

People With Disabilities (WA) Inc.
individual & systemic advocacy



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Submission

Review of the Equal Opportunity Act 1984 (WA)

Law Reform Commission WA

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People With disabilities WA (PWdWA)

Since 1981 PWdWA has been the lead member-based disability advocacy organisation representing the rights, needs, and equity of all Western Australians with a physical, intellectual, neurological, psychosocial, or sensory disability via individual and systemic advocacy. We provide access to information, and independent individual and systemic advocacy with a focus on those who are most vulnerable.

PWdWA is run BY and FOR people with disabilities and, as such, strives to be the voice for all people with disabilities in Western Australia.

Introduction

People with Disabilities (WA) Inc. (PWdWA) would like to thank the Law Reform Commission WA for the opportunity to provide comment for their review into the Equal Opportunity Act 1984 WA (the Act). PWdWA receives both state and federal funding to provide advocacy around issues experienced by the WA community including discrimination. Our submission is compiled on the experiences of people with disability, their families, and carers. Our responses are also informed through PWdWA collaboration with other advocacy and disability organisations. We have provided case studies where appropriate to furnish our statements.

The scope of this review is comprehensive given the various Grounds for discrimination covered by the Act. As an organisation whose focus is providing advocacy for people with disabilities our submission is limited to the terms of reference specifically relating to disability, or where we have provided individual advocacy. We acknowledge that many people with disabilities will have experienced issues of discrimination relating to other Grounds under the Act, and in many cases these Grounds will intersect. As an organisation we do not however, have the capacity to explore that intersectionality in any depth in this submission. It is our hope that other submissions will provide this information.

Terms of Reference

Objects of the Act

PWdWA supports the amendment of the Act's objectives to explicitly include the identification and elimination of systemic causes of discrimination and to promote both formal and substantive equality. This would frame the Act as a more proactive piece of legislation and supports recommendations we make below which increase the scope of the Equal Opportunity Commission (EOC) to undertake investigations without the need for individual complaints.

We also support the introduction of an interpretive provision which states the Act must be interpreted in a way that is beneficial to the person which has the protected attribute, or combination of attributes, to the extent possible. We feel this interpretive provision would be useful in guiding decision about whether a reasonable adjustment constitutes an unjustifiable hardship.

Definition of Discrimination

PWdWA supports the introduction of a clear definition of discrimination into the Act, including clearly defining direct and indirect discrimination. A single definition covering all the various Grounds would help to simplify and streamline the Act. In defining indirect and direct discrimination, if the comparator test is to continue to be applied, the term *materially different* must be defined. We recommend adopting the approach taken by the Disability Discrimination Act (DDA) which specially states that the requirement for a reasonable adjustment for a person with a disability does not make circumstances materially different.¹ Additionally to ensure there is no ambiguity, the Act should clearly specify that it is not necessary for the discriminator to be aware of indirect discrimination.

Definition of Impairment

PWdWA recommends that the Act be amended to replace the term and definition of "Impairment" with the definition of disability found in the DDA 1992. The DDA definition is broader, and more in line with community understanding of disability. It

¹ Australian Government. (2018). *Disability Discrimination Act 1992*. Section 5.2

also extends to potential future disabilities which is not specifically mentioned in the current version of the Act.

Positive Duty to make Reasonable Adjustments

PWdWA supports the introduction of a positive duty to make a reasonable adjustment as a stand-alone obligation. We believe the Act in its current format does not provide sufficient protection to individuals with a disability requiring a reasonable adjustment. Reasonable adjustments are an important mechanism for ensuring substantive equality for people with disabilities in WA. Requiring reasonable adjustments is a proactive measure to eliminating discrimination and repositions the Act as a positive force for change.

We note that the Australian Human Rights Commission has recommended the DDA be amended to include a standalone positive duty to make reasonable adjustments.² We recommend that in including a positive duty to make reasonable adjustment the Commission consider an approach which does not require a causal link between the failure to make a reasonable adjustment and the aggrieved persons disability. This is because requiring a person to prove they are disadvantaged by the lack of reasonable adjustment and that the failure to provide the reasonable adjustment is because of a person's disability would be too onerous and contrary to the Convention on the Rights of Persons with Disabilities (CRPD).

To ensure this provision is easily understood and can be enforced, we recommend the Act to include a specific definition of the term “reasonable adjustment.” A clear definition is important to guide understanding and implementation of the term, and to ensure people with disabilities understand their rights. In defining “reasonable,” we propose that an adjustment should be considered reasonable unless it would impose an unjustifiable hardship. This recognises that some level of hardship to make an adjustment is acceptable. In addition to the circumstances outline in the Act currently, we believe there must also be regard to the proposed amended object of the Act and interpretive provisions. Where an adjustment is found to cause an unreasonable hardship there must also be an onus placed on the respondent to

² Australian Human Rights Commission. (25 July 2019). *Submission on the Committee on the Rights of Persons with Disabilities*. Section 4.1

consider alternative options to achieve an adjustment. As outlined below the onus of proof must be on the respondent to prove that an adjustment amounts to an unjustifiable hardship.

In addition to defining these terms in the Act, PWdWA recommends the development of in-practice guidance on how the terms reasonable adjustment and unjustifiable hardship should be interpreted. This should form part of a suite of community education tools to increase awareness of and compliance to the Act.

Onus of Proof

PWdWA recommend that the Onus of Proof be shifted from the complainant/aggrieved person to the respondent/alleged discriminator. We note that the Fair Work Act has provisions under which employers bear the burden of proof, not employees. We believe that a reverse burden of proof onto the respondent/alleged discriminator is justifiable given:

- Power imbalances between complainants and respondents
- The difficulty in accessing evidence to prove a claim, whereas respondents will have access to relevant information and evidence
- The respondent is in the best position to explain the reason for their decision/action/requirement etc.
- People with disabilities may be vulnerable; they may lack the ability and/or capacity to articulate their claim or seek proof. This includes people with intellectual and cognitive disabilities, and those whose mental health impacts on their daily function.

We note that a considerable proportion of complaints received by EOC in 2019-20 were withdrawn based on the inability of the complaint to provide evidence. We posit that the current burden of proof arrangements, and the difficulty of proving discrimination has occurred, also deters people from making a complaint under the Act. Reversing the Onus of Proof will mean that people with disabilities will find it easier to raise a complaint or have someone raise a complaint on their behalf where the particulars of a matter cannot be determined e.g., where a person has an impairment which impacts on their ability to recall exact details.

Assistance or therapeutic animals

PWdWA support the extension of the Act to include any assistance animal certified by an *accredited* medical practitioner or regulation. We note Section 66A(4) specifically mentions blind, deaf, partially blind, and partially deaf persons as the aggrieved persons and that these qualifiers would need to be removed in broadening the scope of the Act. PWdWA have supported several individuals with a range of disabilities applying for funding through the NDIS for an assistance animal which does not fall into the guide or hearing dog category. We believe that extending the terminology will ensure that the Act is inclusive of the diverse range of assistance animals needs in the community.

The consultation refers to both assistance and therapeutic animals. PWdWA would suggest the terminology “assistance animal” be adopted. The WA government does not use the term “therapeutic” or “therapy” when referring to animals which can be accredited to support a person with a disability or medical condition. When referring to “Therapy Dogs” the WA Government specifically refers to:

“...where a dog is brought to a patient (or vice versa) for the purpose of allowing the patient to pet or spend time with the dog.”³

They distinguish therapy dogs from other assistance animals on the basis that they are not required to accompany a handler in their day-to-day activities. Additionally, the DDA 1992 specifically uses the terminology “assistance” rather than “therapeutic”.

We believe adopting the term “assistance animal” rather than “therapeutic animal” will bring the legislation in line with the accepted terminology in the community and minimise any confusion that might arise with different terminology.

Unpaid or Volunteer Work

PWdWA supports the inclusion of unpaid or volunteer workers in the definition of employees, and under the protections from sexual harassment. PWdWA is aware of cases where unpaid students on placements have been denied reasonable

³ Department of Local Government, Sport and Cultural Industries. Applying for assistance dog approval.

adjustments by the placement organisation which would enable them to complete their placements. This has profound consequences to their grades, enrolment, and ability to complete their studies. Additionally, we see no reason an unpaid worker and volunteer should not have the same protection from discrimination as a waged employee.

Case Study: Mary

Mary was studying a university degree that required a placement to be completed. Mary had a Learning Plan in place and had let her placement coordinator know that due to her disability she would require reasonable adjustments on her placement including access to a wheelchair when experiencing a flair up in her condition and a backpack to carry her placement study materials. While on placement she was denied access to these reasonable adjustments. As a result, she could not continue the placement without putting her health at risk which led to her failing her unit.

In this instance although the university may have a duty not to discriminate in relation to making a placement, the party discriminating against Mary was the organisation with whom she was placed. Under the current legislation Mary could not pursue a complaint against the placement organisation and the education institution argued that they were not responsible for the conduct of the placement organisation.

Employment Status

PWdWA notes that discrimination based on employment status may be linked to the Grounds of Impairment where that Impairment prevents or limits a person from working. There can be prejudice and stereotypes attached to the receipt of Centrelink payments such as Job Keeper and Disability Support Pension (DSP). We also know that the requirements for working while in receipt of the DSP can be seen to be prohibitive to employers.

If the introduction of these new Grounds would make it easier for person with a disability to raise a complaint about discrimination based on their status as a DSP recipient, then we are supportive of the Ground being introduced.

Irrelevant Criminal Status

People with disabilities are over-represented in all stages of the criminal justice system. It has been PWdWA's experience those behaviours associated with a person's disability, often the result of inadequate or inappropriate supports, can be linked to offending behaviour. This in turn can have consequences on their ability to access services, supports and community as they may be labelled difficult, or dangerous. These labels can persist even when appropriate supports and services are in place and there is minimal risk of re-offending. This is on top of the additional barriers that persons with a criminal record face in participating in community. It is not clear whether the Grounds of Impairment would protect individuals in these circumstances. We also note that introducing this Grounds would bring WA in line with Commonwealth. Therefore, we are supportive of this Grounds being introduced.

Services

PWdWA supports the definition of services to be amended to include state government agencies. We have supported several individuals who have raised complaints about State funded services acting in a discriminatory manor. This includes the failure to make reasonable adjustments such as taking complaints over the phone for persons who have difficulty writing. While complaints can be made to the State Ombudsman, respondents cannot be forced to act, and there is no possibility of compensation through this mechanism. We believe it is entirely appropriate for state government authorities to be held accountable for discriminatory behaviour.

Education

PWdWA supports the extension of the area of education to include the evaluation and selection of student applications. In PWdWA's experience a student's disability can be directly linked to decisions about whether to grant a student admission to primary and secondary schools. Additionally, we are aware of students being denied access to tertiary studies on the grounds of their disability, with the education institution claiming their disability will prevent the student from being able to meet course requirements. With advocacy, people have been able to be successfully enrolled, but there is limited ability to have a formal complaint acted on if the

education institution will not reverse their decision.

State Administrative Tribunal (SAT)

We support the amendment of the Act to enlarge SAT's powers to enforce the obligations of parties during investigation and conciliation. Agreements that are signed in good faith but are not acted upon by respondents not only waste time and resources but prolong the experience of discrimination for the complainant. It can be a long and arduous process for people with disabilities to make discrimination complaints. The lack of easily enforced outcomes just adds to this stress and people may just give up rather than face a further protracted battle. Where agreements have been reached through conciliation these should be lodged/registered with SAT, and the Act should provide SAT with the power to enforce agreements if they have been breached e.g., a party fails to act in accordance with an agreement.

Investigations and Support with Complaints

PWdWA is supportive of the Act adopting the NSW approach to investigations and complaints handling. We note specifically the recognition of the right for legal guardians, agents, and representative bodies to lodge a complaint would be particularly beneficial to people with disability, who may require support, or in limited circumstances may not have the capacity to lodge a complaint themselves. This should extend to the ability for a disability advocacy organisation to lodge a complaint without naming a specific individual as often the person may not wish to be specifically identified but the breach is serious and needs to be addressed.

We also support the expansion of the EOC role to allow greater power to investigate systemic issues of discrimination and instigate legal action. This would include the ability for the EOC to investigate without the need for an individual complaint to be made. Similarly, to the above, people with disabilities may lack the confidence and resources to make a complaint. We know that relying on individual complaints to enforce these types of legislation does not work to create systemic change. If the Act is to act more broadly in eliminating discrimination in WA, the EOC must be able to proactively pursue breaches.

In making these change to the Act, PWdWA notes that adequate resources must be provided to support these changes. The EOC must be resourced to undertake this function. Similarly, there must be funded support in the community to assist persons to lodge complaints. We note that currently the EOC refer people with disabilities externally to seek legal advice about where their issue constitutes discrimination, and for support to lodge a complaint. There are currently two legal services in Western Australia funded to provide specific disability discrimination advice and they are consistently at capacity. We also note that disability discrimination is the largest proportion of complaints received by the EOC. Although not within the scope of the Commissions consultation, we highly recommend the WA Government commit additional resources to these community legal programs to ensure there is adequate support for people with disabilities to make a complaint under the Act.

Compensation Cap

PWdWA supports the removal of a cap on compensation amounts to ensure people with disabilities are compensated for the full amount of any loss suffered due to unlawful discrimination. We acknowledge this would need to be managed by introducing guidelines for appropriate payment amounts.

Management Plans

PWdWA supports amendments which allows the EOC to monitor and support enforcement of management plans. Without effective monitoring, and penalties for breaches to ensure implementation, management plans are simply pieces of paper with no real influence on policy and practice.

Lodging Complaints and Timeframes

PWdWA recommends extending the timeframe for lodging a complaint to 2 years, with the ability for the EOC to accept applications after 2 years where there is good cause. We support many people who try to resolve issues directly with the respondent and these processes can be long and drawn out. We also note that people with disabilities can be reluctant to make complaints, in many cases due to historical experiences of violence, abuse and neglect, and being disbelieved. We

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encourage the EOC to continue to consider a person's disability, and the impact this has on their ability to raise a complaint, when exercising discretion to accept a complaint out of time.

We also recommend the that the Act allow for complaints to be lodged verbally, noting that people with disabilities may have limited ability to make a written complaint.

Submission is supported and endorsed by:

