Submission to the Review of the *Disability Discrimination Act*

24 October 2025

Circle Green
Community Legal

Acknowledgements of Country

Circle Green Community Legal acknowledges the Australian Aboriginal and Torres Strait Islander peoples as the traditional custodians of the lands where we live, learn and work, and particularly the Whadjuk people of the Noongar Nation, traditional custodians of the land where our office is located. We acknowledge and respect their continuing culture and the contribution they make to the life of this nation, and we pay deep respect to Elders past and present.

Attribution

This submission can be attributed to Circle Green Community Legal.

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Glossary

AHRC Act means the *Australian Human Rights Commission Act 1986* (Cth).

AHRC means the Australian Human Rights Commission.

ALRC means the Australian Law Reform Commission.

ALRC Report means the Australian Law Reform Commission's report, *Safe, Informed and Supported: Reforming Justice Responses to Sexual Violence* (January 2025).

Circle Green means Circle Green Community Legal.

DDA means the *Disability Discrimination Act 1992* (Cth).

DDA Review means the Australian Government's Review of the *Disability Discrimination Act 1992* (Cth).

DRC means the Disability Royal Commission.

EO Act (WA) means the *Equal Opportunity Act 1984* (WA).

EOC means the Equal Opportunity Commission of Western Australia.

FW Act means the *Fair Work Act 2009* (Cth).

FWC means the Fair Work Commission.

IR Act (WA) means the *Industrial Relations Act 1979* (WA).

Issues Paper means the '*Disability Discrimination Act 1992* Review Issues Paper' published by the Australian Government.

SDA means the *Sex Discrimination Act 1984* (Cth).

Speaking From Experience Report means the *Speaking from Experience: What needs to change to address workplace sexual harassment* by the Australian Human Rights Commission (June 2025).

WA means Western Australia.

1. Introduction

Circle Green welcomes the opportunity to contribute to the Australian Government's review of the *Disability Discrimination Act 1992* (Cth).

1.1 About Circle Green Community Legal

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people from marginalised communities who face disadvantage in gaining access to justice.

Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, information, referrals and education on state and national workplace law. This means Circle Green has expertise in providing legal assistance to vulnerable WA workers. We are also a volunteer legal advice provider for the FWC's Workplace Advisory Service.

For more information about Circle Green's services, please see our website: https://circlegreen.org.au.

1.2 Our client base

Circle Green provides legal assistance services to people who are marginalised or disadvantaged in their access to justice. Our clients include those who experience one or more of the following challenges, among others:

- low income or financial hardship;
- homelessness or risk of homelessness;
- physical or mental disabilities;
- being women or gender-diverse;
- being pregnant;
- having dependents and family or other caring responsibilities, or being the sole income earner in their household;
- being under the age of 21 or over the age of 50;
- being from a CALD background;
- being of ATSI descent;
- working or residing in a regional, rural, and remote area;
- being a newly arrived migrant, refugee, or asylum seeker; and
- being subject to family and domestic violence.

2 Submissions

2.1 Introduction

This submission is based on Circle Green's experience and expertise assisting WA workers facing marginalisation and disadvantage, including physical or mental disabilities. Our clients often face one or multiple other intersecting marginalising identities.

Prevalence data: Assistance with disability discrimination

From 1 May 2023 to present, Circle Green:

- received **792 requests for assistance** with matters involving discrimination on the ground of disability; and
- provided **legal assistance in response to 701** of these requests for assistance.

**Prevalence data note: data analysed for this submission is from 1 May 2023 to present due to internal software changes that commenced 1 May 2023, and data collected prior to this date has not been included for the purposes of this submission.*

We focus on amendments to the DDA that we consider would benefit our cohort in particular, and on matters about which we have expertise and experience to comment.

In summary, our view is that to modernise and strengthen the DDA:

1. the DDA must include a positive duty to eliminate discrimination in clearly drafted terms and with appropriate enforcement mechanisms, taking the learnings from the positive duty in the SDA (**paragraph 2.2**);
2. the DDA must include a positive obligation on employers and other duty holders to make adjustments for individuals with disability to achieve substantive equality, particularly for workers who face disadvantage and marginalisation (**paragraph 2.3**);
3. consultation and documentation requirements must be added to the definition and requirements to meet the "unjustifiable hardship" defence for an obligation to make adjustments (**paragraph 2.4**); and
4. any reforms to the DDA must be supplemented by increased funding to the AHRC and involvement of relevant regulators, to support and increase the effectiveness of the operation of the DDA (**paragraph 2.5**).

We address each point in more detail below.

2.2 Positive duty to eliminate discrimination

Part 2 of the Issues Paper refers to the Disability Royal Commission's recommendation[1] to introduce into the DDA a positive duty on duty holders, modelled on the duty in the SDA. The positive duty in the SDA was introduced in December 2022 and since December 2023 the AHRC has had powers to monitor and enforce compliance.

We support the inclusion of a similar positive duty in the DDA. However, we take this opportunity to highlight issues with the effectiveness of the existing positive duty in the SDA. It is important that these be considered and addressed in the introduction and implementation a similar duty in the DDA.

[1] Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report* (2023) vol 4, p 315 (recommendation 4.27).

Two central issues with the operation and enforcement of the positive duty in the SDA are:

1. there are no of penalties for non-compliance with the positive duty; and

2. AHRC's monitoring and enforcement activities are not reported or otherwise published.

These issues mean that the current positive duty mechanism, whilst significant in theory, is without both teeth and transparency. Together, these omissions remove incentive to comply with the duty, significantly affecting its potential to drive real change.

Introducing civil penalties

Both the AHRC and the ALRC have recommended civil penalties for breaches of the positive duty in the SDA.

The AHRC in its recent Speaking from Experience Report[2], recommended strengthening employer accountability by 'introducing civil penalties for breaches of the Positive Duty' under the SDA,[3] after hearing from participants to their Speaking from Experience Project that the legislative framework around the positive duty could be strengthened. The Speaking from Experience Report also noted that:

> *[a]s discussed in* Free & Equal: A reform agenda for federal discrimination laws*, the ability to seek a civil penalty order through the courts is a powerful option for regulators. The threat of going to court can encourage workplaces to improve what they are doing to stop WSH happening.*[4]

The ALRC makes a similar recommendation in its Justice Responses to Sexual Violence Final Report[5], specifically that Parliament amend the AHRC Act to empower courts to order a person who breaches the positive duty to pay a civil penalty.[6] It notes that:

> *in the absence of an express civil penalty provision, there may not be significant incentive for a respondent to comply with a compliance notice from the AHRC – the most likely consequence of non-compliance notice is merely a court order to comply. … [I]ts current powers are better suited to circumstances situated 'lower' on the 'regulatory pyramid' – such as capacity-building for respondents with some willingness to comply with the law – and are not suited to the 'top' of the pyramid – unwilling respondents, committing serious or repeated breaches of the law'.*[7]

Improving transparency of enforcement of the positive duty

As the Speaking from Experience Report highlights, the 'secrecy provisions' in the AHRC Act operate as a barrier to transparency of the enforcement activities of the AHRC and significantly

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[2] AHRC, *Speaking from Experience: What needs to change to address workplace sexual harassment* (June 2025): https://humanrights.gov.au/sites/default/files/Speaking%20from%20Experience%20Report_0_0.pdf.
[3] Ibid, 71 (Recommendation 11).
[4] Ibid, 68.
[5] ALRC, *Safe, Informed and Supported: Reforming Justice Responses to Sexual Violence* (January 2025): https://www.alrc.gov.au/wp-content/uploads/2025/02/JRSV-Final-Report-Book-for-Web-final-20250211.pdf
[6] Ibid, page 465.
[7] Ibid, page 466.

inhibit the effectiveness of the positive duty. The 'secrecy provisions' referred to are in section 49 of the AHRC Act and limit the ability of AHRC staff and the Commission itself to share information.[8]

A consequence of section 49 is that the public is largely unaware of the enforcement actions taken by the AHRC, unless a willing employer agrees to cooperate through an enforceable undertaking, or the AHRC commences court proceedings against an employer. This undermines the public's faith in effective enforcement of the positive duty and removes the threat of poor publicity that could itself serve as an incentive to comply with the duty.

Further, we understand from an AHRC spokesperson that the AHRC interprets section 49 of the AHRC Act to mean that information cannot be shared internally within the AHRC between teams. Such information is therefore not used to identify trends among potential industries and/or specific employers who may not be complying with their positive duty under section 47C of the SDA.

This lack of transparency, both publicly and internally, minimises the effectiveness of the positive duty in the SD Act. Relying on those targeted by harassment to make a separate report to the positive duty team is inefficient and places an additional burden on the person who has suffered. This is contrary to the intention of the amendments as set out in the relevant explanatory memorandum, to relieve that burden[9] We have observed from our own experience that clients are unwilling or discouraged by these issues to report non-compliance with the positive duty in the SD Act.

Our clients have also reported the lack of a trauma-informed approach to handling the positive duty reports made to the AHRC, and told us that this has made them reluctant to report discrimination. We also have feedback from colleagues in the legal assistance sector noting that in practice, the process for reporting a breach of the positive duty through the AHRC's website is one that 'appears to involve reporting a traumatic experience without any update or certainty as to any outcome which may result from the report'.[10] We have been made aware that there is not even an acknowledgement of submission sent to the person who makes a report via the online form on the AHRC website. This is very discouraging for people targeted by this unlawful conduct and deters them from utilising the reporting mechanism.

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[8] *Australian Human Rights Commission Act 1986* (Cth), s 49(1):

> *(1) A person who is, or has at any time been, a member of the Commission or a member of the staff referred to in section 43 or is acting, or has at any time acted, for or on behalf of the Commission shall not, either directly or indirectly:*
>
> > *(a) make a record of, or divulge or communicate to any person, any information relating to the affairs of another person acquired by the first - mentioned person by reason of that person's office or employment under or for the purposes of this Act or by reason of that person acting, or having acted, for or on behalf of the Commission; or*
> > *(b) make use of any such information as is mentioned in paragraph (a); or*
> > *(c) produce to any person a document relating to the affairs of another person furnished for the purposes of this Act.*
>
> *…*

[9] Explanatory Memorandum to the *Anti-discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* at para [18]:

> *The Respect@Work Report recommended that the positive duty (recommendation 17) be accompanied by an appropriate enforcement mechanism to help ensure it is effective and employers engage with their legal obligations (recommendation 18). An appropriate enforcement mechanism would also ease the burden on individuals by enabling the Commission to initiate action to address unlawful discrimination, rather than relying on individuals making complaints.*

[10] Women's Legal Centre ACT, *The paradox of choice. Examining the options for workplace sexual harassment claims and progress on the Respect@Work changes* (11 October 2024).

In summary, there is the potential for the positive duty to be much more effective if the AHRC can commence proceedings for penalties against employers in breach of the positive duty, and enforcement processes are made transparent. There will be greater incentive for duty holders to take compliance seriously. This will shift the culture away from one of individuals bearing responsibility of addressing unlawful conduct that has already occurred, to duty holders preventing the conduct from happening in the first place. This is, of course, the intention of the positive duty, however without transparency and teeth it cannot truly be achieved.

The DDA should include a positive duty to eliminate disability discrimination. However, the feedback in relation to the positive duty in the SDA must be incorporated into the implementation of a positive duty in the DDA so as to ensure its effectiveness.

2.3 Standalone positive obligation to make adjustments

Circle Green recommends that the DDA include a stand-alone duty to provide adjustments, as opposed to incorporating a duty to provide reasonable adjustments in the definition of direct or indirect discrimination. Inserting a stand-alone positive obligation in the DDA, and all anti-discrimination legislation, stands to convey significant benefits as outlined below.

Clarifying the protections

The protections against discrimination and accompanying duty to make reasonable adjustments already exist in the definitions of direct and indirect discrimination in the DDA[11]. However, this is confusing and often misinterpreted, not just by duty holders and persons with a disability but also by Australian courts. Despite the Australian Government's attempt in 2009 to make the duty more explicit in the DDA,[12] decisions[13] such as *Sklavos v Australasian College of Dermatologists*[14] have again cast doubt on how the duty is to be interpreted.

In the *Sklavos* decision, the Full Bench of the Federal Court of Australia interpreted the duty, contained within the definitions of direct and indirect discrimination, as one that only applied where the reason for the refusal is the person's disability.[15] As Dr Alice Taylor states:

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[11] *Disability Discrimination Act 1992* (Cth), section 5 (Direct disability discrimination) and section 6 (Indirect disability discrimination).

[12] The High Court of Australia decision in *Purvis v NSW and the Human Rights and Equal Opportunity Commission* [2003] HCA 62 cast doubt on an implied duty to make reasonable adjustments in the DDA, which led to the introduction of a clearer duty (as drafted now) by the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009*. The Explanatory Memorandum to this Bill states, relevantly, that:

> *Until relatively recently, the general view, including in the case law, was that that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination—subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted. However, comments made by members of the High Court in 2003 cast doubt on the existence of this duty (Purvis v NSW and the Human Rights and Equal Opportunity Commission [2003] HCA 62).*
>
> *The proposed amendment removes this doubt by making explicit the duty to make reasonable adjustments, which are defined to exclude adjustments that would impose unjustifiable hardship. This will return the status of the law to the original intention when the Disability Discrimination Act was introduced.* (emphasis added)

[13] See also *Watts v Australian Postal Corporation* [2014] FCA 370.

[14] (2017) 256 FCR 247.

[15] Ibid.

[t]his approach turns what was described in the extrinsic materials as a positive obligation – to make changes to existing structures and practices to accommodate difference – into a negative obligation. It becomes a negative obligation because a duty-bearer is only required by the DDA to make a reasonable adjustment where a reason for the refusal is the disability itself.

If a duty-bearer's refusal is based on the cost of the adjustment or the inconvenience of the adjustment but not on the complainant's disability, there is no obligation on the duty-bearer to make an adjustment to existing practice. This approach to s 5(2) of the DDA is one which adopts an understanding of discrimination law's purpose as one of formal equality only; that people are only entitled to like treatment, even where they require different treatment to have equal outcomes.[16]

It is clear that legislative clarification of this duty is necessary, and in our view could be achieved by re-drafting it as a standalone obligation provision.

Redress power imbalances

A stand-alone duty to make adjustments would also seek to redress the power imbalance that often exists between people that rely on the protections (for example, an employee with a disability), and a duty holder (for example, an employer). By placing a clear, proactive obligation on duty holders, the responsibility rests more clearly on the party that is better resourced and more likely to have the ability to prevent discrimination from occurring in the first place.[17]

The obligation to make adjustments should be an additional obligation, above simply refraining from discrimination. It is also one that should be borne by duty holders who often have the power and resources in their favour. Framing the duty to make adjustments as a stand-alone obligation is consistent with both of these factors.

The AHRC has long been recommending this change. In its Position Paper, *Free and Equal: A reform agenda for federal discrimination laws* (**Free and Equal Report**)*[18],* the AHRC states that the effect of a standalone duty is that 'a failure to make reasonable adjustments would be a *separate type of discrimination or action to direct and indirect discrimination and a complainant would not have to prove the other elements of those tests*. The duty would still, however, be balanced by the concept of "reasonableness" and the defence of "unjustifiable hardship"' (*emphasis added*).**[19]** We discuss our views on the "unjustifiable hardship" defence below (**see paragraph 2.4**).

[16] Dr Alice Taylor, *Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading* (2019) 45(2) Monash University Law Review 461, pages 476-77.
[17] For example, see the Law Reform Commission of WA's comments in its Review of the *Equal Opportunity Act 1984* (WA) Final Report (2022): '*Respondents have the power to prevent discrimination from occurring, whereas individuals who are discriminated against are often those who, due to their protected attribute, have fewer resources, face greater difficulties with access to different areas of life and, as such, may struggle with accessing their rights under anti-discrimination law*' (page 148).
[18] AHRC, *Free and Equal: A reform agenda for federal discrimination laws* (December 2021).
[19] Ibid, 292.

Providing certainty to both duty holders and people with disability about their respective obligations and rights

As discussed above, the duty to make adjustments as currently drafted unclear both for duty holders and people with disability. It is often too complex for a layperson, let alone a person experiencing reduced capacity, to make any distinction between unlawful direct or indirect discrimination and an unlawful failure to make reasonable adjustments, *unless* the two are clearly separated out in the DDA.

As already mentioned, AHRC and the DRC both recommend a standalone duty to make adjustments be included in the DDA. In its Free and Equal Report, the AHRC specifically states that, instead of amending the definitions of direct and indirect discrimination, it instead prefers 'the *clarity for lawyers and lay persons alike in having a standalone provision* (*emphasis added*). This approach also aligns better with the commitments expressed in the *Convention on the Rights of Persons with Disabilities*'.[20]

Further, as we discuss below (**see paragraph 2.4)**, it is often difficult for employees to continue asking for adjustments when employers simply refuse the request without providing any reasoning for the refusal. If there is a clear standalone obligation set out in the DDA, employees may be more likely to feel empowered to speak up where they believe that an employer has not complied with a specific and identifiable obligation in equal opportunity legislation.

Case Study 1 – Candice

Candice was employed by a large employer in a role that primarily involved working at a desk. Candice suffered an injury outside of work and her doctor recommended simple temporary adjustments to her office set up, such as adjusting her desk and taking 5 minute breaks every hour.

Candice's employer took months to implement the adjustments. Even after the delayed response, the employer was inconsistent with implementing the adjustments, such as scheduling very long meetings that made it difficult for Candice to take the necessary breaks. This made Candice very stressed as she was made to feel like a burden on her employer for asking for these adjustments.

This added stress resulted in Candice's injury suffering a flare-up, which prompted the employer to require Candice to take unpaid leave and undergo an independent medical assessment to assess her fitness for work. This would not have happened had the employer provided the adjustments been promptly and as agreed.

Circle Green assisted Candice to raise her concerns with the employer, but they held firm that Candice was not permitted to return to work until she undertook an independent medical assessment.

[20] Ibid.

Align anti-discrimination legislation across Australia

There is a complexity manifested by a broad range of separate but overlapping anti-discrimination legislation across Australia. As the Review Committee is no doubt aware, an individual who experiences disability discrimination may have recourse under either State or federal anti-discrimination legislation. While they generally may not make claims based on the same facts under multiple pieces of legislation, they are free to select the jurisdiction in which they wish to pursue their claim.

For example, to address workplace disability discrimination, a WA worker may consider legal avenues under the DDA, the EO Act (WA), the FW Act, and due to WA's dual-jurisdiction system brought about by a decision not to refer relevant law-making powers to the Commonwealth, the IR Act (WA). This is further complicated for those with intersecting or combined attributes as grounds for discrimination, who may need to rely on one or more additional pieces of federal anti-discrimination legislation. Whilst we can only speak to the legal landscape in WA, there may be similar issues in other states and territories.

Misalignment between federal and state anti-discrimination legislation creates barriers to accessing justice, particularly for vulnerable members of the community and those experiencing intersectional discrimination and harassment. This is particularly the case where one piece of legislation offers protections that the other does not, presents additional or different hurdles to making a successful claim and/or has different remedies available to a successful claimant.

It is therefore preferable that state and federal anti-discrimination obligations align to the extent possible.

Several States and territories already have anti-discrimination legislation that includes a stand-alone obligation to provide adjustments, namely Victoria,[21] Northern Territory,[22] and Australian Capital Territory.[23] We are separately calling on the WA Government to follow suit and understand a new EO Act (WA) is nearing completion. Including a stand-alone positive obligation to make adjustments will therefore align the federal legislation with the majority of Australian state and territory jurisdictions in this important respect.

2.4 Definitions and considerations for "unjustifiable hardship"

In response to consultation question 19 of the Issues Paper, our preferred approach to the definition of "unjustifiable hardship" is the DRC recommendation, that is, a definition requiring a duty holder relying on the defence to take specific additional factors into account and document the factors they considered in assessing hardship.

[21] *Equal Opportunity Act 2010* (VIC), s 19 (responsibilities as parent or carer) and s 20 (disability).
[22] *Anti-Discrimination Act 1992* (NT), s 24 (duty to accommodate special need for all attributes protected under the Act).
[23] *Discrimination Act 1991* (ACT), s 74 (positive duty to make reasonable adjustments for all attributes protected under the Act).

Too often we encounter situations where our clients (employees) have had their requests for adjustments rejected with a lack of consultation and without any real consideration of alternative adjustments. This is confusing and frustrating for those clients, who are regularly given insufficient or incomplete reasons for refusing the adjustment they requested.

What our lawyers have heard:

Circle Green workplace lawyers report that the following situations frequently come up in client matters where the client requests adjustments, often simple or reasonable ones, and employers reject the requests:

- Employers suggest alternative adjustments that are not what the employee has requested, then state that the requested adjustment would cause too much hardship.
- There were alternative adjustments available that the employer clearly did not consider.
- An adjustment proposed by the employer, which they state would cause unjustifiable hardship, is not even helpful or appropriate for the employee.
- An adjustment proposal is brushed off by an employer as being "too expensive", "too difficult", or "not possible", without any reasoning as to why it is too expensive, difficult, or not possible.
- Employers characterise a refusal of adjustments as a "fitness for work" issue, such as justifying the refusal by stating that it is an inherent requirement of the employee's role, when often it is not.
- Employers imply, as a basis for refusing an adjustment request, that an employee will not get their work done if they are working from home.

Once an employer rejects a request for an adjustment, it is very difficult for employees to continue pushing for any, if not at least some sort of adjustment, that would enable them to continue meaningfully in employment. This is particularly problematic for employment relationships where there is already an inherent power imbalance. The issue is amplified when the employee has a disability or intersecting attributes common in our client cohort (for a list of common attributes see paragraph 1.2).

Case Study 2 – Aya

Aya was employed by a large healthcare provider in an administrative role. Aya suffered a sexual assault and was hospitalised. She was subsequently cleared by her doctor to return to work, with the only restriction being that Aya was not permitted to drive a vehicle for a few months.

Aya asked her employer if she could work from home for the few months that she was not permitted to drive. Aya believed this was a reasonable request, because she had been able to work from home prior to her hospitalisation and her role was one that could be fully completed from home.

Aya's employer refused her request and told her she would need to attend the office or take leave instead, without providing her any clear reasoning for this decision. Further, when Aya escalated her query to HR, they directed her to attend an independent medical assessment. Aya attended the assessment and was distressed to discover that it was a psychiatric evaluation assessment.

It was unclear to Aya why her employer required her to undertake a psychiatric assessment when all she had asked for was to work from home on a temporary basis until she could drive again. Despite this, Aya felt that she had no choice but to attend the independent assessment because her employer refused to let her work. Aya was required to take unpaid leave whilst the assessment was conducted and the report finalised.

Case Study 3 – Monisha

Monisha works for a government agency and for three years has been trying to negotiate adjustments to her role to accommodate for her CPTSD, ADHD and autism diagnoses.

The adjustments sought by Monisha are relatively simple adjustments, such as work-from-home arrangements, moving offices within the work building, and adjustments to her desk and work equipment.

Monisha's requests for adjustments have been met with difficult responses from the employer, such as the employer:

- simply ignoring her requests;
- holding meetings to discuss Monisha's requests with her, but not letting her bring her advocate or take notes; and
- asking Monisha to undertake a fitness for work assessment to determine the adjustments she actually needs.

Monisha wants to continue working for the employer but finds it very stressful and difficult continuously trying to push for the adjustments that would allow her to comfortably perform her work.

Employees should not have to enter debate with employers to convince them make adjustments, as there should be a widely accepted, clear and high threshold for employers to argue unjustifiable hardship. As long as that high threshold is not enforced, or at least not widely understood, employers will feel at liberty to push back on requests and those owed the adjustments put to the pain of trying to justify them.

Whilst a court generally has at least some level of evidence before them to make the assessment of whether a duty holder can claim unjustifiable hardship, employees do not have this benefit of this where there is no requirement on employers to document or provide their reasoning. Therefore, in practice, the legislation creates a loophole for employers to simply "brush off" employees' requests for adjustments, by stating that it would cause them unjustifiable hardship. It is then on the employee to pursue the matter further, such as by making a discrimination complaint, which can be additional stress, time and costs for the employee.

Therefore, to avoid employers engaging in this conduct and to ensure greater accountability, employers must be required to:

(a) consult with the employee about precisely what adjustments the employee is seeking;

(b) offer the employee an opportunity to bring a support person to any consultation meeting;

(c) consider and document alternative adjustments and alternative measures that would eliminate or reduce the hardship such that making the adjustment would not cause unjustifiable hardship;

(d) document the factors that were considered and provide detailed reasons for claiming that the proposed adjustment, and alternative adjustments, would cause them unjustifiable hardship; and

(e) where the relevant consultation and documentation process has not taken place, the employer should be held to a higher threshold of proving that they would have endured unjustifiable hardship to evade a requirement to provide the adjustment, and found to have breached their obligations under the DDA in any event.

2.5 Further reform

We strongly urge the Australian Government to supplement any reforms to the DDA with increased funding to the AHRC so that the reforms can be utilised to maximum effect. We also emphasise the critical importance of appropriate referral pathways between the AHRC and legal assistance service providers to ensure complainants have the opportunity to receive free, or low cost, legal assistance.

Community education would also be required to promote awareness and understanding of any new positive duty and duty to make adjustments. Lack of awareness of reporting options is a barrier to reporting or responding to discrimination and therefore an access to justice issue. We have seen this play out regularly through our work in the area workplace sexual harassment and through the Workplace Respect Project.[24] Concurrently, increasing awareness among duty holders, especially if there are appropriate incentives to comply with any new duty, will also promote compliance and aid in the reduction of discrimination whilst also supporting those experiencing discrimination.[25]

We propose that one possible mechanism to increase awareness in the context of workplaces, would be to require employers to provide an information sheet, equivalent to the Fair Work Information Statement provided pursuant to section 125 of the FW Act, to new employees on commencement of their employment.[26]

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[24] Circle Green is the lead agency in WA funded to provided legal assistance services under Recommendation 53 of the Respect@Work Report, and we run the state-wide Workplace Respect Project. The Workplace Respect Project partnered with the Centre of Social Impact (University of Western Australia) to undertake research. The research report, Understanding workplace sexual harassment: Trends, barriers to legal assistance, consequences, and legal need (June 2023) found, amongst other things, that '*there are many barriers to reporting or responding to workplace sexual harassment, including lack of awareness of reporting options, lack of trust in reporting systems and the justice system, and access to justice issues*' (page 36).

[25] Paul Flatau et. al., *Understanding workplace sexual harassment: Trends, barriers to legal assistance, consequences and legal need* (2023), 63.

[26] The Fair Work Information Statement prepared by the FWO, must be given to every new employee before, or as soon as possible after, they start a new job, pursuant to section 125 of the FW Act. Casual employees must also be given a copy of the Casual Employment information Statement (section 125B), and fixed term employees must also be given a copy of the Fixed Term Contract Information Statement (section 333K).

More responsive dispute resolution pathways

A legal framework to address discrimination should not require an applicant to wait for years to resolve a matter that is likely to have a significant impact on their wellbeing, ability to earn a living and or their ability to participate in society on an equal basis with others.

Since early 2024 applicants to the AHRC have waited significant periods for their complaint to be processed. We know of some applicants waiting 10 to 12 months, some even more, to attend a conciliation conference. Whilst the AHRC does encourage complainants to make attempts to resolve their complaints informally and directly with the respondent in the meantime, this is not always appropriate. This is particularly so considering inherent power imbalances that exist between, for example, a large or well-resourced employer, and an employee with a disability. Further, before reaching the decision to make a complaint an applicant has usually already approached their employer regarding the unlawful behaviour, and the employer has failed to engage in any discussion to resolve the matter.

For WA workers the alternative fora for making a disability discrimination complaint are the EOC and the FWC, which each have legal and other complexities. Complainants are often forced into making a difficult choice about which forum to pursue a complaint in. For example, the time frame for making a complaint to the EOC is shorter (12 months), and there is a compensation cap of $40,000. The EOC also sometimes requires applicants to participate in additional processes prior to conciliation such as providing additional information onto the respondent, which may be difficult for a person with disability to navigate.

Other claim options may be available such as a general protections claim in the FWC.[27] This is a legally technical claim to make and varying limitation periods[28] make this process a difficult or confusing one, particularly for someone with a disability. Further, in general protections claims not involving a dismissal, employers may choose whether to participate in the FWC dispute resolution process to deal with the dispute. Essentially, an employer can simply refuse to participate, which leaves the employee with the difficult options of either convincing the employer to participate in consent arbitration by the FWC, or to lodge a court application in the Federal Court of Australia or Federal Circuit and Family Court of Australia.

Circle Green calls for increased funding to the AHRC to minimise wait times for discrimination claims to be processed, so that applicants are able to access the benefits of the AHRC process, such as those discussed above, without having to forego the timely processing and resolution of their complaint.

With increased funding to support the quicker processing of complaints, target timeframes should then be adopted for the AHRC to allocate complaints to a conciliator, for example, that complaints to the AHRC be allocated to a conciliation within 60 days of an applicant filing a complaint.

Statutory review of the DDA and any amendments

In response to consultation question 50 of the Issues Paper we recommend that the DDA include a requirement for a statutory review of the operation of any amendments, to commence within two

[27] Unlawful disability discrimination may be addressed as a General Protections claim if the employer takes adverse action against an employee or prospective employee based on their disability.
[28] Where the adverse action is a dismissal, the limitation period is 21 days from the date of dismissal. However, where the adverse is not a dismissal, the limitation period is 6 years from the date of the adverse action.

years of the amendments taking effect.[29] Further consideration should be given to review the operation, effectiveness and relevance of the DDA and other federal anti-discrimination legislation at regular intervals to ensure that these important legislation remain fit-for-purpose in line with modern society.

We request that the Australian Government bear in mind the substantial expertise of community legal centres, like Circle Green, who assist the most vulnerable and marginalised members of our community. It is often the marginalised members of our community that are disproportionately impacted by any unintended effects of legislative changes, and by inadequacies in existing laws.

Circle Green would welcome the opportunity to comment on any further review of the DDA or on any draft amending legislation to the DDA.

[29] For example, section 4 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (amending legislation to the FW Act), required that the review of the operation of amendments made under that legislation start within two years of the relevant section commencing.