



# **Vision Australia Submission**

## **Review of Queensland's Anti-Discrimination Act**

Submission to: Queensland Human Rights Commission

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Submission approved by: Chris Edwards, Manager Government Relations and Advocacy, NDIS and Aged Care, Vision Australia

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## Introduction

Vision Australia welcomes the opportunity to provide a submission to the Queensland Human Rights Commission (the Commission), regarding the review of the *Anti-Discrimination Act 1991 (Qld)* (the ADA). Vision Australia recognizes the need for reform of the ADA to align it with corresponding legislation, such as the *Equal Opportunity Act 2010 (Vic)* (the Victorian legislation) and the *Disability Discrimination Act 1992 (Cth)* (the Commonwealth legislation). We advocate for improvements that will strengthen and enhance protections for people who are blind or have low vision. Key reforms that are essential for our community include the need to remove the proportionality test from the definition of indirect discrimination, and the introduction of a positive duty to make reasonable adjustments for people with a disability across all areas of activity.

At Vision Australia we advocate for individuals who have experienced discrimination, but we also seek to address systemic discrimination issues. We support measures that will expand the capacity of the Commission to address systemic barriers, and enable action to effect systemic change.

## Summary of Submission

This submission provides our response to the Commission's Discussion Paper on the review of the ADA dated November 2021. We have answered those questions in the Discussion Paper that are relevant to the work of Vision Australia, to the blindness and low vision community, and to the disability community more generally.

## Meaning of Discrimination

### Test for direct discrimination

At present, the test for direct discrimination is whether a person with a protected attribute has been treated less favourably than a person without the attribute, in the same or similar circumstances. This test requires a comparison to be made, and the construction of a hypothetical person for this purpose. In circumstances where disability is a factor, it can be challenging to construct a suitable comparator, and often an unfair and unreasonable result will follow. For this reason, we support a move towards the unfavourable treatment approach as it applies in the Victorian legislation and the ACT Discrimination Act 1991. The benefit of this approach is that the impact of the treatment on the person who is making the complaint is the only consideration that is required.

### Test for indirect discrimination

At present, subsection 11(b) of the ADA imposes a proportionality test, which puts the onus on a person who is blind or has low vision to determine whether a higher proportion of people without a disability could comply with the term, test or requirement. For an individual complainant, it can be difficult to identify this group of hypothetical people, then prove that they are proportionally worse off than the comparative group. This places an extra burden on a complainant to make out their prima facie case. Further, the statistical information to prove the proportionate access between groups may be unavailable or hard to source.

On this basis, we would seek an amendment to the definition of indirect discrimination to mirror that of the Victorian legislation. That legislation only requires consideration of whether a term has the effect of unreasonably disadvantaging a person with a disability.

### A unified test for both direct and indirect discrimination

Whilst the ADA currently distinguishes between direct and indirect discrimination, it is common that a single incident of discrimination can constitute both forms of discrimination. For people who are blind or have low vision and who are self-represented, it can be difficult to identify what case should be pursued.

We support the adoption of a unified test, as it applies in Canada and South Africa, which defines discrimination in such a way that encompasses both direct and indirect discrimination as we currently know it.

## Unjustifiable hardship

The unjustifiable hardship measure in the ADA serves to provide a defence or excuse that can be argued in response to a complaint of discrimination. Whilst we submit that this concept should be retained, we consider that large businesses, corporations and government should only be able to argue unjustifiable hardship in certain narrow circumstances. The capacity of these organisations, both financially and in terms of human resourcing, should limit access to this exception. Unjustifiable hardship should remain available to small businesses and organisations, who may legitimately be constrained by financial or human resourcing issues.

## Reasonable adjustments

It is imperative that a positive duty to make reasonable adjustments be adopted in the ADA. People who are blind or have low vision often require reasonable adjustments in order for them to have equal access to the community. The lack of a positive duty in the ADA has been a barrier to making discrimination complaints under this legislation on the basis of impairment. People who are facing a reasonable adjustment issue (such as the provision of screen reading software in a workplace, or the provision of educational materials in an accessible format) may instead need to rely on the Commonwealth legislation to afford them protection.

Our preferred approach is for the ADA to follow the Victorian legislation, which has a standalone provision requiring reasonable adjustments for people with a disability. However, rather than this duty being limited to the areas of employment, education and the provision of goods and services (as is the case with the Victorian legislation), the standalone provision must apply to all areas of activity covered under the legislation. Corresponding legislation in the Northern Territory and Canada provide for reasonable adjustments for all attributes in all areas, and the ADA must mirror this approach in order to achieve substantive equality.

## Discrimination on Combined Grounds

We support a complainant being able to lodge a complaint on the basis of one or more protected attributes. This would provide greater safeguards for people who are blind or have low vision who may be experiencing discrimination due to a combination of attributes, such as blindness and pregnancy or blindness and race.

## Burden of Proof

We endorse the approach that the burden of proving a prima facie case, in the first instance, should rest with the person making the complaint. However, we submit that the onus should then shift to the respondent to prove that the conduct was not unlawful, by relying on reasonableness, or establishing that an exemption, defence or excuse applies.

However, in the area of pre-employment, when a person who is blind or has low vision applies for a position and is not selected, it is difficult or often impossible for that person to prove that this was due to discrimination, based on impairment. Because the person does not have objective information regarding the recruitment process, that person cannot prove a prima facie case of discrimination. The recruitment and selection information is only available to the potential employer. In this case, there should be a presumption of discrimination, and the burden of proof should be on the potential employer to provide

evidence that the decision to reject the person's job application was not on the grounds of the person's impairment, and was not unlawful discrimination.

## Dispute Resolution

The ADA currently has a two-stage enforcement model in terms of discrimination complaints. A complainant is first required to attend the Commission for compulsory conciliation, with the option for the matter to be subsequently referred on to the Queensland Administrative Appeals Tribunal (QCAT). While this gatekeeping model should be retained as an option, one drawback of the model is that there are often delays in the conciliation process. This can make the process unnecessarily elongated and stressful for the complainant, and potentially not viewed by the respondent as an immediate and imminent legal risk. Another drawback is the lack of public exposure at the initial stage. As the conciliation process and resulting settlement agreements are confidential, this model does not promote community awareness of discrimination issues, nor provide opportunities for systemic change.

To overcome these issues, we support there being an additional option made available to the complainant, that is, to be able to bypass conciliation at the Commission and proceed directly to QCAT. As the QCAT process also involves conciliation prior to a hearing, the option to potentially settle a matter is not circumvented.

A complainant should also have the option of applying directly to the Supreme Court in limited circumstances. If a leave process was implemented for this purpose (similar to that which applies in the High Court of Australia), the Supreme Court would have the ability to decide on which matters were appropriate to be heard in that jurisdiction. We recommend that the circumstances to be considered in assessing an application for leave to apply to the Supreme Court include that the claim: (a) is of significant public interest; (b) is systemic in nature; and (c) is time critical.

## Terminology

We encourage a move away from the terminology of 'complaint' and 'complainant' as it is currently used in the ADA. We are aware that this terminology has deterred people who are blind or have low vision from lodging claims of discrimination in the past, due to negative connotations associated with this wording. It is preferred that more neutral language be adopted, such as "dispute parties", "lodging a dispute", and "applicant" or "respondent" to a dispute.

## Written Complaints

At present complaints to the Commission must be in writing. We encourage the expansion of this method to include audio and video applications. This would enable people who are blind or have low vision with co-existing barriers (such as poor literacy and a non-English speaking background) to lodge complaints in a way that is accessible, and avoid the non-lodgement of complaints due to language and written communication difficulties.

For people who require assistance to formulate complaints, we submit that it would be preferable for the Commission to refer those people to independent bodies for this purpose. There is a risk that the Commission providing direct assistance in the form of transcribing a complaint, while also facilitating the conciliation process, could present conflict of interest and impartiality issues.

## Efficiency and Flexibility

We support an increase in the capacity of the Commission to tailor the complaint process to the needs of the parties and the nature of the dispute, including matters of priority and urgency.

In urgent cases (as may occur in areas of employment or education), if the Commission's view is that a shuttle negotiation at an early stage will produce a better outcome than a 4-6 week wait for a formal conciliation conference, then they should have the power to pursue that course. The ADA should be amended to align with the *Human Rights Act 2019 (Qld)* which allows the Commission to exercise discretionary power in dispute resolution.

## Time limits

The one-year time limit that currently applies to the lodgement of a disability complaint is appropriate. However, there needs to be provision for an extension of this time limit for children and people with impaired decision-making capacity in order to make the process accessible to people with differing needs. Whilst the Commission has discretion to consider such aspects when assessing a complaint that is outside the time limit, it is preferable for special provisions exempting these groups from the one-year time limit to be explicitly stated.

## Representative and Organization Complaints

We recognize the importance of representative complaints, and submit that this form of complaint should be retained in the ADA.

We also support representative organizations being able to make a complaint on behalf of an affected person/s. Representative organizations should be able to take on matters of genuine concern that an individual or individuals may not otherwise be able to pursue because they lack the resources, capacity or financial ability to do so. We suggest a similar provision to that which exists in the Victorian legislation. The requirement for a representative organization to have consent, and a sufficient interest in the application are appropriate safeguards in relation to these types of applications. Further, if a body is acting with the consent of an affected person/s they should be able to participate in all aspects of the complaint process, including the conciliation process and tribunal proceedings.

## Objectives of the Act

We support the inclusion of an objects clause in the ADA, and for it to cover those matters outlined on page 68 of the Discussion Paper.

## Special Measures

We support the concept of special measures being retained in the ADA, but do not have a particular view on whether these measures should be framed as an exemption or incorporated within the definition of discrimination.

## Positive Duties

We support the introduction of a positive duty in the ADA. In the context of disability, we submit that there be a positive duty to implement reasonable adjustments across all areas of activity. We have advocated for many years that a purely complaint driven process does not achieve the best outcomes in the area of disability discrimination. Individuals and organizations are not motivated to adopt inclusive practices merely by the possibility of a complaint against them. It is necessary to balance this with positive obligations so as to encourage changed behaviours, and to address areas of systemic discrimination. The Commission should have powers to enforce compliance with any positive duties incorporated into the ADA.

A broad approach has already been adopted in the Victorian legislation, which includes a list of factors to determine the reasonableness and proportionality of positive duties. These factors give some flexibility based on the size, resources and nature of a person's business or operation, and appear sensible in balancing the impact on businesses of the introduction of any positive obligations.

It is also important that other legislation (such as Workplace Health and Safety legislation) not discourage the inclusion of positive obligations within the ADA. Whilst there may be the perception of some overlap between different legislation, positive duties in the ADA (whether in the area of employment or otherwise) are necessary to maintain focus on the elimination of discrimination, rather than being bundled with other considerations.

## Role of the Commission

We support the Commission having the full suite of powers set out in the Discussion Paper (that is, in the areas of education and persuasion, co-regulation, and addressing non-compliance). In our view, the increased regulatory capacity of the Commission would be a positive step towards raising the status of the body, as well as awareness of the seriousness of eliminating discrimination across all areas of society.

## Role of the Tribunal

Whilst we do not have any comment on the specific questions about tribunals, and tribunal members, we do want to advance the need for tribunal members to have disability awareness and disability training. This is necessary to ensure that appropriate adjustments are put in place for people with a disability throughout the tribunal process, and that representations by the disability community are properly heard and understood.

## Non-legislative measures

We support each of the non-legislative measures set out on page 91 of the Discussion Paper.

## Attributes

### Impairment

We submit that the ADA should be amended to replace the attribute of 'impairment' with the attribute of 'disability'. This would bring it in line with the Commonwealth legislation, and with legislation in other jurisdictions, such as New South Wales and Victoria.

### Discrimination based on care, assistance animals or disability aids

We submit that the ADA should separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal or disability aid. This is in keeping with the provisions of the Commonwealth legislation, and therefore would not impose any additional burden on organizations. Further, the number of complaints that continue to be received around dog guide refusal emphasizes the need for this to be recognized as a distinct category of discrimination.

### Employment activity

It is vital that the ADA continues to cover discrimination on the ground of employment activity, in addition to the protection of employee rights under the Fair Work Act. The purpose of these pieces of legislation is entirely different, despite a potential overlap in certain areas. With the processes in place under the Fair Work Act, there is unlikely to be the same understanding or awareness of disability issues as would exist with the processes in place under the ADA. However, there should not be contradictory provisions across this legislation.

## Areas of Activity

### Not for profit associations

We submit that not for profit associations should be included as goods and services providers for the purpose of the ADA. People with disability participate across all facets of the community, including with many not for profit associations. It is non-sensical that these associations are not accountable under the ADA in the same way as other organizations, particularly given that many are sizeable bodies, and deal with various categories of people with protected attributes. For smaller associations, the unjustifiable hardship provisions would be available as a balancing factor.

### Sport

Sport should be included as a separate area of activity under the ADA. Access to sporting opportunities is important for people with a disability, both in terms of community participation, and health and wellbeing. The Victorian model (which also expands the definition of sport beyond traditional categories) would be an appropriate model to adopt. Whilst there may be some overlap with other areas of activity in the ADA, we do not consider it to be substantial. Having sport as a separate area of activity would also make it easier for individuals to bring a complaint that is a sporting complaint, rather than having to fit it within another category that may not be as suitable to the nature of the issue.

### Additional areas of activity

We also recommend the following as additional areas of activity for inclusion in the ADA: (a) Specific reference to digital services, to recognize the increasing provision of services through digital means; and (b) The expansion of 'goods and services' to 'goods, services and facilities, to recognize that there is a difference between providing a good or a service, and allowing the use of a facility. This is also consistent with the terminology in the Commonwealth legislation.

## About Vision Australia

Vision Australia is the largest national provider of services to people who are blind or have low vision in Australia. We are formed through the merger of several of Australia's most respected and experienced blindness and low vision agencies, celebrating our 150th year of operation in 2017.

Our vision is that people who are blind or have low vision will increasingly be able to choose to participate fully in every facet of community life. To help realise this goal, we provide high-quality services to the community of people who are blind, have low vision or have a print disability, and their families.

Vision Australia service delivery areas include:

- Registered provider of specialist supports for the NDIS and My Aged Care Aids and Equipment;
- Assistive/Adaptive Technology training and support;
- Seeing Eye Dogs;
- National library services, early childhood and education services and Felix Library for 0-7 year olds;
- Employment services;
- Production of alternate formats;
- Vision Australia Radio network including a national partnership with Radio for the Print Handicapped;
- NSW Spectacles Program; and
- Government advocacy and engagement.

We work collaboratively with governments, businesses and the community to eliminate the barriers our clients face in making life choices and including fully exercising their rights as Australian citizens.

Vision Australia has unrivalled knowledge and experience through constant interaction with clients and their families, of whom we provide services to more than 26,000 people each year, and also through the direct involvement of people who are blind or have low vision at all levels of our organisation.

Vision Australia is well placed to advise governments, business and the community on challenges faced by people who are blind or have low vision as well as they support they require to fully participating in community life.

We have a vibrant Client Reference Group, comprising of people with lived experience who are representing the voice and needs of clients of our organisation to the board and management.

Vision Australia is also a significant employer of people who are blind or have low vision, with 15% of total staff having vision impairment. Vision Australia also has a Memorandum of Understanding with, and provides funds to, Blind Citizens Australia, to strengthen the voice of the blind community.