

National Mental Health Commission
November 2025

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



Australian Government
National Mental Health Commission

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Acknowledgement

Acknowledgement of Country

The Commission acknowledges the traditional custodians of the lands throughout Australia. We pay our respects to their clans, and to the elders, past and present, and acknowledge their continuing connection to land, sea and community.

Recognition of Lived Experience

We recognise the individual and collective contributions of those with a lived and living experience of mental health challenges and suicide, and those who love, have loved and care for them. Each person's journey is unique and a valued contribution to Australia's commitment to mental health suicide prevention systems reform.

About this submission

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Office of the Chief Executive Officer
National Mental Health Commission
GPO Box 9848
Sydney NSW 2001

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A note on language

The Commission acknowledges that language surrounding mental health and suicide can be powerful, emotive and at times contested. People make sense of their experiences in different ways, and there is no consensus on preferred terminology. The Commission has been conscious to use terminology throughout this submission that is respectful of those whose experiences we are describing and is well understood by the audience reading this submission.

The Commission endorses and follows the Mindframe guidelines Our Words Matter and Images Matter. The Commission also endorses the Mindframe Guidelines on Media Reporting of Severe Mental Illness in the Context of Violence and Crime and requests that media using this report do so in accordance with the Guidelines.

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Sydney NSW 2001

Introduction

The Commission welcomes the Attorney-General's Department's review of Australia's *Disability Discrimination Act 1992* (Cth) (the DDA) and the opportunity to make this submission.

We note, whilst not formally defined in international treaties, the Committee on the Rights of Persons with Disabilities has accepted that mental illness falls under the Convention of the Rights of Persons with Disabilities (CRPD).¹ Accordingly, our submission will consider the proposed amendments and issues through a mental health lens, with a focus on improving outcomes for individuals, families and communities experiencing mental health challenges. It will also consider the needs of individuals experiencing psychosocial disability (a disability arising from a mental health challenge), emphasising the critical interaction between mental health challenges, and the individual's experience of their social environment and construct.

The case for reform is compelling.

The recent Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission), finalised in 2023, found that people with disability continue to experience discrimination, exclusion and significant barriers across multiple domains, including education, housing, employment, justice and health.

There is also evidence to suggest that, without significant reform, this impact will be compounded by growing rates of mental health challenges across Australia. The Commission's 2024 National Report Card '*Monitoring the performance of Australia's mental health system*' found that among people with a mental health condition who experienced discrimination, a disability or health issue was the second most common reason for the most recent incident at 31%.²

Without action to strengthen existing protections, more Australians are at risk of experiencing stigma and discrimination based on their lived experience of mental health challenges and psychosocial disability. As identified by the Disability Royal Commission, and echoed across similar inquiries, there is a critical need for structural reform to support individuals and safeguard their right to inclusion, participation and equity free from discrimination.

While our submission is limited to considering the rights of people with a lived experience of mental health challenges and psychosocial disability, the Commission acknowledges that discrimination is a significant concern for people living with all types of disability.

Central to our submission is an ongoing call for consultation and collaboration with people with a lived experience of mental health challenges and psychosocial disability, as well as their families, kin and carers, to inform the development, implementation and evaluation of legislative or systemic reform.

The Commission's Response

Updated understanding of disability and discrimination

Recommendations 4.33 and 4.34 – Interpreting the *Disability Discrimination Act 1992* (Cth) in line with Convention on the Rights of Persons with Disabilities (CRPD)

Despite existing protections, people with a lived experience of mental health challenges or psychosocial disability continue to experience discrimination, exclusion and barriers to full participation and inclusion in society. This demonstrates the important need for ongoing reform to augment and strengthen efforts to protect individuals and the communities in which they live.

Strengthening and refining anti-discrimination legislation to align with contemporary evidence and social, rights-based constructs of disability is a critical and necessary step to achieving this.

The Commission supports the proposed recommendation to better align the interpretation of the DDA with the CRPD and encourages efforts to strengthen the legislation in accordance with other contemporary human rights principles and instruments, as ratified in Australia. This approach will prioritise equity, accessibility, inclusion and non-discrimination and promote fundamental human, cultural, social, health and economic rights.

In addition to the CRPD, the Commission suggests that consideration should be given to the following human rights principles and instruments:

- Universal Declaration of Human Rights, UDHR (1948) – Article 25 (1).³
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) – Article 12.⁴
- Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1993).⁵
- United Nations Declaration on the Rights of Indigenous Peoples (2006) – Articles 21, 23 and 24.⁶

Past or anticipated stigma or discrimination also create significant barriers to individuals seeking help which can result in delays to people finding and getting the right treatment, care or support.⁷ Further, individuals with multiple disabilities or who identify as being part of more than one priority population (such as people with disability who live in rural and remote communities, or also come from culturally and linguistically diverse backgrounds) face further discrimination and barriers to accessing services.⁸ This represents a significant risk for individuals with a lived experience of mental health challenges or psychosocial disability and can contribute to poorer health, social and economic outcomes.

The Commission also acknowledges that human rights are interrelated and interdependent. Fulfilment of the right to health, for example, may depend on the fulfilment of other rights such as the right to education or freedom of information. This emphasises the importance of highlighting the interconnections between an individual's personal circumstances and characteristics and how this impacts their experiences and the discrimination they may face.

As such, the Commission supports the consideration of intersectionality when undertaking reform of the definitions and tenets of the DDA.

Definition of disability and adopting a strengths-based approach

The existing definition of disability within the DDA risks perpetuating a deficit-based, 'medical model' of disability, focusing on individual impairment, rather than the social and environmental

barriers that underpin disability.⁹ It does not align with contemporary social or human rights models of disability.

The Commission welcomes the proposed reframing of the legal definition of disability within the DDA to reflect modern terminology and adopt a strengths-based approach. The use of strengths-based language when referring to people and groups experiencing, or at risk of experiencing, mental health challenges and psychosocial disability reflects contemporary understandings of disability and positively shifts the narrative towards empowerment, rather than deficit.

It is further noted that in comparison to the existing permanent constructs of other forms of disability, mental health challenges and psychosocial disability may be episodic in nature and can vary on a spectrum of severity that fluctuates over time. As such, the episodic nature of psychosocial disability and mental health challenges should be appropriately and adequately reflected in the revised definition of disability.

Positive duty to eliminate discrimination

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

The Commission promotes the proactive elimination of discrimination and is supportive of introducing a positive duty to eliminate discrimination on identified duty holders, modelled by the positive duty enshrined in the *Sex Discrimination Act 1984* (Cth). Embedding a positive duty further aligns with the CRPD which emphasises that anti-discrimination laws must go beyond reactive remedies to include proactive, structural obligations to remove barriers.¹⁰

In its current form, the DDA is reactive and places the onus on individuals to file complaints after discrimination has occurred. This lacks a commensurate focus on proactively preventing the abuse of human rights, which limits its efficacy in eliminating discrimination and places a disproportionate burden on victims to be aware of, and enforce, their rights.

While there are several jurisdictional laws and safeguards that prohibit the abuse of human rights, respecting, protecting and promoting human rights requires positive action to be optimally effective. To promote equity and eliminate discrimination, a positive duty for duty holders is a welcome step forward.

It is well documented that people with a lived experience of mental health challenges are more likely to experience poorer physical health. Evidence suggests that this cohort receive less and lower quality health care than the rest of the population – and die younger.¹¹ This discrimination, commonly referred to as ‘diagnostic overshadowing’, occurs when a person’s physical health symptoms are overlooked and misattributed as symptoms of their mental health challenges. This often leads to physical conditions being undiagnosed and untreated, which can prove fatal.¹² Preventing diagnostic overshadowing is critical to improving the quality of health care received by people experiencing mental health challenges. Aligning disability discrimination legislation with a national framework such as the *Equally Well Consensus Statement*,¹³ and specifically Element Three – equity of access to all services – is a necessary step toward eliminating diagnostic overshadowing and ensuring that all Australians, regardless of their mental health, receive the health care they deserve.

Efforts to impose a positive duty on health services, for example, could elicit significant benefits and improve outcomes for people with a lived experience of mental health challenges and psychosocial disability.

The Commission recommends genuine consultation and co-design be undertaken with people with lived experience of mental health challenges and psychosocial disability to support the development of legislation, and implementation and compliance measures, in factors relating to discrimination – such as defining the scope of a positive duty.

In doing so, the government will have the opportunity to ensure the DDA is effective and appropriately targeted to support individuals with a lived experience of mental health challenges or psychosocial disability as well as others experiencing discrimination. This will in turn support those who carry a duty of care to better meet the needs of people with disability and actively prevent and eliminate discrimination.

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

The findings of the Disability Royal Commission clearly demonstrated a link between disability and experiences of discrimination in employment, education, healthcare and housing. This discrimination, often driven by stigma and mistaken assumptions about capacity, contributes to disadvantage, inequity and exclusion which lead to significantly poorer outcomes for people with disability compared to the general population.

The Commission strongly welcomes proposed reform intended to remove barriers which exacerbate disadvantage and prohibit participation and inclusion for people with a lived experience of mental health challenges and psychosocial disability.

This approach aligns with core tenets of the Commission's [Contributing Life Framework](#), a holistic approach aimed at improving the quality of life for individuals living with mental health challenges, ensuring they have the same rights and opportunities as those without mental illness. This framework acknowledges the social determinants of mental health and articulates the concept that individuals with a lived experience of mental health challenges have the fundamental right to lead fulfilling lives enriched with meaningful activities, valued relationships, and access to proper health care, education and training, free from discrimination.

Through strengthening access and removing barriers to critical supports and the underlying social determinants of mental health, a revised DDA has the potential to significantly improve outcomes for people with a lived experience of mental health challenges and psychosocial disability.

Recommendation 7.26 – Expanding the factors when determining if an employee can carry out the inherent requirements of particular work

The Commission supports a person-centred and recovery-oriented approach to supporting people experiencing mental health challenges and psychosocial disability in the workplace. This includes proactively considering how employees can be supported in both defining and carrying out the inherent requirements of particular work and preventing discrimination when employers undertake key decisions.

The DDA currently provides an exception to unlawful discrimination in employment if an employer can establish that a person with disability is unable to perform the 'inherent requirements' of particular work. The Disability Royal Commission recommended an amendment to include two additional factors that must be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of particular work:

- the nature and extent of any adjustments made
- the extent of consultation with any person with disability concerned.

The Commission supports embedding a requirement for consultation with people with mental health challenges and psychosocial disability to promote fairness, inclusion and to encourage conversations with prospective or existing employees about job design or the scope of adjustments that could be made. This should be supported by appropriate training and ongoing support for both employees and employers about their rights, obligations and responsibilities, as well as job design principles.

Improving access to justice

Recommendations 4.29 and 4.30 – Offensive behaviour and vilification protections

The Commission promotes the inclusion of explicit provisions within the DDA to prevent discrimination when engaging with people with disability and to ensure safe, inclusive practices by introducing provisions relating to offensive behaviour or vilification.

The Commission supports the recommendation by the Disability Royal Commission to include two new provisions to better protect people with disability from offensive behaviour and vilification, including aligning a prohibition on offensive behaviour because of a person's disability based on section 18c of the *Racial Discrimination Act 1975* (Cth). That is, "where an act is reasonably likely, in all circumstances, to offend, insult, humiliate or intimidate another person or group of people," and, "the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability"¹⁴

The Commission encourages and welcomes the explicit inclusion of psychosocial disability or experience of mental health challenges within this revised provision.

Recommendation 8.19 – Services provided by police officers

The Commission supports the recommendation made by the Disability Royal Commission to amend the DDA to ensure all people with disability are protected from unlawful discrimination when engaging with police, regardless of the nature of that engagement. The Commission further recommends that the provisions explicitly require appropriate training for all first responders when engaging with people with lived experience of mental health challenges.

Where individuals experiencing mental health challenges appear distressed, police are often called upon to intervene.¹⁵ This can result in people with lived experience of mental health challenges becoming unjustly involved with the criminal justice system if a mental health matter is misconstrued or escalated to a criminal matter. Ensuring police officers are appropriately trained to engage with people experiencing mental health challenges helps protect individuals from experiencing discrimination. It also enables police officers and first responders to feel confident, supported and assures that they are acting in a safe, inclusive and appropriate manner.

Exemptions

Section 46 – Superannuation and insurance

Section 46 of the DDA permits insurance and superannuation providers to discriminate against individuals with disability if the discrimination is:

- Based upon actuarial or statistical data on which it is reasonable for providers to rely on; and
- Is reasonable having regard to the matter of the data and other relevant factors.

Alternatively, the DDA provides that where there is no such actuarial or statistical data available and cannot reasonable be obtained, the discrimination is considered reasonable having regard to any other relevant factors.¹⁶ This has led to systemic discrimination against people living with mental health challenges in Australia, with a number of cases documented where people have

either been denied coverage, forced to pay additional premiums, or have been unable to receive the benefit when making a claim.¹⁷ The Productivity Commission also reported on this in their Mental Health, Inquiry Report¹⁸ making specific reference to the need for insurance companies to improve the way they collect information about, and relate to, people who experience mental health challenges and psychological distress.

The Commission recognises the importance of reviewing policies, practices and legislation to ensure discrimination in insurance and superannuation is eliminated. It emphasises the value of provisions that consider individual circumstances and the inclusion of protective factors in decision-making – such as social or support networks and other psychosocial factors. These factors are highly relevant to the consideration of risk profiles, as they can be the factors that prevent someone from becoming acutely unwell. Further, they form an essential component of evidence-based decision making in relation to a person's future trajectory. Similar protective factors exist for individuals with a past or current experience of suicidality. An opportunity exists for insurers to develop indicators of recovery and utilise these alongside protective factors in assessing risk and a person's capacity level. For instance, a person's history of using medication to successfully manage a mental health condition could, in many cases, be considered a protective factor, rather than something that necessarily indicates increased risk. A sound understanding of the nature of mental health challenges, suicide and the various factors involved in individual circumstances is critical to appropriate assessment and communication of reasons for decisions where mental health is a factor.

To appropriately maintain an exemption in this category, it is essential that the revised DDA clearly articulates the relevant factors and information to be taken into account when determining whether an exemption is discriminatory.

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