Submission to Australian Human Rights Commission's discussion paper 'Free and Equal: Priorities for federal discrimination law reform'

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Introduction

[1] The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. The DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with disabilities, and to generally promote equality for those with disabilities.

[2] The DDLS solely provides casework assistance on claims involving the *Equal Opportunity Act* and the *Disability Discrimination Act*.[1] As such, we believe we have a valuable insight into the operation of both the Federal and Victorian systems and how they should be developed going into the future. This submission responds only to those discussion questions that we believe we can make a meaningful contribution to.

Do you agree that the above principles should guide discrimination law reform? Are there other principles that should be identified?

[3] Broadly speaking the DDLS agrees with the principles identified by the Australian Human Rights Commission (AHRC). We would like to stress the importance of the following:

Accessible

[4] For discrimination law, as a reactive form of legislation, to be an effective means of achieving equality there needs to be a real commitment to ensuring access to justice. If vulnerable people cannot effectively access the legal system to enforce their rights, or feel they cannot, it matters very little the quality of their legislative

[1] *Equal Opportunity Act 2010* (Vic) (*'EOA Act'*); *Disability Discrimination Act 1992* (Cth) (*'DDA Act'*).

rights.

[5] When considering disability discrimination law in particular, this means:

a. Ensuring there are appropriately resourced legal services that specialise in assisting people with disabilities in the area of discrimination.
b. That the complaint process is flexible enough to be useable and effective for people with disability taking into account not just their disability but other personal and socio-economic factors that may be linked to their disability.
c. Ensuring the built environment and online services are accessible.
d. That the complaint process, and any subsequent legal proceedings, are affordable so as not to disincentivize individuals bringing forward a complaint. This should include consideration of not just no risk of costs being awarded against complainants but also meaningful commitment to providing financial resources to help fund legal advice and services.
e. Better facilitate representative bodies to take action in their own names or on behalf of individual complainants. This is necessary as no matter how the complaint process is structured it will be difficult and stressful, therefore creating an undue burden for many people with disabilities.

Preventative

[6] Discrimination law is largely reactive. The law is engaged when a complainant alleges that they have been treated wrongly. Thus, for the current Australian discrimination law framework to be effective it requires individuals to be able to easily bring forward complaints and for the remedies provided to be capable of having a general deterrent effect. Neither of these elements are guaranteed under the current discrimination law framework. We believe that the reactive nature of our current discrimination law framework, putting the onus on the person with a disability to enforce compliance, fails to support the fundamental intent behind discrimination legislation. In its current state the discrimination law framework is unlikely to ever prove sufficient to provide a fair and equal world for people with disabilities.

[7] There are a number of concerns the DDLS has with the capacity of the current discrimination law framework to act preventatively. Firstly, it is vitally important that the Australian Human Rights Commission (AHRC) be given the powers and resources, either through the *Australian Human Rights Commission Act* or the *Disability Discrimination Act,* to enable it to proactively enforce compliance.[2] Secondly, While we support the concept of 'the standards' in outlining requirements for compliance, we have concerns with how they are currently formulated. Thirdly, we are also concerned that exemptions are provided too readily by the AHRC. If a discriminator has a genuine reason for their actions this should be justifiable under discrimination law, for example through the concept of unjustifiable hardship. All these concerns will be discussed further below.

[8] Furthermore, any proactive positive duty that is framed as non-binding is in danger of having little positive effect as there is no reliable way for the AHRC to effectively monitor or enforce this obligation. Victoria provides a clear example of this danger. The *Equal Opportunity Act* contains a positive duty to "take reasonable and proportionate measures to eliminate… discrimination, sexual harassment or victimisation as far as possible."[3] However, the powers of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) do not allow them to adequately enforce this duty, and their educative and advisory role has not resulted in substantive change to the non-discriminatory treatment of people with disabilities in Victoria.[4]

Clear

[9] We believe that the ad-hoc nature of the way discrimination law has developed in Australia has produced a framework which is unnecessarily complex. This is largely due to different branches of the federal discrimination law framework being introduced at different times and reflecting legal concepts and descriptions of discrimination that were 'in vogue' at the time. In principle, we support any efforts

[2] *Australian Human Rights Commission Act 1986* (Cth) (*'AHRC Act'*).
[3] *EOA Act* (n 1), s 15.
[4] Ibid ss 149, 155.

to synthesise Australia's discrimination law framework. However, we believe it is important to stress that there are important and necessary differences that any composite law must be able to facilitate and recognise.

[10] We also believe clarity involves a sense of certainty in what the legislation requires of individuals and organisations when interacting with people with disabilities and what it protects those groups from. One problem with the current version of the *Disability Discrimination Act,* and the relevant standards produced under it, is that it has been framed in language that while 'clear' is open to interpretation. This is problematic as it has left the *Disability Discrimination Act* vulnerable to attack in legal proceedings that seek to limit the legislative protections as far as possible. This is not just a hypothetical concern but is demonstrated in a number of decisions, discussed further below, that have limited the practical value of the *Disability Discrimination Act.* This clearly undermines the intent and purpose of the *Disability Discrimination Act* as a transformative tool to stimulate and facilitate a more equal, accessible and fair Australian society.

What are the key factors relevant to the need for federal discrimination law reform? Please provide any comments on the commissions observations in the six dot points above

Issue 1

[11] We agree that the mix of discrimination laws has created unnecessary complexity and differences between similar concepts. However, it is important to note that there are concepts that do not apply universally across all parts of discrimination law and any effort to synthesise federal discrimination law into a single piece of legislation must be careful to recognise this. An obvious example of this is the concept of reasonable adjustments in disability discrimination law. As such, complete uniformity is undesirable.

[12] The *Equal Opportunity Act* provides one clear model on how this synthetisation could be achieved.[5]

Issue 2

[13] We believe the Australian discrimination law system has been slow to react to problems that have arisen. This is problematic as it ultimately means a failure to ensure that the system remains capable of fulfilling the role it was intended to. Primarily, responsibility for ensuring that the federal law remains fit for purpose rests with the Federal Parliament. Clear examples of the inability of parliament to respond to problematic legal decisions are *Sklavos, Walker, Varasdi, Purvis,* and *Snell.*[6] These are all individually discussed below.

[14] Currently, responsibility for stimulating interest in rectifying deficiencies in discrimination law is almost solely left to representative bodies and advocacy organisations. While this is within their remit, these organisations have limited resources and other competing priorities. Furthermore, their advocacy on these issues will have varied results as they are operating in an ad-hoc manner outside of any formal system that is designed and implemented by the Federal Government to address these issues. With this in mind we believe the AHRC should be given a formal role by the Federal Government to keep a watching brief on our human rights legislation to ensure that it at all times performs the role that it should. This is particularly appropriate considering that the Federal Government claims that this legislation is responsible for fulfilling its obligations under international conventions. For example, that the *Disability Discrimination Act* plays a primary role in assisting Australia to comply with its obligations under the *Convention on the Rights of Persons with Disabilities.*[7]

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[5] Ibid.

[6] *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78; *Walker v State of Victoria* [2011] 279 ALR 284; *Varasdi v State of Victoria* [2018] FCA1655; *Snell v State of Victoria (Department of Education and Training)* (Federal Court of Australia, JR Allaway, 8 August 2019); *Purvis v State of New South Wales (Department of Education and Training)* [2002] 190 ALR 588.

[7] *Convention on the Rights of Persons with Disabilities,* opened for signature on 30 March 2007, A/RES/61/106) (entered into force 3 May 2008).

Issue 3

[15] Broadly speaking the definition of disability and the areas of operation of Victorian and federal disability discrimination law are similar. However, we do agree that there are unnecessary differences between Victorian and federal laws concerning disability discrimination and the legal concepts used.

[16] One issue is the different ways the concept of reasonable adjustments is included in the Victorian and federal acts. Under the *Equal Opportunity Act,* the definitions of direct and indirect discrimination do not expressly include the concept of reasonable adjustments.[8] Rather the concept of reasonable adjustment is incorporated in standalone obligations imposed upon various types of providers.[9] Thus, certain providers are under an obligation to provide an adjustment if it is deemed reasonable. Under the *Disability Discrimination Act*, however, the concept of reasonable adjustments is incorporated within the definition of direct and indirect discrimination.[10] The practical effect of this is that for the failure to provide a requested adjustment to be deemed discriminatory, the refusal to provide the adjustment must be *because* of the disability. The problem with this difference is shown in the decision of *Sklavos,* which is further discussed below.[11]

Issue 4

[17] ***Sklavos***[12]

The decision in *Sklavos* concerned the definition of indirect discrimination and how it incorporates the concept of reasonable adjustments.[13] The *Disability Discrimination Act* includes in its definition of indirect discrimination the failure to provide reasonable adjustments.[14] Prior to *Sklavos* it was unclear whether, to be deemed discriminatory, the failure to provide the reasonable adjustment had to purely lead

[8] *EOA Act* (n 1 ss 8-9.
[9] Ibid ss 20, 33, 40, 45.
[10] *DDA Act* (n 1) ss 5, 6.
[11] *Sklavos* (n 6).
[12] Ibid.
[13] *DDA Act* (n 1) ss 5, 6.
[14] Ibid, s 6(2).

to the disadvantage suffered by the person with a disability or whether there was an additional requirement that the refusal to provide the adjustment was because of the disability. The judgment in *Sklavos* found that there was this additional causal requirement.[15] This means that unless the provider refuses to provide the reasonable adjustment because of the disability, it is not unlawful discrimination and thus not covered by the *Disability Discrimination Act*.

[18] Practically speaking it is difficult to think of many situations where a refusal to provide a reasonable adjustment can be seen to be based on a person's disability and not other factors such as cost or inconvenience. As such, the *Sklavos* decision has dramatically reduced the effectiveness of the *Disability Discrimination Act.*

[19] ***Walker***[16]

Walker involved the interpretation of the *Disability Standards for Education* and highlight our concern with how the current standards are formulated.[17] Other disability standards produced under the *Disability Discrimination Act* provide very specific obligatory requirements to be complied with. An obvious example of this is the *Disability Standard for Access to Premises* which provides clear technical specifications.[18] There is very little room for interpretation within these technical standards.

[20] The *Disability Standards for Education* are framed in much more fluid and interpretable language, using concepts such as 'consultation' or 'strategies and programs'.[19] The problem with such vague language is that when required to be interpreted, courts have tended to respect the discretion of the education provider and thus shown a disregard to the human rights of persons with disabilities. This is

[15] *Sklavos* (no 6), [43] (Blomberg J).
[16] *Walker* (no 6).
[17] Attorney- General, *The Disability Standards for Education 2005* ('*Disability Standards for Education'*).
[18] Attorney- General, *Disability (Access to Premises – Buildings) Standards 2010* ('*Disability Access to Premises Standards'*).
[19] *Disability Standards for Education* (n 16), pts 3.5, 8.3.

problematic as *Walker* demonstrates.

[21] That case concerned the application of the reasonable adjustments aspect of the *Disability Standard for Education.*[20] Importantly, the standard requires a school to consult with the student or their representative when making the decision whether to provide an adjustment. The standard does not provide clear guidance on what consultation requires. The consultation requirement was interpreted by the court to allow the school to determine how consultation takes place and what level of significance to give to the opinion of the student, their representative, or their medical professional.[21] Fundamentally, this decision allows schools to ask students or their representatives for their opinion, and then for the staff to make their own decision as to whether the adjustment is needed or whether there is an alternative that is just as appropriate. This is a dangerous interpretation considering schools cannot be considered experts in disability and are certainly not in a position to be a better judge on the appropriateness of adjustments than the student or their representative. Furthermore, it raises a range of clear conflict of interest issues, most obviously, any subjective financial priorities.

[22] It is worth noting that this decision has been confirmed and followed on this point in later cases including *Sievwright*.[22]

[23] ***Varasdi***[23]

Varasdi involved the application of the *Disability Discrimination Act* to the situation of bullying of students with disabilities in schools. The bullying of students with disabilities is a large and well-documented issue, with it being recognised that students with disabilities are at an increased risk of bullying than their able-bodied peers.[24] The decision in *Varasdi,* has meant that requiring the school to put in place

[20] Ibid, pt 8.
[21] *Walker* (n 6), [284] (Tracey J).
[22] *Sievwright v State of Victoria* [2012] FCA 118
[23] *Varasdi* (no 6).
[24] Children and Young People with Disability Australia, *CYDA Education Survey 2017 (*Survey Results, 2018, https://www.cyda.org.au/education-survey-results-2017*;* Victorian Equal Opportunity & Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools* (Final Report,

measures to prevent the bullying of students with disabilities cannot be considered a reasonable adjustment.

[24] Equally, the *Disability Standards for Education* provide no route for any meaningful redress as they require only that a general strategy or program is in place. This is satisfied by school's general bullying policies and fails to recognise the unique susceptibility of students with disabilities.

[25] ***Purvis***[25]

Purvis involved the expulsion of a student with a visual impairment and diagnosed intellectual disability. The intellectual disability partly manifested itself through disinhibited behaviours which included violent behaviours such as striking out at other students and the student's aide. In the High Court decision it was decided that the prohibition against direct discrimination in s5(1) of the *Disability Discrimination Act 2010* expressly included a 'comparator test', which required a comparison between the student with a disability and student without a disability "in circumstances that are not materially different."[26] In applying this test it was held that the appropriate comparator, taking account of all the objective features surrounding the intended treatment, was a student without a disability displaying the same behaviours.[27] As the court decided the school would have expelled a student without a disability if they displayed the same violent behaviours, they found that the school had not acted in a discriminatory fashion.

September 2012), 71-72; Rebekah Heinrichs *Perfect Targets: Asperger Syndrome and Bullying: Practical solutions for surviving the social world* (AAPC Publishing 2003), 7; Mary Konstantareas, 'Anxiety and Depression in Children and adolescents with Asperger Syndrome in Kevin Stoddart (ed.), *Children, Youth and Adults with Asperger Syndrome: Integrating Multiple Perspectives* (Jessica Kingsley Publishing 2005) 51; Liza Little, 'Middle-class mothers' perceptions of peer and sibling victimization among children with Asperger Syndrome and nonverbal learning disorders' (2002) 25(1) *Issues Comprehensive Paediatric Nursing* 47, 50; Melissa Sreckovic, Nelson Brunsting and Harriet Able 'Victimization of students with autism spectrum disorder: A review of prevalence and risk factors' (2014) 8(9) *Research in Autism Spectrum Disorders*, 1155, 1169; Robert Kowalski and Cristin Fedina 'Cyber bullying in ADHD and Asperger Syndrome populations' (2011) 5(3) *Research in Autism Spectrum Disorders*, 1201, 1205.

[25] *Purvis* (no 6).

[26] *DDA Act* (n 1), s5(1).

[27] *Purvis* (no 6), [225] (Gummow, Hayne, and Heydon JJ).

[26] The decision in *Purvis* has proven problematic for two reasons. Firstly, in many situations it becomes incredibly difficult or artificial to construct an individual without a disability in the same circumstances. This is demonstrated in the case of *Trindall,* where the appropriate comparator for an individual with a sickle cell condition was an individual who didn't have a sickle cell condition but had a "risk of injury of a similar nature to that of a person with the sickle cell trait."[28] Such a person does not exist. Therefore, alleged discriminators defending their actions on the basis they would treat anyone similarly misses the point as they don't treat anyone else in a similar fashion. This understanding of the comparator test undermines the value of the protection provided by the *Disability Discrimination Act*. Secondly, by disconnecting the behaviour from the disability, the nature of the disability is misunderstood. Although the majority in *Purvis* expressly noted that detaching the manifestations of a disability from the underlying disability was dangerous and undermined the protections provided by the *Disability Discrimination Act*, the ultimate decision has in effect done just that.[29]

***Snell*[30]**

[27] *Snell* concerned an interlocutory application to file and serve a further amended statement of claim. It is an important decision due to the findings about what can and cannot be considered a reasonable adjustment. The deputy registrar decided that processes that go towards identifying what adjustments need to be made for a student with a disability cannot, in and of themselves, be considered reasonable adjustments.[31] This means processes such as establishing a Student Support Group or hiring a Board Certified Behavioural Analyst cannot be considered a reasonable adjustment for a student with a disability. Such an understanding of what constitutes reasonable adjustment is problematic because it fails to fully appreciate how intertwined the process of identifying an adjustment is with the final adjustment identified/implemented. In a variety of situations it is not possible to identify what

[28] *Trindall v NSW Commissioner for Police [2005]* FMCA 2, [145] (Driver FM).
[29] *Purvis* (n 6), [212] (Gummow, Hayne and Heydon JJ).
[30] *Snell* (n 6).
[31] Ibid [26] (JR Allaway).

the necessary reasonable adjustment is without initiating some process of identification or analysis. The decision in *Snell* effectively allows education providers to avoid their obligation to provide reasonable adjustments by refusing to initiate the process necessary to identify the needed adjustments in the first place.

Conclusion

[28] None of the examples above have resulted in any law reform effort from Federal Parliament, only consternation from people with disabilities and their supporters who do not have the power to institute the necessary law reform. The one exception is *Purvis,* which did result in law reform. However, that reform merely confirmed the distinction between disability and behaviour in the comparator test, which we believe is discriminatory against many people who exhibit behaviours of concern that are a result of various cognitive disabilities.

[29] Fundamentally, this indicates that the Federal Parliament and the current discrimination law framework is unresponsive and unable to rectify deficiencies as and when they arise.

What, if any, changes to existing protected attributes are required?

[30] We believe that due to the decision in *Purvis* the *Disability Discrimination Act* fails to adequately cover behaviours of concern that are directly caused by an individual's disability. This has a particular effect on individuals who have cognitive disabilities. As mentioned above, the decision in *Purvis* has reduced the ability of the *Disability Discrimination Act* to protect people with disabilities from discriminatory treatment on the basis of some manifestations of their disability. Although the *Disability Discrimination Act,* in its definition of disability, does include "manifestations" of disabilities, the decision in *Purvis* has meant that behaviours triggered or caused by a disability may not be strictly considered as being part of a disability. Although an

effort was made to correct this in 2009 with an amendment to the definition of disability in the *Disability Discrimination Act*, this has not had the desired effect.[32]

What are your views about the commission's proposed process for reviewing all permanent exemptions under federal discriminate law?

[31] We disagree with the need for permanent exemptions under the *Disability Discrimination Act* and thus would advocate for option c) to be implemented and the permanent exemptions sunsetted. There is no justification for exemptions. If the discrimination is necessary or justifiable it will be permissible under the exemption for unjustifiable hardship or inherent requirements. At the very least each of the permanent exemptions must be reviewed and it expressly justified why the unjustifiable hardship or inherent requirements exceptions would not apply to them.

Any process for reviewing current exemptions or granting further exemptions should actively involve persons with disabilities or their representative organisations. This active involvement should be provided as a reflection of Australia's obligations under article 4(3) of the *Convention on the Rights of Persons with Disabilities* and further expanded upon under *General Comment 7.*[33]This involvement should be more meaningful and decisive then the opportunity to provide submissions to the AHRC as is currently the case.

[32] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).
[33] *Convention on the Rights of Persons with Disabilities* (n 7);UN Committee on the Rights of Persons with Disabilities, *General Comment No 7:* on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the convention, UN Doc CRPD/C/GC/7 (9 November 2018), paras 24-33.

What form should a positive duty take under federal discrimination law and to whom should it apply?

[32] We believe that a positive duty should be included in any major reform. This duty should apply with particular force to government entities as they should be industry leaders in ensuring equality and inclusion and this is often not the case.

[33] However, it is important that the expectations for what such a clause can achieve should be tempered. The form and effect of the *Equal Opportunity Act's* positive duty provides a clear example of the limitations of such a duty.

[34] Under the *Equal Opportunity Act's* positive duty provision, all organisations covered by the act are expected to actively take measures to eliminate discrimination, sexual harassment and victimisation rather than waiting for complaints to be made.[34] However, this is not an enforceable right for the public nor can any individual or body force an organisation to undertake any measures under this duty. Thus, in practice it is voluntary and understanding it as a true obligation is misleading.

[35] That is not to say that the *Equal Opportunity Act's* positive duty provision has no use. It is under this provision that the VEOHRC can engage in dialogue with organisations and provide support and guidance for those willing to implement change. However, for the VEOHRC to play an effective role doing this it needs meaningful legislative powers. Currently, the VEOHRC can investigate an organisation in relation to particularly serious claims of discrimination or a failure to comply with the positive duty.[35] However, the power to investigate can only be used by the VEOHRC on the request of the party who would be investigated.[36] This was recently confirmed in *United Firefighters' Union v VEOHRC*.[37] This fundamentally weakens the effectiveness of the VEOHRC to help realise the fundamental intentions of the *Equal Opportunity Act* as it is difficult to think of many circumstances where large recalcitrant discriminators might

[34] *EOA Act* (n 1), s 15.
[35] Ibid s 15, pt 9.
[36] Ibid s 151.
[37] *United Firefighters' Union v VEOHRC* [2018] VSCA 252.

request the VEOHRC to investigate their behaviour. Furthermore, even if an investigation was requested the VEOHRC has a very limited range of outcomes it can implement; none of which are really concerned with enforcement.[38] Thus, while the VEOHRC is central to the effectiveness of the *Equal Opportunity Act*'s positive duty, it is limited by its fairly inadequate powers to monitor, investigate and enforce that duty.

[36] As such, any positive duty in the federal discrimination law framework must learn from the Victorian experience, particularly ensuring that the duty is enforceable and the AHRC has the means and powers to monitor compliance.

How can existing compliance measures under federal discrimination law be improved?

Standards

[37] We agree that, conceptually, the standards published under the *Disability Discrimination Act* could be a positive tool. However, their effectiveness is entirely dependent on whether or not they actually do provide "detailed technical advice" on how to comply with the *Disability Discrimination Act.*[39] An obvious example of a positive standard is the *Disability Standard for Access to Premises*.[40] It provides technical requirements that clearly guides individuals and organisations on what is expected of them. Equally importantly, there is no margin for interpretation when complying with the more technical standards.

[38] The *Disability Standards for Education 2005* do not provide clear technical requirements but rather phrases their requirements in more general language. This leaves it open to interpretation which has proven problematic. This issue was explored further in paragraphs 20-25.

[38] *EOA Act* (n 1), s 139.
[39] Australian Human Right Commission, *Free and Equal: Discussion paper – Priorities for federal discrimination law reform* (Discussion paper, October 2019).
[40] *Disability Access to Premises Standards* (n 18).

As such, we believe that if the standards published under the *Disability Discrimination Act* are to be an effective tool, they must be clear and proscriptive in nature.

Action Plans

[39] While action plans should be encouraged by the AHRC, their use as a tool of compliance is limited and their role in establishing the defence of unjustifiable hardship is concerning. Action plans under the *Disability Discrimination Act* are voluntary in the sense that any organisation that implements a plan is only bound to fulfil it to the extent that they chose to and there is no consequence for not doing so. Thus, while they are useful from a public information point of view, as they allow organisations to show an intention to the public that they are committed to equality, they should not play any role in establishing the defence of unjustifiable hardship as they currently do.[41] An intention to improve, which is not binding, is irrelevant to whether an individual has suffered harm through discrimination contemporaneously. As such, in our view, organisations should not be allowed to use this to assist in their own defence.

What, if any reforms should be introduced to the complaint-handling process to ensure access to justice?

Direct Access to the Federal Court

[40] We, in principle, support the use of conciliations by the AHRC as a useful, informal, and cost-effective way to try and resolve disputes.

[41] However, we firmly disagree with the current process that, effectively, makes it mandatory for a complaint to be made to the AHRC and for that dispute resolution service to be exhausted before a legal proceeding can be initiated at the Federal Court.[42] Requiring complainants to use the AHRC complaint process unnecessarily

[41] *DDA Act,* s 11.
[42] *AHRC Act* (n 2), s 46PO(3A).

elongates process for complaints that are unlikely to settle. It also fails to appreciate and accommodate those complainants and situations where conciliations may be inappropriate as they may cause further harm to the parties involved.

[42] Furthermore, our experience confirms the findings of the productivity commission that the conciliation process is rarely a fair one.[43] The respondent is almost always far-better resourced and legally-informed than the complainant and this creates a negotiating power imbalance. This imbalance raises the possibility for well-resourced respondent to bully their way to settlements that neither remedy the harm suffered by the complainant nor evidence a commitment to future commitment to not discriminate. Fundamentally, such an outcome undermines the purpose of providing a more cost-effective and accessible alternative route for dispute resolution.

[43] We believe complainants should have the choice to directly initiate proceedings at the Federal Court. A similar ability exists under the *Equal Opportunity Act* in Victoria, where complainants may directly submit their claim to the Victorian Civil and Administrative Tribunal rather than with the VEOHRC if they wish.[44]

Victimisation

[44] Currently, it is an offence under the *Disability Discrimination Act* to victimise a complainant for making a complaint under the *Australian Human Rights Commission Act*.[45] However, it is currently unclear whether an allegation of victimisation can be made civilly at the Federal Court or whether it can only be made criminally. We firmly believe that in the interests of access to justice victimisation claims should be able to be made as a civil proceeding.

[43] Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry report, report no 30, April 2004), 371.
[44] *EOA Act* (n 1), s122
[45] *DDA Act* (n 1), s 42.

What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?

Remedies – is the tort approach appropriate?

[45] We believe that the current approach to how remedies are awarded may not be effective in having a long term impact on the eradication of discrimination. Under the *Australian Human Rights Commission Act*, the court has a wide power to make any award that they see fit.[46] However, it is our experience that damages and compensation awarded are backwards-looking, as is traditionally expected in other areas of the law like tort, backwards looking. This approach means that any award is designed to remedy the individual harm that has been suffered by the complainant and any other wider considerations or purposes are secondary at best. This has been confirmed in *Hall, Oliver & Reed v Sheiban*.[47]

[46] The court may in its discretion take a more forward-looking approach, which more expressly considers deterrence of both the individual respondent and, more broadly, the community. The key tool in doing this is the use of exemplary damages which are in character more punitive than compensatory. However, these are rarely used under any of the distinct branches of the federal discrimination law framework and doesn't appear to have ever been used under the *Disability Discrimination Act*.[48] Taking a more forward-looking approach is justifiable because discrimination law is not just concerned with rectifying harm but is a reflection of human rights and the public importance placed upon respecting and realising them.

[47] Without regular use of more forward-looking remedies it is unlikely that discrimination law will have a marked impact in improving public life. Discriminators are likely to roll the dice when interacting with people with disabilities assuming no legal action will result or any adverse outcome will be relatively minor. Examples of

[46] *AHRC Act* (n 2), s 46PO(4).
[47] *Hall, Oliver & Reed v Sheiban* [1989] 20 FCR 217
[48] Australian Human Rights Commission, *Federal Discrimination Law* (Australian Human Rights Commission, 2016), ch 7.

more forward-looking remedies beyond exemplary damages include: court-ordered audits, court orders to implement special measures, or court orders incorporating an element of court supervision.

[48] One solution for how this could be rectified is provided by the South African model of remedies in discrimination law. The *Promotion of Equality and Prevention of Unfair Discrimination Act* expressly states in the guiding principles behind the act that it is concerned with the "use of corrective or restorative measures in conjunction with measures of a deterrent nature."[49] The explicit recognition of the deterrent purpose of the law is again reflected in the array of remedies the court has the power to provide. These remedies include:[50]

> (e) after hearing the views of the parties or, in the absence of the respondent. the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;…
> (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
> (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
> (i) an order directing the reasonable accommodation of a group or class of persons by the respondent; …
> (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court:

[49] *Promotion of Equity and Prevention of Unfair Discrimination Act 2000* (South Africa), s 4(1)(d).
[50] Ibid s 21.

(l)an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person:
(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order

[49] All these remedies are capable of being used by the court to initiate transformative change in particular discriminators and potentially in society itself. The potential power of these broader forward-looking orders is demonstrated by a 2006 case where the Constitutional Court of South Africa ordered that all South African courts be accessible and user-friendly for persons with a disability within five years with a requirement to provide six-monthly updates.[51]

Remedies – discrepancy between categories of discrimination

[50] Although the reason as to why is not entirely clear, there is indeed a difference in the total level of damages being awarded to persons who have been discriminated against under different branches of the federal discrimination law framework, particularly in the award of non-economic damages (i.e. compensatory awards for pain, suffering, and humiliation).[52] Although further analysis is required, as awards are entirely fact dependent, it does indicate a form of hierarchy in the protected attributes. If this were the case further judicial education needs to be provided.

Costs

[51] We strongly believe that the costs of pursuing legal action are a significant problem. Considering the well accepted socio-economic disadvantages prevalent amongst

[51] South African Human Rights Commission, *Annual Report* (South African Human Rights Commission, 2006), 27.
[52] Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) 85, 100-102; *University of Tasmania Law Review*; *Federal Discrimination Law* (n 39), ch 7.

Australians with disabilities, it is unreasonable to expect them to carry this burden unassisted.

The common outcome of 'costs following the outcome of a legal proceeding' is a dramatic disincentive to bringing claims. Our own experience, supports the finding of Gaze and Hunter who suggest that, outside those clients with no assets or property that may be put at risk by an adverse finding most potential complainants will either not initiate proceedings or seek to settle regardless of the strength of their case.[53]

[52] We believe that the best approach to deal with the problem of costs is the following. The starting point should be that costs are born by each party. There are two exceptions to this. Firstly, if the complainant's legal action is successful than the respondent should bear the complainant's legal costs. This would allow an element of punitive action against wrongful organisations and thus an incentive to not discriminate. It would also be an important reflection of the idea that the complainant is asking for no more than what they are entitled to and should have been granted. Secondly, the court should have the power to, in exceptional circumstances where the complainant has acted vexatiously, frivolously, or in bad faith, award costs against the complainant. This would act as an important deterrent against disingenuous claims.

Financial support

[53] As noted, the Australian discrimination law system is dependent upon individuals being able to easily bring a claim. If the Australian government has chosen to expect individuals to bring claims rather than enforcing a positive duty then they should provide appropriate support to do so. Although introducing more complainant-friendly costs procedures reduces the risk of bringing a claim it does not necessarily make the system more financially accessible for the vast majority of complainants.

[53] Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New* Regime (Themis Press, 2010), 18-20.

As such, it should be expected of government to provide direct financial support for claimants to cover legal fees.

[54] While legal aid services do provide some financial assistance, these services are often difficult to access. This can largely be attributed to limited resources in the sector and how competing legal issues for access to legal aid, particularly criminal cases, are prioritized. Unless, they are accessible and simple to apply for they act as a disincentive to begin legal action rather than an incentive or support.

[55] Pro-bono work is also unlikely to be of major assistance with disability discrimination claims. Often the claims, particularly in areas like education and employment, involve events of discrimination that are complex and have occurred over an extended period. This often means trials can extend for significant periods of time and thus are unattractive pro-bono candidates.

Is there a need to expand protections relating to harassment and vilification on the basis of any protected attributes

[56] The legal concept of vilification is designed to capture behaviour which is particular abusive or offensive and is directed at a person because of some inherent characteristic/attribute they possess. Unlike harassment, vilification is not usually limited by the areas that it applies in but is limited on the basis of the targeted characteristic/attribute. Currently, vilification laws at the federal and state levels generally do not extend to conduct targeted at people with disabilities.[54] The exceptions to this are Tasmania and ACT, who have included disability in their vilification provisions, and New South Wales, who have express protections only for

[54] *Discrimination Act 1991* (ACT); *Discrimination Act 1977* (NSW); The Northern Territory does not currently have any form of vilification prohibition; *Anti-Discrimination Act 1991* (Qld); *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); Criminal Code (WA), s 77-80J; *Racial Discrimination Act 1975* (Cth), 18C.

those people who have HIV/AIDS.[55]

[57] We believe that broader vilification prohibitions should be introduced at the federal level and these should expressly include disability as a protected attribute. Legislative prohibitions against vilification have tended to be a reflection of the fact that vulnerable groups within society who have historically been held in serious contempt or ridicule are often the targets of conduct that could be classified as vilification. Prohibitions were felt to be necessary because the process of vilification is cyclical. A particular group is targeted because they are socially isolated and vulnerable. Being the victim of vilification perpetuates this isolation and vulnerability and means the group remains vulnerable to further vilification. The disability community fits this archetype well. Historically, people with disabilities have been targeted as points of ridicule, abuse, and violence and despite improvement in this largely remains the case.

[58] Currently, in Australia there are two distinct approaches for establishing vilification under legislation. At the Commonwealth level vilification, which is really only available under the *Racial Discrimination Act*, focuses on the effect of the vilifying conduct on the victim.[56] It essentially asks whether a person observing the conduct is reasonably likely to consider that it would offend, insult, humiliate or intimidate the targeted person or group of people. At the state level, where vilification is more widely available, there is a focus on the effect of the conduct on observers. It essentially asks whether a person observing the offending conduct is reasonably likely to consider that the conduct is likely to incite hatred towards the targeted person or group of persons.[57] We firmly believe that the commonwealth approach is far more appropriate. Such an approach better fits with the purpose of vilification and discrimination law in encouraging and facilitating a more inclusive environment. It matters little that onlookers might not have been incited to hatred if the targeted

[55] *Discrimination Act 1977* (NSW), s 49ZXB; *Discrimination Act 1991* (ACT), s 67A; *Anti-Discrimination Act 1998* (Tas), s 19;
[56] *Racial Discrimination Act 1975* (Cth), 18C; Creek v Cairns Post Pty Ltd (2001) 112 FCR 352, 355 (Kiefel J).
[57] An example of this approach can be seen in *Eatock v Bolt [2011]* 283 ALR 505, [15] (Bromberg J).

individual is further socially isolated as a result of being humiliated or intimidated.

[59] As such, we believe that vilification laws should be expressly extended to cover other protected attributes, including disability, and the legal concept should focus on the effect of the conduct on the target, not on onlookers.