



ATSILS
Aboriginal and
Torres Strait Islander
Legal Service (Qld) Ltd

Brisbane Office | ABN: 1111 6314 562

- 📍 Level 5, 183 North Quay, Brisbane Qld 4000
- 📮 PO Box 13035, George Street, Brisbane Qld 4003
- ☎️ 07 3025 3888 | Freecall 24/7: 1800 012 255
- 📞 07 3025 3800
- ✉️ info@atsils.org.au
- 🌐 www.atsils.org.au



27th November 2025

The Hon Michelle Rowland MP
Attorney-General
Attorney-General's Department
Australian Government
4 National Circuit
Barton ACT 2600

By email: DDAReview@ag.gov.au

Dear Attorney-General,

Re: Disability Discrimination Act Review – Issues Paper

Thank you for the opportunity to provide comments on the Disability Discrimination Act Review – Issues Paper (**Review**). We strongly support the Review and are hopeful that it will culminate in recommendations which would strengthen the legal framework contained in the *Disability Discrimination Act 1992* (Cth) (**DDA**) including, notably, to: modernise the language in the DDA to better reflect community standards; update the definitions of direct and indirect discrimination; introduce positive duties to eliminate discrimination with a view to promoting a more proactive rather than reactive approach to addressing discrimination; clarify the duty to make adjustments for people with disability; and strengthen relevant provisions in the DDA to better protect students with disability from discriminatory practices involving the use of exclusionary measures against them (i.e., school suspensions and exclusions).

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 25 offices strategically located across the State. Our Vision is to be the

leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Introductory Comments

Aboriginal and Torres Strait Islander persons experience disproportionately high rates of disability.

Whilst somewhat dated, the Australian Bureau of Statistics *National Aboriginal and Torres Strait Islander Health Survey 2018-19* (NATSIHS) is considered to be a reliable source on the number of Aboriginal and Torres Strait Islander persons with disability. NATSIHS found that **approximately 35% (274,000) of Aboriginal and Torres Strait Islander peoples under 65 years of age have a disability**¹. This was **3 times the percentage of persons with a disability in the general population**, which was 12%. NATSIHS further recorded that **72,700 Aboriginal and Torres Strait Islander children live with disability**, being **more than one in five** Aboriginal and Torres Strait Islander children. This can be compared with one in twelve children with disability in the general population².

These numbers are incredibly high and might, in reality, be higher given the limitations of the data collected, as such relied upon survey participants identifying that they had a disability and reporting it, which might not have occurred due to cultural or other factors.

¹ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey, 2018-19* (ABS, 2019).

² Note 1.

Additionally, persons with disability are significantly overrepresented in the prison population. In 2022, the Australian Institute of Health and Welfare conducted a study on the health of people in Australia's prisons. The data obtained in that study showed that 39% of prison entrants aged 18 and were recorded as having a disability³.

Aboriginal and Torres Strait Islander persons are also overrepresented in the prison population. The 2022 Australian Bureau of Statistics *Prisoners in Australia* survey showed that, as at 30 June 2022, the adult prisoner population was approximately 39,000 and that almost 13,000, of these prisoners, which represents 33%, were Aboriginal and Torres Strait Islander persons. The overrepresentation of Aboriginal and Torres Strait Islander persons extends into the number of prisoners on remand and the numbers of children in youth detention.

As became evident in the 2023 Royal Commission into Violence, Abuse and Exploitation of People with Disability (**Disability Royal Commission** or **DRC**), it is imperative to consider the criminalisation of disability (i.e., why and how persons with disability are drawn into the criminal justice system) and how persons with disability are treated whilst in custody.

The review of the DDA provides an opportunity to examine how the legislative framework can be strengthened to provide better protections for such individuals, including Aboriginal and Torres Strait Islander persons with disability in consideration of their intersectional profile and the impacts of cumulative discrimination/disadvantage.

The DDA, whilst a keystone in the legislative framework regulating discrimination in Australia, contains within it a number of opportunities to provide better protections against discrimination. These have been aptly described in the Issues Paper and include, but are not limited to:

- its reactive approach to regulation:
 - which relies upon those aggrieved making individual complaints to the Australian Human Rights Commission (a process which, in and of itself, can be a daunting process); and
 - which fails to contain positive obligations to eliminate or prevent disability discrimination;
- its failure to adequately address intersectional discrimination, which is a particular concern for Aboriginal and Torres Strait Islander persons;

³ Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022*.

- the need for an overhaul of the definition of direct discrimination including, notably, the inherently complex and impractical 'comparator test' and the challenges that an applicant faces in trying to prove that they were treated less favourably and the reason for such was because of their disability;
- the lack of sufficient explicit protection to make it unlawful for an education institution to discriminate against a student on the grounds of their disability by suspending or excluding them from schooling; and
- the lack of clarity in relation to the application of the DDA to police when they are interacting with individuals that are suspected of committing an offence.

Comments on the Review and the Issues Paper

We have had the opportunity to review the Queensland Independent Disability Advocacy Network's submission (**QIDAN Submission**) on the Review and support the recommendations made within that submission.

We make the following additional comments.

Part 1 of the Issues Paper – Updating Understandings of disability and discrimination

Definition of 'disability' in the DDA

We strongly recommend that the definition of 'disability' be amended to reflect modern, strengths-based language and remove reference to the words 'malfunction', 'malformation', 'disfigurement' and 'disturbed', as are currently used in the definition of disability in the DDA.

In the development of a new definition of disability, we strongly recommend that the Government consults with:

- relevant experts from the health sector and from organisations that have expertise in supporting individuals with disability to ensure that the definition of 'disability' reflects modern community standards;
- relevant Aboriginal and Torres Strait Islander Peak bodies including the Coalition of Peaks, the National Aboriginal Community Controlled Health Organisation and Queensland Aboriginal and Islander Health Council, in consideration of relevant cultural context relating to disability; and

- peak legal bodies in addition to the community legal assistance sector to ensure that the drafting of this definition is clear, simple and unambiguous from a legal standpoint.

Addressing intersectionality

We note that intersectionality, i.e., the way in which different forms of discrimination, for example, based on disability, race, gender, age, etc., can combine and compound to create unique experiences of discrimination, is specifically contemplated in the preamble of the Convention on the Rights of Persons with Disabilities which states at subparagraph (p):

(p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.⁴

Intersectionality, though a reality for many individuals that the DDA was established to protect, is not sufficiently recognised or addressed within the DDA. Whilst we acknowledge the comments in the Issues Paper regarding the flexibility in the conciliation process which provides space – at least in practice – for the AHRC to consider discrimination due to multiple attributes, this cannot avoid complexities at the beginning of the process, when making complaints, and down the line, if and when these matters are challenged in court. The Review provides us with an opportunity to address this gap in the legislative framework.

Accordingly, we recommend that the DDA be amended to explicitly allow for claims relating to unlawful discrimination on the basis of intersecting and combined protected attributes, including multiple disabilities. We feel that this will result in fairer outcomes which are better aligned with community expectations.

Amending the definitions of 'direct discrimination' and 'indirect discrimination'

We support the recommendations contained in the QIDAN submission with respect to the amendments needed for the definitions of 'direct discrimination' and 'indirect discrimination'.

⁴ Convention on the Rights of Persons with Disabilities (CRPD), opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Preamble at subparagraph (p).

In particular, the 'comparator' test, which is part of the definition of 'direct discrimination', and in which a person is required to prove that they have been treated less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different (see s5 of the DDA), must be removed from the DDA framework due to the complexities it raises, particularly for those experiencing intersectionality. We offer the example of a First Nations student with ADHD and autism who is also a victim of trauma and whose behaviour can manifest in defiance or aggression when triggered. It might be difficult, if not impossible, to find a 'like' person to find a person who meets the test of being 'in circumstances that are not materially different', without the disabilities. Where there are no real individuals to use for the comparator test, courts have resorted to using a hypothetical comparator – which is impractical and artificial. The consequences of such is that individuals that experience complex intersecting forms of discrimination might face significant barriers to justice, as the law appears to fail in capturing how the particular combined attributes shaped the treatment received.

Part 3 of the Issues Paper – Encouraging inclusion of people with disability in employment, education and other areas of public life

Exclusionary discipline and suspension

The overuse of exclusionary discipline, i.e., school suspensions and exclusions, against children with a disability in schools, is of immense concern.

In the Queensland jurisdiction, recent data released by the Queensland government shows that in Term 2 of 2025 despite students with a disability making up approximately 25% of the state school student cohort, these children constituted 64% of suspended students; which is the highest that this figure has been in the last 12 months⁵.

We are aware, based on earlier data obtained, that in Queensland state schools:

- children with a disability that also identify as Aboriginal and Torres Strait Islander have a higher risk of receiving exclusionary discipline; and
- children with a disability, that identify as Aboriginal and Torres Strait Islander and are also in out-of-home care are at an even higher risk of receiving exclusionary discipline⁶.

⁵ Queensland Parliament, Question on Notice No. 103, Asked on 26 August 2025.

⁶ Department of Education and Training (November 2020) State school enrolments, 2016-20; <https://qed.qld.gov.au/our-publications/reports/statistics/Documents/enrolments-summary.pdf>.

As a result of our concerns relating to the overuse of suspensions and exclusions against children with disability, ATSILS became a joint-partner with Queensland Advocacy for Inclusion (QAI), Youth Advocacy Centre (YAC), PeakCare and Youth Affairs Network Qld (YANQ) in a targeted advocacy partnership called 'A Right to Learn' which calls for progressive reform to address the overuse of exclusionary discipline against children with disability. This campaign has been going for 3 years and counting.

Consistent with the long-standing advocacy of the Campaign, we are of the view that:

- students with disability should be able to access quality education at all stages of life, from childcare and school to tertiary education;
- every student deserves the right to learn in an inclusive environment;
- suspensions and exclusions to be used only as a last resort; and
- students with disability should be learning alongside their peers, not separated from them.

Accordingly, we recommend that:

- (a) section 22(2)(b) of the DDA be amended to explicitly cover 'suspension and exclusion' as well as expulsions;
- (b) consideration be given to protecting against all exclusionary practices for students with disability;
- (c) the DDA and associated Disability Standards for Education be amended to require education authorities to avoid the use of exclusionary discipline unless it is necessary as a last resort to avert serious harm to the student, other students, or staff.

With respect to exceptions or limits on when the exclusion is unlawful, we support DRC Recommendation 7.2, i.e. that exclusionary discipline on students with disability should be avoided unless exclusion is necessary as a last resort to avert the risk of serious harm to the student, other students or staff.

In our view, the revised DDA should state that before using exclusionary discipline on students with disability, educational authorities should be required to:

- (a) consult with the student with disability and their supports;
- (b) consider all available and appropriate alternative adjustments, measures or actions;
- (c) consider the impact of exclusionary discipline on the best interests of the student and their right to education; and

- (d) consider the student's disability, needs and age, and the particular effects of exclusionary discipline for young children.

Provisions should also be made to ensure:

- (a) a duty on principals to report the repeated use of exclusionary discipline involving a student with disability to an escalation point within educational authorities for independent case management;
- (b) a robust review or appeals process for with supports for students with disability and their families or carers;
- (c) students with disability have access to educational materials appropriate to their educational and behavioural needs while subject to exclusionary discipline;
- (d) students with disability are supported to re-engage in education post exclusion;
- (e) the creation and retention of documentation describing consultation and consideration; and
- (f) the student is provided with reasons for the decision to use exclusionary discipline.

In our view, the DDA should not seek to adopt a model relating to exclusionary discipline from any other states or territories. Instead, we recommend that DRC Recommendation 7.2 be implemented.

Part 4 of the Issues Paper – Improving access to justice

Services provided by police officers

As aforementioned, and as is well-documented, Aboriginal and Torres Strait Islander persons are significantly overrepresented in the numbers of people that have contact with, or that are at risk of being in contact with, the criminal justice system. Aboriginal and Torres Strait Islander persons are also overrepresented in the numbers of people with disability in Australia.

The criminalisation of persons with disability is something that was specifically reported upon in the DRC.

In our experience, we have observed time and time again concerning treatment in the way that police interact with persons with disability and, in particular, Aboriginal and Torres Strait Islander persons with disability. Disability discrimination in the context of policing is a significant issue and the uncertainty with respect to the definition of 'services' under the DDA in the context of policing has resulted in gap in legislative protection against this type of discrimination.

In addition:

- We have observed discriminatory practices in the way that persons with disability are treated in correctional facilities by correctional officers/staff - We offer the example of a prisoner who was medicated for anxiety prior to being in custody. Whilst in custody, his medication was changed without sufficient explanation/oversight and this resulted in behavioural issues leading to a custodial incident. This then had the flow-on effect of the prisoner not being able to undertake relevant rehabilitation programs to be able to then successfully apply for parole. Whilst this is just one example, discrimination with respect to appropriate healthcare in custody is a significant and ongoing issue;
- We have observed discriminatory practices in the way that persons with disability are treated by child protection officers/staff in their service provision - The current Queensland State government Commission of Inquiry into Child Safety has heard evidence on numerous occasions in relation to circumstances where child protection staff have removed children with disability from their parents/families and placing them in emergency care without sufficient briefing in the handover report to carers regarding the disability and needs of the child, resulting in the carer not being able to appropriately meet the child's needs.

We strongly recommend that the DDA is amended to make it clear that the definition of services in the context of policing includes any interactions between police and members of the public, including those that might be suspected of committing a crime. Furthermore, the protections in the DDA must also extend to all government agencies including in the context of corrections and child protection. We see this as an important step in addressing systemic discrimination which continues to persist.

We thank you for the opportunity to provide feedback on the Review.

Yours faithfully,

Shane Duffy
Chief Executive Officer