier to our clients utilising the protection provided by these laws.

For example, a person who is dismissed because they required six weeks personal leave due to a hospitalisation following an exacerbation of their mental health condition might be compared with an employee who required six weeks unexpected and unauthorised leave unrelated to a disability. In this case, the court is likely to find that the employer would have treated the other employee requiring a long unexpected period of leave without a disability no differently to the person with the disability, therefore the dismissal was not discriminatory.

Often it is disability which causes the circumstances to arise. Forcing applicants to prove that someone else in those circumstances would have been treated better if they did not have a disability is artificial and fails to adequately address the cause of the discrimination. This is highlighted by the leading case in an education context of *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR, in which a student with challenging behaviours caused by his disabilities was compared with another student with those challenging behaviours but without the disabilities.

Neither the Victorian Act nor the Australian Capital Territory *Discrimination Act 1991* (ACT) require a comparator in order to find direct discrimination has occurred. Not only is there no express requirement for a comparator in the legislation in these jurisdictions, but the relevant Tribunals have confirmed that there is no implied requirement for a comparator.¹⁸ We consider that the simplification and clarification of the definition of discrimination at a Commonwealth level will assist to promote greater compliance with discrimination laws and assist business and service providers to understand their legal obligations.

Recommendation 7: The definitions of discrimination in the *Disability Discrimination Act 1992* (Cth) should be simplified by removing the comparator test.

¹⁶ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

¹⁷ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

¹⁸ In the ACT see *Prezzi v Discrimination Commissioner* (1996) 39 ALD 729. In Victoria see: *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.

Clarify reasonable adjustments under the DDA

In our practice experience, we see practical difficulties caused by confusion about what constitutes a reasonable adjustment in a given set of circumstances – for example, what might be reasonable flexible work arrangements in the office, or additional teaching support in the classroom. Reasonable adjustments are often essential for securing access to educational and financial opportunities for people with disability, for ensuring they are not neglected in their learning and to reduce the risk of exploitation caused by workplace discrimination.

The DDA provides that discrimination includes a failure of an employer or an education provider to make reasonable adjustments for a person with disability which would have prevented them being treated less favourably.¹⁹ In the 2017 Full Federal Court case of *Sklavos v Australiasian College of Dermatologists* [2017] FCAFC 128, Bromberg J confirmed the analysis of the primary judge that in order to prove an unlawful failure to make reasonable adjustments, it is necessary to show that the reason why the adjustments weren't made was the person's disability.²⁰

This in effect negates the beneficial impact of the reasonable adjustments duty in the DDA for people with disability who are treated unfavourably at school or work by a failure to make reasonable adjustments. It is out of step with the protection in Victoria, where reasonable adjustments are required by a standalone section and there is no causation element required in order to prove a breach of the law.²¹

VLA sees the significant positive impact this protection has on the lives of people with disability in Victoria, enabling them to remain engaged with their employer or school. VLA also sees the significant impact that a failure to comply with this protection has on the lives of people with disabilities, exposing them to abuse and neglect and excluding them from employment and education.

Recommendation 8: The *Disability Discrimination Act 1992* (Cth) should be amended to provide a standalone reasonable adjustments protection following the model adopted in Victoria.

¹⁹ *Disability Discrimination Act 1992* (Cth) s 5.

²⁰ *Sklavos v Australiasian College of Dermatologists* [2017] FCAFC 128, [48]–[53] (Bromberg J).

²¹ *Equal Opportunity Act 2010* (Vic) ss 20, 40.

2. Education specific recommendations

The Royal Commission has identified that education and learning “represents both a setting for violence, abuse, neglect and exploitation and an important component of a society that seeks inclusion for people with disability”.²² VLA regularly advises students and parents of students who have experienced discrimination in educational settings. We see the same structural and systemic issues and barriers experienced by students with disability that are outlined in the Royal Commission’s Education and Learning Issues Paper (**the Issues Paper**).

While disability discrimination in education is protected by Commonwealth, state and territory laws, the protections are not uniform and have complex interactions with the Disability Standards for Education 2005 (**Education Standards**). There is a clear knowledge gap of educational staff and management when it comes to obligations under discrimination law, in particular, the requirement to make reasonable adjustments for a student with disability. There also appears to be a widespread assumption that resources put into educating a student with disability will negatively impact the education of students without disabilities. Contrarily, research shows that inclusive education increases short-term and long-term benefits for students with and without disability.²³

In primary and secondary education, students with disability face clear barriers in the form of gatekeeping, segregation, exclusion from school activities, suspension and expulsion, as outlined in part 2.1 of the Issues Paper. These issues continue into tertiary settings, with a prevalence of discrimination cases within tertiary placements. When these issues do arise, educational authorities often invoke exceptions to discrimination laws, such as the unjustifiable hardship exception, or the exception found in some jurisdictions where the discrimination is necessary to protect the health and safety of anyone. These exceptions are sometimes used as a catch-all shield to justify discriminatory behaviour and contribute to students with disabilities being neglected, abused, and shut out of their education.

When any student with disability is not provided with reasonable adjustments to allow them to access an education, or excluded from parts or all of their education altogether, this can have impacts on the rest of their lives, including community engagement, relationships and employment. Statistically, people with disability are less likely to complete secondary and tertiary education when compared with people without disability, and the available evidence clearly establishes the negative impact this has on employment outcomes.²⁴ Reform is needed to ensure that our anti-discrimination laws are effective at preventing and addressing discrimination at school to ensure students with disability are not exposed to violence, abuse, neglect or exploitation at school or beyond.

²² *Royal Commission into Violence, Neglect, Abuse and Exploitation of People with Disability* (Education and Learning Issues Paper, 30 October 2019), 1.

²³ Thomas Hehir, ‘A Summary of the Evidence of Inclusive Education’ (August 2016) 1 <https://alana.org.br/wpcontent/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf>

²⁴ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016) 40 <<https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination>>.

2.1 Barriers to starting school

Gatekeeping

While discrimination laws, in conjunction with the Education Standards, seek to prevent schools from denying a child's enrolment because of their disability, schools are not complying with this obligation. We see families told by schools that a student with disability would be better off at a 'special school', indicating that enrolment waiting lists are too long or indefinitely suspending students for behavioural issues. This issue is highlighted by Samara's story below.

A 2019 survey by Children and Young People with Disability Australia (**CYDA**) found that 12.5% of students with disability had been refused enrolment.²⁵ Another study by three Australian universities found that more than 70% of students with disability had been discouraged from enrolling or participating in mainstream schooling.²⁶ We can see the impact of this in the enrolment at special schools, with the number of students in Australia with disability attending a special school increasing by 35% between 2003 and 2015.²⁷

By the time families seek legal advice, these issues have often continued for a number of years across multiple schools. If they do want to pursue a discrimination claim, the burden will be on them to prove there was an unlawful reason for the enrolment refusal, and it can be difficult to prove that the student's disability was a reason for the treatment. Schools will often give general reasons, such as high enrolment numbers, as the reason for the decision to decline enrolment, without evidence to back this up. Despite a family knowing this is unlikely to be the real reason, it can be difficult to prove the reason for discrimination, and it can become impossible to complete a legal process before it becomes necessary to enrol a child elsewhere. There are also limited remedies that a family may seek when they do bring a claim as it is common that the relationship with the school has broken down, making re-engagement unlikely. In some cases, families are unable to find a suitable school that will accept their child's enrolment and they are left for extended periods without any education at all.

It is necessary to introduce a clear obligation on schools to justify why a student with disability cannot be enrolled in their school in order to avoid students with disability being unjustifiably excluded. This will make it easier for parents to bring a discrimination claim if the school cannot demonstrate a valid reason why their child's enrolment was refused. It is also necessary to increase the funding available to schools to support students with disability, to remove the pressure on schools which is a likely driver of enrolment refusals. We address the need for increased funding at section 2.5 below.

²⁵ CYDA, 'Time for change: the state of play for inclusion of students with disability', *Education* (Web Page, October 2019) 3 <https://www.cyda.org.au/education_issues>.

²⁶ Shiralee Poed, Kathy Cologon and Robert Jackson, 'Gatekeeping and restrictive practices with students with disability' (Paper, Inclusive Education Summit, October 2017), 1 <<http://allmeansall.org.au/wp-content/uploads/2017/10/TIES-4.0-20172.pdf>>.

²⁷ Australian Institute of Health and Welfare, 'Disability in Australia: changes over time in inclusion and participation in education' (Fact Sheet, 2017) 2 <<https://www.aihw.gov.au/getmedia/34f09557-0acf-4adf-837d-eada7b74d466/Education-20905.pdf.aspx>>.

Excluded from school because of Autism Spectrum Disorder – Samara’s son

My son was told he couldn’t start in prep at the school my other child attends. We were told by a school leader that it was because my son has autism and they thought it would be too difficult to teach him and he should go to a special school instead, but the CEO said it was only because application numbers were too high. I have tried for six months to try to explain how unfair the decision is. However, all the time the school has rejected even communication. It was very upsetting and disrespectful process. But, for my son I had to go through everything. This hopeless and most difficult situation, but my lawyer bring everything together very efficiently, effectively and clearly. She also applied for in-term injunction to make things quicker. She was also very respectful and empathic during this process. The court day has arranged last day of holiday. Unexpectedly, on Friday the school’s lawyers has called my lawyer to say, school is going to accept my son, they do not want to go court.

It was a direct discrimination and I have tried so hard to explain this to school. I sent them equality laws, I told them it is discrimination and I will be after my son’s education rights. However, I was unsuccessful and felt disrespected. It was very hard as a mother. I was crying every time when I have looked at my son. He was so innocent and was not able to understand how injustice people can be. I am very very thankful to Legal Aid for the support. As they were able to protect my son’s rights with a very sensitive, respectful, effective, prompt manner. They did not let us to be victim.

Being a mother of a child with additional needs pushed me to try so hard. I am taking him to therapies since last three years. I have to work full time. I have no family member here in Australia. I have been separated because of domestic violence where child protection has involved. I am trying so hard to raise my children safe and ready to be independent, responsible, productive members of the community. In addition to all this hard work, facing with this decision and handling all this process was absolutely impossible for me. I am thankful from my heart for all the support I received. And all the professionals that help me to understand it is not my son’s fault, it is not my fault. I do not need to take anything on me. It was an injustice and all the government organisations are there to support us.

Recommendation 9: State, territory and Commonwealth discrimination legislation should be amended to require a school to provide within seven days of a request written proof of the number of enrolment places available at the school, the number of existing students seeking re-enrolment, and the number of students in the catchment area seeking to enrol.

At private and independent schools, there is a lack of external complaints processes to resolve issues at an early stage. There is also a lack of oversight in the way that there is with public schools subject to the policies and processes of the relevant department. The inability to resolve complaints early often results in parents either crisscrossing between schools or enrolling in a special school. If external complaints processes existed for independent schools, this would provide an opportunity to resolve enrolment issues at an early stage without the need for time consuming litigation.

Recommendation 10: Each state and territory should create a body designated to receive and resolve complaints against independent schools by prospective and current parents and students.

2.2 Abuse and neglect during school

Segregation and seclusion

Once a student with disability is enrolled in a school, they too often face segregation and seclusion, being denied full participation in school activities or segregated from the classroom. VLA has assisted students who have been excluded from the classroom or from school activities, often due to challenging behaviours caused by their disabilities. CYDA's 2019 survey found 15.5% of students with disability at mainstream schools had been separated from their peers. Furthermore, 40% of students with disability had been excluded from events or activities in the past year.²⁸

While discrimination laws seek to protect students from being neglected or abused because of behaviours or manifestations of disability,²⁹ the reality is quite different. Too often, students with disabilities such as Autism Spectrum Disorder or Attention Deficit Hyperactivity Disorder slip through the cracks. The behaviour is commonly framed as "naughtiness" and measures to address the behaviour can often be focussed on punishment or separation, rather than providing adjustments for the student's disability as Leila's story below highlights. This can result in educational authorities seeing seclusion as the only option, even though alternatives to seclusion are available and the school is required to make reasonable adjustments where this does not pose an unjustifiable hardship.³⁰ Subjecting a child with disability to seclusion and denying them learning and socialisation opportunities available to other students constitutes neglect and has long-term consequences which can take years to overcome.

Restrained and secluded at school without reasonable adjustments – Leila's son

I knew that my son was a little different from other children very early on, he was an extremely active child. Due to our concerns about escalating behavioural difficulties at home we sought professional assessments and he was diagnosed with Autism Spectrum Disorder. His lack of social skills and heightened sensory sensitivities created numerous problems for him, we tried our best to be guided by experts and get him the support he needed.

When he started in prep all the supports he'd had in place in kindergarten stopped. He didn't receive dedicated one-to-one support, he stopped receiving speech pathology and occupational therapy support, no detailed individual learning plan was developed, and there was no funding in place to support him at school. We had provided reports from experts recommending a full time aide, a program to help regulate activity levels, consistent behaviour strategies and more but these were not put in place.

As he deteriorated at school, his "access" to the curriculum deteriorated at the same rate. He could not access the curriculum in the same way others could because he was often literally not in the room due to his behaviours, and often when he was in the room, he was misbehaving and therefore not paying attention to his teacher.

²⁸ CYDA, 'Time for change: the state of play for inclusion of students with disability', *Education* (Web Page, October 2019) 3.

²⁹ See *Disability Discrimination Act 1992* (Cth) s 4; *Equal Opportunity Act 2010* (Vic) s 4.

³⁰ See *Disability Discrimination Act 1992* (Cth) s 5.

It was clear as soon as staff began having problems with him that they were not effectively addressing his disabilities. His behaviour was deteriorating at school, he was being bullied by other students and it would get to the point where he would have a “meltdown” and lash out. For a long time there was no formal attempt by anyone to try and find out what was causing his behaviours.

My son was often placed in a timeout, or I was asked to come and pick him up early. He missed a lot of schooling because of this. Staff resorted to restraint and seclusion to manage his behaviour. At times he was physically restrained for up to 40 minutes while he was struggling violently to get away. We were told that a store room was being converted into a sensory calming room but the room was used while it was still full of supplies. It had heavy objects, objects with sharp and hard edges and was completely unsafe to place an autistic child who was having a meltdown. Every week I would be called to the school to pick him up due to him having a meltdown. When I arrived, I would be often led to the storeroom, which was where he had been placed. Most of the time he was in there, he was on his own, with the door shut. Sometimes when I picked him up he had urinated or defecated and wiped himself up. This was due to the fact that he needed to go to the toilet, but could not get out.

His behaviours continued, and any strategies that were being used were clearly ineffective. We had a meeting with the school where they said an aide would be provided and eventually funding was put in place, but this was 18 months too late. In the meantime my son continued to have meltdowns and be secluded and restrained. We knew the situation was terribly wrong but did not know what to do. The school continued not to understand that what we wanted was preventative strategies put in place in order that there was the lowest possibility that my son became agitated in the first place. I requested a written assurance that methods of restraint employed by the school would cease immediately, but we received no assurance it would stop. We ended the year being fairly traumatised as a family. We decided to investigate other schools in the hope of a fresh start.

In Leila’s case the school relied on defences to discrimination law to justify its actions. Under the DDA, there is no clear requirement that schools consider less restrictive means available when deciding whether something is an unjustifiable hardship and refusing to make reasonable adjustments.³¹ Under the Victorian Act, there is similarly no clear requirement to consider less restrictive means when considering whether the health and safety exception enables seclusion to be lawful. We address issues with defences to discrimination law more broadly in section 2.4 below.

Recommendation 11: Commonwealth, state and territory discrimination laws should be amended to expressly require schools to consider less restrictive means available when considering whether seclusion is justifiable under an exception available under the relevant act.

³¹ See Ibid s 11 (definition of ‘unjustifiable hardship’).

Failure to make reasonable adjustments

Students with disability commonly require reasonable adjustments in order to fully participate in their education. Without clear procedural requirements regarding reasonable adjustments, schools are commonly unsure what adjustments they are required to make, as highlighted by Leila's story above. Through our casework, we see particular problems around the requirement for adjustments for non-physical disabilities such as Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder.

When a student's disability results in challenging behaviours, schools often fail to make the arrangements necessary to identify what adjustments could be made to assist the student to participate in their education. There is currently no clear legal obligation on schools to identify what adjustments could be made to better manage a student's challenging behaviours. Instead the burden falls to parents and students to raise the adjustments required with the school themselves and ensure that individualised supports are put in place.

Where the adjustments have been identified, students requiring adjustments for their disability are frequently told by schools that the resources involved in making the adjustments are not reasonable, often without any real consideration of how adjustments could work. When an assessment for adjustments is made that requires substantial funding, education providers often seem to feel they have to make a choice between the adjustments and the educational needs of other students. The student is then left unable to fully participate in their education or excluded from the school.

This situation is not helped by a lack of understanding of the Education Standards by school staff and management. Further, the Education Standards do not provide significant clarity to schools, parents or students around what is required in terms of identifying and implementing reasonable adjustments for students with disability. A review of the Education Standards took place in 2015.³² They have also been considered in a Senate Inquiry on *Current levels of attainment for students with disability in the school system*, and the impact on students and families associated with inadequate levels of support.³³ There is widespread consensus among advocates and organisations that reform to the Education Standards is required.³⁴

Reform is recommended by education providers, their representatives and organisations representing students with disability and parent organisations:

³² See Australian Government Department of Education and Training, *Final Report on the 2015 Review of the Disability Standards for Education 2005* (Report, 3 December 2015) <<https://docs.education.gov.au/documents/final-report-2015-review-disability-standards-education-2005>>.

³³ See Parliament of Australia, (Web Page) <https://www.aph.gov.au/parliamentary_business/committees/senate/education_and_employment/students_with_disability>.

³⁴ See for example Disability Discrimination Legal Service, Submission to Commonwealth Department of Education and Training, *Review of the Disability Standards for Education 2015* (5 June 2015) 11 <<http://ddlsaustralia.org/wp-content/uploads/2015/07/Disability-Standards-for-Education-Review-2015.pdf>>; Australian Education Union, Submission to Review of Disability Standards for Education 2005 (12 June 2015) <<https://docs.education.gov.au/node/40351>>; 2015 Review of the Disability Standards for Education 2005, Children with Disability Australia, June 2015, <https://docs.education.gov.au/node/40401>; Our Children Our Concern- DSE Review, Parents Victoria, 12 June 2015, <https://docs.education.gov.au/node/40506>; Submission to the 2015 Review of Disability Standards for Education, Australian Parents Council, 5 June 2015, pages 2-4, <https://docs.education.gov.au/node/40356>; Review of the Disability Standard for Education 2005, Communication Rights Australia, 3 June 2015, pages 8-9, <https://docs.education.gov.au/node/40406>

- The Disability Discrimination Legal Service in Victoria has made detailed recommendations about reform to the Education Standards including that they should enable students to access assessment and recommendations from specialists relating to their disability and require educational providers to implement recommendations of specialists.³⁵
- Parents' organisations, such as Parents Victoria, have also called for the Education Standards to be made more precise and clarify the obligations of education providers.³⁶
- Both the Australian Education Union representing teachers and the Australian Parents Council representing parents have called for greater training for teachers around the requirements of the Standards and how to make reasonable adjustments for students with disability.³⁷

This lack of clarity around reasonable adjustments can result in lengthy delays and can leave students and their families stranded. By the time legal proceedings are commenced, a student may have lost years of education and no legal remedy can replace or properly compensate for the lost education. When a child with disability has been denied access to years of schooling and socialisation with peers, this can lead to social isolation and have a significant impact on their ability to navigate the world more broadly and may leave them at increased risk of abuse, neglect and exploitation.

Australia's anti-discrimination laws need to be amended to prevent neglect and identify and implement adjustments at the enrolment stage and throughout the students' education. If individualised supports are put in place to manage challenging behaviours for students with disability, this can help sustain their education and improve their future prospects.

Veronique's story below highlights the difference that reasonable adjustments can make to a student's experience at school and to their educational and life outcomes.

Student cannot attend without adjustments – Veronique's son

Veronique's son has a learning disability and has suffered serious health problems. As he approached high school he was told that his special aide funding would cease and that he'd be expected to go through Year 7 without any learning assistance. "To put my son into High School without aide was a terrifying thought for my son and he told me how worried he was" said Veronique.

"Expectations of the school for him to perform at High School level, for example, assumptions that he understood what he was being taught, severe weaknesses in the basic Literacy & Numeracy skills, and his lack of social skills particularly in the playground... was an unbearable thought for me as his mother."

³⁵ Disability Discrimination Legal Service, Submission to Commonwealth Department of Education and Training, *Review of the Disability Standards for Education 2015* (5 June 2015) 11.

³⁶ Our Children Our Concern- DSE Review, Parents Victoria, 12 June 2015, <https://docs.education.gov.au/node/40506>

³⁷ See Australian Education Union Submission to Review of Disability Standards for Education 2005, Australian Education Union, 12 June 2015, pages 3-7, <https://docs.education.gov.au/node/40351> and Submission to the 2015 Review of Disability Standards for Education, Australian Parents Council, 5 June 2015, page 3, <https://docs.education.gov.au/node/40356>

Veronique home schooled her son for nine months, but decided to investigate legal options. “I didn’t believe that a child with disabilities should have to be Home Schooled and isolated from others. It was also my belief that parents should not have to bear another heavy burden on top of what is already a difficult job caring for a child with disabilities.”

Victoria Legal Aid worked with Veronique to bring a discrimination claim and attend a conciliation. Veronique says her son benefitted immensely from the legal advice and representation she received: “After the conciliation my son was given an aide, personalized transition to a mainstream High School, additional support from the school welfare officer... and importantly teachers with knowledge of his difficulties because the school implemented professional development in this area.

My son became a very happy young man. He had the knowledge that the school understood his difficulties and more importantly there would always be someone willing to listen to what he has to say. My son completed years 11 and 12 and graduated with the rest of his class. He is now studying a trade to set up a career for himself. Without a doubt the adjustments made in our case made such a big difference. I fear without Victoria Legal Aid’s help to get these adjustments my son would have fallen through the cracks and not succeeded with his education.”

Recommendation 12: The Disability Standards for Education 2005 should be amended to be more prescriptive and specific about obligations of education providers to make reasonable adjustments, particularly around students with cognitive and intellectual disabilities and mental health conditions.

Recommendation 13: States and territories governments should provide annual training to teachers regarding their obligations under anti-discrimination laws and the Standards, and how to identify and implement adjustments for students with disability.

2.3 Exclusion from school

Due to a range of factors, including the circumstances outlined in this submission, students with disability are often excluded from educational activities, including temporary or indefinite suspension of enrolment. CYDA’s 2019 survey found 15% of students with disability had been suspended in the previous year.³⁸

While exclusion is generally seen by schools as a last resort, the issues that have led to exclusion have generally been present for significant periods of time.

In Victoria, the Department of Education requires that public school principals *must* be sure that reasonable adjustments have been made to manage behaviour that is a manifestation of a disability when deciding whether to suspend a student.³⁹ However, there is no indication

³⁸ CYDA, ‘Time for change: the state of play for inclusion of students with disability’, *Education* (Web Page, October 2019) 3.

³⁹ Victorian Department of Education, ‘Suspension Process’
<<https://www.education.vic.gov.au/school/teachers/behaviour/suspension-expulsion/Pages/inschoolsuspension.aspx>>

given in the suspension procedure of when the Department of Education should become involved.⁴⁰ VLA has assisted multiple students who have reported being excluded by their school for more than 12 months on a period of suspension without significant steps being taken to enable them to return to school.

Furthermore, as outlined above, the DDA requires that a comparator be identified in order to establish that direct discrimination has occurred, which is a significant barrier to our clients accessing these legal protections under Commonwealth law.

Recommendation 14: Commonwealth, state and territory anti-discrimination laws should be amended to require that the relevant department be notified when a student with disability is suspended for more than five days.

We have also assisted students with disability who have been excluded from their schools in circumstances where no alternative school is in a position to enrol them. Often their parents are not in a position to facilitate home schooling. This means that these students are unable to access their education for significant periods of time.

It should not be possible for schools to exclude a student with disability in circumstances where there is no alternative schooling available. There are currently no provisions in Commonwealth, state or territory anti-discrimination laws that expressly provide that students cannot be excluded in these circumstances. If clearer protections of this nature were inserted into anti-discrimination laws, the existing exceptions would be sufficient to prevent unjustifiable hardship to schools where a student is causing significant harm to others even after reasonable adjustments have been made.

Recommendation 15: Commonwealth, state and territory anti-discrimination laws should be amended to expressly provide that it is unlawful discrimination to expel a student with disability unless alternative local schooling has been arranged and is commencing within 3 months.

2.4 Tertiary placements

Students with disability can face discrimination while undertaking placements as part of their tertiary studies. Too often, placement providers fail to make reasonable adjustments for the student or terminate their placement because of characteristics or symptoms of the disability.

In this situation, the placement provider that makes the decision is not considered the educational authority and it is not clear that the placement provider is providing the student with a “service”. Therefore, it is not clear that the treatment occurred within a protected area of life under discrimination laws, creating difficulties in resolving the situation through legal avenues.

When a student has had a placement terminated because of their disability, tertiary institutions often argue that the responsibility for reasonable adjustments lies on the placement provider and they are unable to assist. As the placement providers have already

⁴⁰ Ibid.

indicated their inability to make adjustments, students are effectively locked out of completing the requirements of their studies.

These circumstances lead to students with disability being prevented from completing their studies, which in turn dramatically reduces their opportunities for future meaningful employment.

Recommendation 16: Commonwealth, state and territory discrimination laws should be amended to expressly confirm that providers of tertiary placements are providing a service to students and are therefore required to make reasonable adjustments.

Recommendation 17: Commonwealth, state and territory discrimination laws should be amended to create a clear obligation for tertiary institutions to take all reasonable steps to find a placement provider that can make reasonable adjustments for a student with disability.

2.5 Defences available to schools

For students with disabilities that result in challenging behaviours, the exceptions available to schools have a significant impact on their ability to access and participate in their education. Commonwealth discrimination law provides an exception to schools where it is found that there would be “unjustifiable hardship” to avoid the discrimination.⁴¹ Other jurisdictions, such as Victoria, allow education providers to discriminate on the basis of disability if it is reasonably necessary to protect the health and safety of any person or the public generally.⁴² Schools rely heavily on these exceptions to argue discrimination is justified, particularly when a disability manifests in challenging behaviours. This can result in schools subjecting students to harmful restrictive practices and excluding them from the classroom and from opportunities to socialise with their peers as highlighted by Leila’s story above.

The unjustifiable hardship exception is often used as a catch-all to describe a resourcing issue, particularly around funding for adjustments. While one consideration in applying the exception must be the nature of the benefit or detriment to any person, the nature of the detriment to our clients is rarely given full consideration by the school. Both exceptions are often invoked by schools to justify seclusion, segregation, or exclusion, where the risk is relatively minor or could be addressed with reasonable adjustments. This often results in the consequences outweighing the risks posed, preventing the student from fully participating at school without genuine cause.

The way these exceptions are drafted leave significant room for interpretation and fail to provide clear guidance to schools, parents or students as to when discrimination is lawful. A range of relevant factors to be taken into account are listed in the legislation,⁴³ or in case law,⁴⁴ but no guidance is given as to what considerations should be given primacy. Further, nowhere is it expressly required that reasonable adjustments be identified and trialled before

⁴¹ Including *Disability Discrimination Act 1992* (Cth) s 29A.

⁴² For example, *Equal Opportunity Act 2010* (Vic) s 86.

⁴³ *Disability Discrimination Act 1992* (Cth).

⁴⁴ There are no express factors in the *Equal Opportunity Act 2010* (Vic) but these have been provided for in caselaw, for example see *Hall Matthew v Victorian Amateur Football Association* [1999] VICCAT 333.

the exception can be relied upon. This means that if a school fails to take steps to help a student manage challenging behaviours at school, then they can use those challenging behaviours as a justification to exclude them from the school.

Defences to discrimination must be limited so the student's best interests are the primary consideration, and we need to be satisfied that a school has done everything possible to support the student before they are excluded on the basis of their behaviour. Defences were relied upon in Leila's case outlined above in circumstances where reasonable adjustments hadn't yet been properly explored or put in place. It shouldn't be possible for a school to justify discrimination if it hasn't yet made reasonable adjustments to try and prevent the need for the discrimination occurring.

Recommendation 18: Relevant exceptions in Commonwealth, state and territory anti-discrimination laws should be amended to:

- (a) Provide that the student's best interests are the primary consideration; and**
- (b) Prevent schools from relying on exceptions to discriminate against a student with disability if reasonable adjustments were not actively identified and implemented first.**

2.6 Increased funding is essential

All of the reforms outlined above rely on increased funding to be effective. It is essential that this consideration around resourcing is incorporated into any reform package seeking to prevent and address discrimination against people with disability at work and at school.

We know from our practice that a lack of sufficient resources is already one of the key factors limiting the ability of schools to put the resources needed into identifying and implementing the adjustments students with disability need in order to meaningfully participate in and maintain their education.

Increasing funding available for students with disability will ensure legal changes are implemented in practice, and remove the pressure on schools to prevent students with disability from enrolling by making sure the necessary supports can be provided to manage challenging behaviours and avoid students being excluded from the school.

Recommendation 19: States and territories should increase funding available to schools to train staff and to identify and implement reasonable adjustments for students with disability.

3. Employment specific recommendations

The barriers faced by people with disability at work and the need for reform to our discrimination laws has previously been considered in the Australian Human Rights Commission's Willing to Work Inquiry.⁴⁵ The Inquiry highlighted that the unemployment rate for people with disability was twice that for people without disability,⁴⁶ and that people with disability were twice as likely to experience discrimination.⁴⁷

Removing barriers to people with disability accessing employment opportunities and thriving in a work environment is essential to preventing violence, abuse, neglect and exploitation of people with disability. Secure employment provides financial security and a sense of purpose and belonging which is too often being denied to people with disability. A lack of secure employment is associated with an increased risk of violence, abuse, neglect and exploitation.

Reform is needed to address the barriers to people with disability obtaining work, to clarify and strengthen the reasonable adjustments provisions, and to make it easier for people who have experienced discrimination to enforce their rights.

3.1 Barriers to obtaining employment

Making interview notes available

VLA provides legal assistance to many people with disability who experience discrimination when applying for jobs. For our clients with disability, issues can arise when they are asked to disclose any pre-existing medical conditions or disabilities in their application form. For the most part, this discrimination remains hidden behind explanations relating to expertise, experience and suitability for the role.

The FWA, the DDA, and state and territory laws protect against discrimination in determining who should be offered employment. However, it is typically very difficult to prove that a client was unsuccessful in applying for a position for a discriminatory reason. Even if our clients' evidence about a discriminatory question or comment is accepted, this alone does not prove that they would have been employed if they did not have a disability. At the time when an unsuccessful job applicant, who has a disability, is deciding whether or not to take action about discrimination, we do not know how qualified and experienced the successful applicant was, nor what the employer's reasons for choosing that applicant was. Given the uncertainty of the claim and outcome, most of the people we speak with in these circumstances decide not to pursue the matter any further. This means that most employers are not challenged to demonstrate their compliance with discrimination law, reducing the impetus for employers to comply with discrimination law when selecting a successful candidate for a position. Ultimately, this results in people with disability being neglected in

⁴⁵ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016).

⁴⁶ Ibid 41.

⁴⁷ Ibid 43.

the employment process. When people with disability do find employment, it is more likely to be for lower pay and in more exploitative conditions.

Recommendation 20: The *Disability Discrimination Act 1992 (Cth)*, state and territory discrimination laws should be amended to require employers to make interview notes for all interviewees available to an individual interviewee on request.

Requesting discriminatory information

People with disability can be placed in a difficult position when their employer requests their medical history or asks that they attend a medical assessment. Often this information is sought in circumstances where there are no reasonable grounds to question the client's fitness to work, and employers often seek access to wide ranging medical information, arguably beyond what is reasonable or necessary. An employee risks disciplinary action or dismissal if they refuse the request because they have an obligation to obey their employer's lawful and reasonable directions. While such directions may not be reasonable, the employer generally believes the directions are reasonable and it is incredibly difficult to convince them otherwise. If the employee is dismissed for not complying, then the employee must take legal action to test whether the direction was reasonable.

Section 30 of the DDA already makes it unlawful for employers to make a request for information for the purpose of discriminating against an employee. This protection does not apply if the information is required to assess whether the person can perform the inherent requirements of the job or for assessing what "reasonable adjustments" may be required. An example of what request might be unlawful is given in the section, but it does not provide guidance on when a request for information might go too far.

Greater clarity is needed on the scope of the protection, to make it clear that a request for medical information must be limited to:

- the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and
- circumstances where there is evidence that the medical information requested is required.

This greater clarity would empower employees with disability to negotiate with their employers about directions which they consider to be unreasonable and help avoid the situation where a person's disability is unreasonably used against them in their employment.

Unnecessary requests for medical information – Tom's story

"I've been trying to go back to work for a few months now. They've got a report saying I'm fit to start back but it's not enough. I just feel like they don't understand. They see me as a liability if I go back. They've asked for more reports about my physical injury, which is why I've been off work, but then they wanted me to do an independent psychiatric assessment too. It's been a tough time for me, but my doctors all say my mental health has no impact on my ability to work and it never has, so it makes no sense to insist on that. I asked them why all the reports they've already got aren't sufficient and they said no, they need to have

me independently assessed. I've already been through that and it's tiring telling the same story all the time. I feel like they just want to get rid of me and they're making me jump through all these hoops to force me to leave.

I feel humiliated and embarrassed actually, having to go to the doctors, having to go to the psych, having to report back. Having to go to the psych made me feel very apprehensive and insecure. They wanted to know about my background, my history. There was a fair bit of personal detail that was documented. I haven't got the report so I don't know what's in it, so I'm a bit unsure of what was actually documented. I don't know if everything I told the psychiatrist has been put into writing or whether he edited it for the purpose of what my employer wants. They don't need to know some of the stuff that I said to him. The psych said the sooner I get back to work the better, but I'm very concerned about the outcome. It's detrimental on my health and mental state because I sit there and I wonder, and maybe I wonder too much because it's out of my control. I'm passionate about what I do and I want to return back to work."

Excessive requests for medical information – Rebecca's story

"I had a few days off work for a medical condition after I spent a few hours in a hospital emergency ward. I took my doctor's advice, rested for a few days, and went back to work when my GP said I was fit to do so. When I came back to work my employer called me in and asked for full unrestricted access to my medical records. I said I'm happy to get a letter from my doctor saying I'm well, but I'm not prepared to sign all my documents over to you. I don't believe my medical history needs to be included with my employment file. I gave them a letter from my doctor which confirmed I was fit to work but this wasn't enough for them. They insisted on direct liaison with my doctor regarding my medical records. That scared me and I spoke to the union who told me you're going to lose your job if you don't release your records and kept asking me what I was scared about. I advised that it is a privacy issue.

After being back at work for some time my employer then said I had to take sick leave. They walked me out and said I couldn't come back to work until they had my records. The union said take it to the Fair Work Commission but I said no. I never wanted to upset my employer. My union was trying to negotiate for me to come back to work but weeks went by. Everybody kept telling me we can't help you until you get sacked. I just wanted to get back to work. I had accrued lots of sick leave before this all occurred, so you can see that I'm not a person who takes a day off on a Monday or a Friday. I was so embarrassed to be on sick leave for so long. I felt insulted that they were trying to make me sick when I wasn't."

Recommendation 21: The *Disability Discrimination Act 1992 (Cth)*, state and territory discrimination law prohibitions on requesting discriminatory information should be strengthened by providing limiting a reasonable request for medical information to:

- (c) the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and**
- (d) circumstances where there is evidence that the medical information requested is required.**

3.2 Barriers during employment

Strengthening reasonable adjustments

In our experience, many employers are confused as to what exactly is required by their obligation to make “reasonable adjustments” under section 5 of the DDA. No examples are given in the section as to what kinds of adjustments are envisaged to be reasonable. This is a significant barrier for some people with disability securing quality employment and avoiding the exploitative and lower paid work many people with disability are offered in sheltered workshops and similar employment arrangements.

One of the biggest issues people with disability face in employment is when employers insist that they be fully fit to work their full hours and duties, with no adjustments required, before they are allowed to return to work from a period of illness or injury. It would assist in return to work negotiation and avoid the need for litigation if greater guidance was provided for employers as to what adjustments might be reasonable.

The Victorian Act provides examples of adjustments that may be reasonable such as allowing the person to be absent during work hours for rehabilitation, or allowing the person to take breaks more frequently.⁴⁸ A similar list of examples should be inserted into the DDA, including the example of a gradual return to full hours and duties.

Back full time or not at all – Sarah’s story

“Prior to my heart operation, my boss told me that I was not to worry about my job - it would always be there for me. Then after the operation when I dropped off my medical certificates, the same boss said to me no matter how long it took my job was safe and that when I was ready to go back I could work half a day a week if that suited me and then after that I could work up to my full time hours. I was on leave for a few months recovering and then my doctor said that I could gradually return to work. After much communication (backwards and forwards) and many delays on my boss’s behalf I was then able to start back at work. I came back the first week for a half day, which I found exhausting, and then I came in the following week for 2.5 days. I was then told I could no longer do my old job and was given other jobs to do (which I had never done before). There was a lot of work involved and new skills to learn, which on top of trying to get my confidence back whilst dealing with the fatigue was extremely stressful. I was continually berated by a younger worker who said that I was slow and wasn’t including all the details required. I felt useless and very upset as I wasn’t given much training in the new role, I was just thrown the work and told to do it.

A few weeks into my return to work my boss took me outside the office door where there were no witnesses and asked me how I was. I said not too bad. My boss then said ‘will you be back to work full time in three weeks?’ I said no, as discussed previously I was working on increasing my hours each week and in a couple of months I would be back full time. She then stated ‘well then I don’t have a job for you and you can go now’. At the time this whole experience of returning to work in an unknown job, the constant degrading by younger co-workers and the constant chopping and changing of my days of work was

⁴⁸ *Equal Opportunity Act 2010* (Vic) s 20.

horrible. And then to be told there was no job for me was the ultimate rejection, which made me feel useless and depressed. I cried for days because I wasn't given a chance to recover - ask anyone who has had heart surgery how tired the operation leaves you let alone how painful it is for months.

I feel there were completely unrealistic expectations and pressure placed on my return to work. There should've been a clear and realistic return to work procedure. My mind was perfect, my body just needed to adjust to working again. I have long since recovered physically and if I had been given the opportunity, I would've been back to full time work as I had originally agreed upon. It took a very long time to gain even an inch of my confidence back after this experience, and as a result of this I have never returned to the workforce, as who is going to employ an elderly lady that has had heart surgery? I have found this terribly sad as I have worked my entire life and to be treated with absolutely no dignity or compassion was appalling.”

Recommendation 22: The *Disability Discrimination Act 1992 (Cth)* reasonable adjustments provision should be strengthened by providing greater clarity as to what adjustments may be reasonable, including clear examples.

3.3 Barriers to bringing claims

Time limits under the FWA are too short

For a variety of reasons, it can be difficult for people with disability to obtain legal advice and take legal action after their dismissal within the 21 day time limit set by the FWA for a General Protections claim. For some, the loss of employment leads to financial hardship and housing insecurity which takes priority in the first few weeks following their dismissal. For others, the dismissal may have been related to an illness, or may exacerbate an illness, which means that they are too unwell to pursue their claim for a few weeks. Further, due to the complexity of discrimination law and the various options for legal redress, it is common for people to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint. Many people then delay in seeking advice after lodging their claim until a conciliation date is set, and by this time it is often too late for them to change jurisdictions and bring a General Protections claim.

The Fair Work Commission has a discretion to extend the time limit in exceptional circumstances under section 366 of the FWA. The threshold for extending this time limit is set very high and operates as a bar to most clients bringing a General Protections claim outside the 21 day period. For example, in the case of *Cole v Key Resources Pty Ltd* [2014] FWC 3278, Commissioner Blair found that the fact the applicant had a miscarriage and seizure within the 21 days and was shocked, distressed and confused did not justify a three-day extension. Given Commonwealth and state and territory discrimination laws allow six months or more to bring a claim, an employee who has been terminated still has the ability to bring a discrimination claim outside of this 21 day time limit. However, the FWA may have been the most favourable jurisdiction to them, particularly if they can bring an additional claim for dismissal because of a temporary absence for illness or injury, or because of an exercise of their workplace rights.

Missing the time limit – Tracy’s story

“Sometimes it would be an effort for me to get out of bed to walk to the toilet, let alone go to work, and I’d have this boss that just doesn’t seem to understand. I’d explained the condition to him, said sometimes I’ll need a few days off work. I said I get you’re frustrated but it’s frustrating on my end as well. All I want to do is get out and work. It’s not like I’m doing it on purpose. I didn’t ask to be sick. Quite a lot of times I’d still go in and do my job even when I shouldn’t have. There’s times when I should have been resting but I’d go into work because he didn’t understand. I still did my job as best I could. I didn’t take lots of days off, I was still working 35 hours a week. But in the end, I needed some time in hospital and my boss fired me for it.

I couldn’t get my claim in within the 21 days to the Fair Work Commission. I put it in late anyway but then I was told to withdraw it. I just didn’t have enough time. After I was fired I was in and out of hospital for pain management. They were giving me medication which made me really sleepy. I found it really challenging trying to get stuff done when I wasn’t well enough to even cook myself a meal or do simple basic household duties. I found it hard trying to fill out forms and that online, or ring around and make phone calls to try and find someone to help. I’m not very good with big words at the best of times, I was having to deal with all these big words, trying to read information, where to go, I was having that much trouble with it. I spent a lot of my time sleeping to try and recover which didn’t give me a chance to get it in.

If you had more time, it would be easier for people when they are suffering and finding it hard to do things and they’re stressing. I’d be worrying knowing I had this deadline to meet but I couldn’t do simple things let alone get that done. I’d think ‘I’ll get up and do that tomorrow’, then you’re worrying about it in your sleep, then you get up the next day and you’re sick because you’ve been worrying about it. If you have that bit more time you’re not worrying as much so you can get it done.”

Recommendation 23: Commonwealth, state and territory discrimination legislation should be amended to extend the time limit for bringing a complaint to 6 years.

Protecting witnesses

As we have outlined above, one of the biggest barriers to people with disability taking action about discrimination is a lack of evidence. It is very rare for a person to be supported in a discrimination claim by a witness who continues to be employed by the respondent to the discrimination claim. This is because these witnesses are concerned that they will lose their job or be subjected to other unfavourable treatment. This issue affects our clients at the early internal complaint stage of proceedings, in addition to subsequent legal proceedings.

Witnesses are provided some protection under the victimisation provisions of the DDA. However, this protection does not expressly extend to supporting a colleague’s version of events during an internal investigation, nor does it expressly extend to other witness support that falls short of attending the conciliation conference or asserting their colleague’s rights under discrimination law. Clarifying the scope of the victimisation protection to expressly cover the reasonable support of witnesses at any stage of a complaint of discrimination would assist witnesses to come forward at an early stage of proceedings.

No support – Peter’s story

“My doctor told me to take some time off work for my mental health. It wasn’t until I was ready to return to work that my employer said they’re not satisfied that I was well enough to do the job. The doctor looked at my position description and said you can perform these duties that’s fine. I gave that to them and they said they were going to arrange an independent medical examination. I did that and they still didn’t let me back. It was a job that I loved and that I really wanted to get back into, and it was part of my rehabilitation as well to do that because I didn’t like being off work. Eventually it was arranged for me to come back to work but the guy they had hired to replace me told me my boss said I had to sit in the office and do nothing. To be told this on top of everything else – it’s debilitating. I asked Management does the company want me to stay and they said no, the company wants you to move on. So basically, I knew at this time that my time is numbered, they’re going to get rid of me. I really felt like I didn’t have any other choice but to resign.

I’d actually asked my replacement in the time I was back at work would you mind putting on paper exactly what’s occurred here. He said he could, no problem at all. Later on I spoke to him and I let him know I’m going to pursue this and he said look I thought you just wanted to let it go and move on, which were strange words because they were the same words the company used. This was also at the time where it was up in the air whether he was going to get another contract or not. He went from being very open and friendly to being at one point just pretty much cutting me off and not saying anything. I don’t know whether he was told not to communicate with me but that’s pretty much the impression that I got.

Basically, it feels like you’ve got really no support. At one point I actually felt like giving up, I thought what help have I got? Nobody is going to back me up, the truth isn’t going to come out, what am I going to do? It’s always in the back of your mind that people can say whatever they want. And that’s exactly what they did. The company said that it’s ‘inconceivable’ that my boss would have done the things I alleged. I was stunned when I read that. Basically my feeling when I read that was how can you blatantly lie like that? It says a lot about the company, I can’t really blame the individuals who didn’t support me, they were put in a difficult situation where they weren’t really able to say what they wanted to say.

In the end my matter did settle, but it would have been much quicker if the people involved had been able to stand up for me and tell the truth. Losing this job was a massive loss. I was eventually allowed onto Newstart but that’s less than what I’m paying in rent. My savings were running out and I was at risk of losing my housing by the time my matter settled. I’ve applied for 120 jobs in the last six months and it’s really tough. I think it subconsciously affects how I perform in job interviews now because I really don’t want to go through this again.”

Recommendation 24: There should be express protection of witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made under anti-discrimination laws.

Clarifying discrimination under the FWA

While the FWA does seek to prevent disability discrimination in the workplace, there are inconsistencies with Commonwealth, state and territory discrimination laws that increase the likelihood that an employee with disability is subject to neglect, abuse and exploitation.

The extent to which the “discriminates between employees” aspect of adverse action in section 342 of the FWA extends to indirect discrimination, is not yet settled. The Federal Court has held that it is open to find that adverse action could extend to indirect discrimination where the employer’s reason for imposing the “facially neutral” criterion was a discriminatory one.⁴⁹ This concept of “indirect discrimination” is far more limited than that under the DDA. Under the DDA it is not necessary to prove that the employer intended to discriminate against their employees in order to find indirect discrimination occurred. Further, the Courts have held that the concept of a “failure to make reasonable adjustments” for an employee with disability is not captured by the FWA.⁵⁰

Further, Commonwealth, state and territory discrimination laws clearly define “disability” as extending to characteristics or manifestations of that disability.⁵¹ The FWA does not contain that definition extension. Some cases have interpreted this quite strictly. For example, in the case of *Hodkinson v Commonwealth*, the Court rejected the argument that ‘disability’ should be interpreted in line with section 4 of the DDA, drawing a distinction between the limitations of a disability and the consequences of that limitation.⁵² More recent cases have moved closer to the definition of “disability” contained in other discrimination laws. For instance, in *Stephens*, Smith FM found that “some of the inherent consequences of the medical conditions... must be intended to be part of the employee’s ‘disability’”.⁵³

For clarity and consistency, the definition of “disability” under the DDA should be clearly stated to apply in the FWA. It is confusing for both employers and employees to have different protections provided by different discrimination laws. In our experience employers focus heavily on their obligations under the FWA and are often unaware of their broader obligations under other discrimination laws. It would increase compliance with discrimination law to have consistency between Commonwealth discrimination laws.

Recommendation 25: The *Fair Work Act 2009* (Cth) should be amended to expressly prohibit indirect discrimination, to expressly require employers to make reasonable adjustments for employees with disability, and to define key terms such as “disability” and “discriminates”.

Recommendation 26: The *Fair Work Act 2009* (Cth) should be amended to state that the definition of “disability” includes characteristics or manifestations of a disability, in line with the *Disability Discrimination Act 1992* (Cth).

⁴⁹ *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402.

⁵⁰ *Hodkinson v Commonwealth* [2011] FMCA 171.

⁵¹ For example, see *Disability Discrimination Act 1992* (Cth) s 4.

⁵² *Hodkinson v Commonwealth* [2011] FMCA 171 at 146.

⁵³ *Stephens v Australian Postal Corporation* [2011] FMCA 448 at 87.

About Victoria legal Aid

VLA is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria. As the image below shows, our clients from the 2018–2019 financial year are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.

Our clients

7%

Were at risk of homelessness



5%

Identified as Aboriginal or Torres Strait Islander



32%

Had no income*



25%

Disclosed having a disability or mental illness



47%

Were receiving some form of government benefit



12%

Were in custody, detention or psychiatric care



30%

Were living in regional or rural Victoria



18%

Were younger than 19 years of age



5%

Required the assistance of an interpreter



25%

Were from culturally and linguistically diverse backgrounds**



These figures do not include clients seen by a private practitioner duty lawyer.

* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.

** This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.