

Aboriginal Legal Service of Western Australia Limited



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

The Aboriginal Legal Service of Western Australia Limited acknowledges the Traditional Custodians of the land on which we all live and work, and pay our respects to their elders past, present and emerging. We acknowledge and respect the continuing culture and contributions that our First Nations Peoples make to the life of this state and country.

About the Aboriginal Legal Service of Western Australia Ltd

ALSWA is a community-based organisation which was established in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander people and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally matched and quality legal services to Aboriginal people throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal people as the First Peoples of Australia;
- Ensure that government and Aboriginal people address the underlying issues that contribute to disadvantage for Aboriginal people on all social indicators, and implement the relevant recommendations from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal people as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform, as well as providing a number of important support services.

ALSWA is governed by a Board of Directors who are all Aboriginal. ALSWA is company limited by guarantee registered with the Australian Securities and Investment Commission and a public benevolent institution registered with the Australian Charities and Not-for-Profits Commission.

ALSWA provides legal advice and representation to Aboriginal people in a wide range of practice areas including criminal law, family law, child protection, civil law and human rights law. Our legal services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth. ALSWA also provides a number of additional services to support clients, including the Custody Notification Service, the Custody Wellbeing Service, the Bail Support Service and Prison In-Reach Program, the Work and Development Permit Service, the Youth Engagement Service and the Old Ways New Ways program.

Terms of Reference

The Australian Government are consulting on the implementation of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**'the Disability Royal Commission'**) recommendations with respect to the *Disability Discrimination Act 1992* (Cth) (**'the Act'**), and other possible amendments to modernise and strengthen the Act.

This review does not question whether the Act should be improved but rather seeks input on the best way to amend the Act to improve the experiences of people with disability, and people with duties under the Act, alike.

Scope of ALSWA's Submission

This submission is informed by ALSWA's experience in representing Aboriginal and Torres Strait Islander people throughout the state of Western Australia. As such, these submissions will not address every aspect of this review but are limited to those that relate to our client's experiences or our experiences representing clients.

Any reference in this submission to Aboriginal people should be taken as a reference to Aboriginal and Torres Strait Islander people.

ALSWA recognises the importance of using ability-focused language, however we have used the term 'disability' in these submissions as it is the term currently used in the legislation.

Introduction

Disability is more present in Aboriginal communities than in the non-Aboriginal communities.¹

The Disability Royal Commission found that:

- Aboriginal people with disability are uniquely marginalised; and
- The experiences of Aboriginal people with disability cannot be separated from the ongoing impacts of colonisation, intergenerational trauma and racism experienced by Aboriginal people generally.²

ALSWA's clients contact us regularly with concerns about the way they are treated by both Commonwealth and state government departments and public agencies.

¹ *Royal Commission into the Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, Volume 9, First Nations people with disability, September 2023) 3 ('Disability Royal Commission').

² Disability Royal Commission, Volume 9, First Nations people with disability, 3.

Aboriginal people have higher rates of interactions with government systems:

1. Aboriginal people are overrepresented in the criminal justice system;³
2. Aboriginal children are more likely to be in out of home care than non-Aboriginal children;⁴
3. Aboriginal people experience a higher rate of mental health issues than non-Aboriginal people and use some mental health services at higher rates than non-Aboriginal people;⁵
4. Aboriginal people have experienced much higher rates of homelessness and have been overrepresented among clients seeking homelessness and social housing services than non-Aboriginal people;⁶
5. Aboriginal people are over-represented in being recipients of certain types of income support such as Youth Allowance, Parenting Payment Single and Jobseeker Payment.⁷

Similarly, people with disability are also overrepresented in many government systems:

1. If renting, people with disability are more likely to be living in public housing than people without disability.⁸
2. Government pension or allowance was the *main* source of income for 43% of people with disability, and 69% with severe or profound disability, compared to 7.9% for people without disability.⁹
3. They are more likely to have poor health and mental health.¹⁰
4. People with disability are overrepresented in the criminal justice system.¹¹

Because of this overrepresentation in government systems, it is crucial that anti-discrimination

³ Productivity Commission, Closing the Gap dashboard, table CtG10A.1, accessed at [Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system - Dashboard | Closing the Gap Information Repository - Productivity Commission](#) on 14 October 2025.

⁴ Productivity Commission, Closing the Gap dashboard, table CtG12A.1, accessed at [Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system - Dashboard | Closing the Gap Information Repository - Productivity Commission](#) on 14 October 2025.

⁵ Australian Institute of Health and Welfare & National Indigenous Australians Agency, [Measure 3.10 Access to mental health services, AIHW, Australian Government](#), (2024) accessed on 14 October 2025.

⁶ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness* (2019) p. v.

⁷ Australian Institute of Health and Welfare & National Indigenous Australians Agency, [Income and finance of First Nations people](#) (2023) accessed on 14 October 2025.

⁸ Australian Institute of Health and Welfare, *People with disability in Australia* (23 April 2024) accessed 14 October 2025 at [People with disability in Australia, Summary - Australian Institute of Health and Welfare](#).

⁹ Australian Institute of Health and Welfare, *People with disability in Australia* (23 April 2024) accessed 14 October 2025 at [People with disability in Australia, Summary - Australian Institute of Health and Welfare](#).

¹⁰ Australian Institute of Health and Welfare, *People with disability in Australia* (23 April 2024) accessed 14 October 2025 at [People with disability in Australia, Summary - Australian Institute of Health and Welfare](#).

¹¹ The Hopkins Centre, *Assessing the Disability Needs of Indigenous Prisoners* (Final Summary Report, June 2021) 8.

legislation protects Aboriginal people with disabilities from disability discrimination in this area of life.

Recommendation 8.19 – Services provided by police officers

How could the Disability Discrimination Act be amended to ensure that it covers policing?

Police

ALSWA agrees with the comments made by the Disability Royal Commission that police should be held accountable if they discriminate against a person, regardless of the nature of the person's engagement with the police.¹² Given the overrepresentation of Aboriginal people in interactions with police, denying Aboriginal people the ability to bring discrimination complaints arising from their treatment by police only serves to further perpetuate the oppression of Aboriginal people. To continue to exclude police from liability for disability discrimination would be inconsistent with the purpose of anti-discrimination legislation, being to eliminate, so far as possible, discrimination, and promote equality in the community.

In addition, the ability to make a complaint against police should not depend on the status of the individual making the complaint, i.e. it matters not whether the person discriminated against is a witness, complainant, suspect, accused, offender or an individual in police custody, but not under arrest.

The Disability Royal Commission recommended that the definition of 'services' in section 4 of the Act should be amended to expressly include 'services provided by police officers in the course of performing policing duties and powers'.¹³ It is imperative that 'services provided by police officers' should include actions by police when exercising the functions and powers of their office. This would include the exercise of arrest powers along with, for example, actions undertaken during the investigation of alleged offending and when an individual is detained at a police station.

Prison officers, youth custodial officers and officials employed with other public authorities

Prison officers, youth custodial officers and officials from other public authorities should also not be exempt from being held accountable under discrimination legislation.

¹² Disability Royal Commission, 'Criminal Justice and people with disability', *Final Report*, 2023, Volume 8, p 276.

¹³ *Ibid*, recommendation 8.19.

Again, it is crucial that anti-discrimination legislation is not confined to discrimination experienced solely involving the provision of a 'service', i.e. the legislation must cover discrimination experienced during all interactions with employees of a public authorities performing the powers and functions of their offices.

This is an important issue in relation to the discrimination of prisoners and detainees in juvenile detention with a disability. It is well documented that individuals with an intellectual disability, hearing impairment, mental illness, acquired brain injury and other cognitive impairments are overrepresented in the Australian criminal justice system.¹⁴ In 2011, an audit of Victoria's prisons found that 42% of male prisoners and 33% of female prisoners had been diagnosed with an Acquired Brain Injury.¹⁵ Similarly, a Telethon Institute study from 2015 to 2016 found that more than one third of the young people at Western Australia's Banksia Hill Detention Centre, had Foetal Alcohol Spectrum Disorder and 90% had a significant neurodevelopmental impairment.¹⁶

It is also well established that prisoners and detainees in juvenile detention with disabilities experience victimisation and discrimination, along with an increased risk of social isolation, vulnerability, coercion and difficulties with coping with prison and juvenile detention.¹⁷ This is compounded by a lack of appropriate disability awareness by prison staff.¹⁸ For example, in a recent report, the WA Inspector of Custodial Services found that prisoners with intellectual disabilities experienced disadvantage in prisons¹⁹, with the following issues identified:

- the limited dedicated living units in WA prisons for adult prisoners with intellectual disability or other complex needs;²⁰
- both adult and youth behaviour management policies failing to provide clarity and guidance about managing cognitive impairments and intellectual disabilities;²¹ and

¹⁴ The Hopkins Centre, *Assessing the Disability Needs of Indigenous Prisoners* (Final Summary Report, June 2021) 8.

¹⁵ Brain Injury Australia, *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System* (July 2011) 6.

¹⁶ Carol Bower et al, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia, (2018) *BMJ Open*.

¹⁷ Caroline Doyle, et al, 'There's not just a gap, there's a chasm' *The boundaries between Australia disability services and prisons* (June 2022) citing Kathy Ellem, *Life stories of ex-prisoners with intellectual disability in Queensland* (2010, Doctoral thesis, The University of Queensland) <<https://espace.library.uq.edu.au/view/UQ:207877>>.

¹⁸ Caroline Doyle, Shannon Dodd, Helen Dickinson, Sophie Yates and Fiona Buick, 'There's not just a gap, there's a chasm' *The boundaries between Australia disability services and prisons* (June 2022) citing Kathy Ellem, *Supporting people with cognitive disabilities in contact with the criminal justice system: the importance of relationship-based practice* (2019 6(2) *Research and Practice in Intellectual and Developmental Disabilities*) 164-177.

¹⁹ Office of the Inspector of Custodial Services, *People in custody with an intellectual disability* (July 2024).

²⁰ Office of the Inspector of Custodial Services, *People in custody with an intellectual disability* (July 2024) 13.

²¹ Office of the Inspector of Custodial Services, *People in custody with an intellectual disability* (July 2024) 14.

- the inadequacy of disability awareness training for custodial staff.²²

Courts have found anti-discrimination legislation does not apply in circumstances where prison officers are engaged in performing functions over which prisoners have no control, such as providing food or medical care.²³ As such, it is crucial that there is an additional area of life to expressly cover the actions and functions of employees of public authorities, including prisons and juvenile detention centres.

Below are some case studies, which provide examples of the direct and indirect discrimination experienced by ALSWA clients in prison and juvenile detention. For several of these clients, ALSWA pursued complaints to internal and external agencies but did not make complaints under anti-discrimination legislation.

A case study

A was in prison, used a wheelchair and had several psychosocial disabilities. A instructed ALSWA that there were no ramps to enter and exit his prison unit, forcing him to stay inside the unit for lengthy periods each day. As to his mental health, A said that he was not getting any support: 'I've asked a few times, then hit a dead end. I can't get a shrink to talk to, and I'm not given a reason why. So I've just given up on it.'

J case study

ALSWA assisted a young person with a complaint about the conditions he was experiencing in juvenile detention. J was diagnosed with attention deficit hyperactivity disorder and foetal alcohol spectrum disorder and was spending a lot of time confined to his cell. J instructed that he was generally allowed out of his cell for only one hour during which time detainees would engage in education. J struggled with concentrating for long periods while undertaking education. J was told by the officers that he had two options: to sit down and do the schoolwork or to go back to his cell. As J needed to move around every 4 minutes or so, he was sent back to his cell.

D case study

D was diagnosed with foetal alcohol spectrum disorder and was in juvenile detention. D's complaint focussed on the fact that staff at the detention centre did not properly understand the issues D faced given his diagnosis and the adverse impact of lengthy 'lockdowns' on D's mental health. Prior to the commencement of 'lockdowns', the detention centre had offered D an informal 'opt out' procedure for him, to help manage his mental health. If D felt overwhelmed,

Office of the Inspector of Custodial Services, *People in custody with an intellectual disability* (July 2024) 15.

²³ *Rainsford v Victoria* [2007] FCA 1059.

he could ask the officers to 'opt out' and go and sit in a peaceful area to calm down. After the rolling 'lockdowns' commenced, the 'opt outs' ceased and staff appeared to have no meaningful appreciation of the impact on D's mental health of being confined to his cell for very lengthy periods of time, without support.

B case study

B was diagnosed with an acquired brain injury, autism spectrum disorder and epilepsy, resulting in him having only approximately 5% frontal lobe brain function. B was on remand in prison. His mother disclosed to the prison that B had expressed suicidal intent during a visit. Prison officers placed B in an observation cell, strip searched him and seized his clothes. He was given a rip-proof jacket to wear.

B's cell was very cold. It was also illuminated by a bright light. The cold and light triggered B's epilepsy.

B took the jacket off and placed it over his head to block out the bright light. B also covered a CCTV camera in his cell with toilet paper.

After B engaged in this conduct, several officers rushed into B's cell and removed the mattress and pillow from his cell. B was forced to lie on the concrete floor of his cell when trying to sleep. He remained very cold. B became worried that he might have a seizure and began banging his fists against his cell. B also tried to call the emergency cell call button, but it did not work.

The following morning, an officer came to B's cell to provide him with his medication. B's birthday falls on a well-known public holiday in Australia. The officer asked B his date of birth. B answered by providing the name of the public holiday and the year of his birth. The officer told him to stop being sarcastic and left the cell without giving B his medication.

ALSWA assisted B with a complaint to the prison, raising his concerns that:

1. The staff had not attempted to understand B's behaviour or recognised that he may have difficulty communicating his needs.
2. The staff refused to provide B with his medication based on an assumption that he was being sarcastic.

ALSWA submits that for the avoidance of any doubt, the Act should be reformed to specifically provide that discrimination can occur when police, prison officers, youth custodial officers and officials employed by other public authorities are exercising the powers and functions of their office.

The new provision could be worded as follows:

Administration of state or territory laws and programs

It is unlawful for a person who performs any function or exercises any power under a state or territory law or for the purposes of a state or territory program or has any other responsibility for the administration of a state or territory law or the conduct of a state or territory program, to discriminate against another person on the ground of the other person's disability in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

This would be similar to the state or territory equivalent to section 29 of the Act which applies to the administration of Commonwealth laws and programs.

The above provision would be capable of covering all statutory functions that a state or territory government agency is bound to carry out including those activities of a coercive nature.

ALSWA notes that there are also several Australian jurisdictions that currently have equivalent provisions in their discrimination legislation.²⁴

Recommendations 4.29 and 4.30 – Offensive behaviour and vilification protections

How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?

ALSWA is of the view that the Act should be amended to include a provision which prohibits offensive behaviour because of a person's disability. This new provision should mirror s 18C and its related provisions in the *Racial Discrimination Act 1975* (Cth). Further, any new section should not be limited to a particular area of life, as it is important that behaviour by police, prison officers, youth custodial officers and officials employed by other public authorities from police and in prisons should be covered.

The below case study illustrates the importance of ensuring that police and places of custody are included in any new provisions.

V case study

V was a 13-year-old Aboriginal boy who had been diagnosed with foetal alcohol spectrum disorder, attention deficit hyperactivity disorder, adjustment disorder, conduct disorder, obsessive-compulsive behaviours and borderline intelligence. V was taken into police custody

²⁴ *Anti-Discrimination Act 1991* (Qld) s 101, which has been interpreted as applying to police, for example in *Given v State of Queensland (Queensland Police Service)* [2019] QCAT 16 at [55]; *Anti-discrimination Act 1992* (NT) s 49A; *Discrimination Act 1991* (ACT) s 23C.

and became distressed when no one could tell him when he would be taken to court. In response to his dysregulation, WA Police officers made the following comments, which were captured on CCTV: ‘are you demented?’, ‘Have you been abused as a child or something?’ and ‘you’re a bit simple aren’t ya?’.

Part 7 – Further options for reform

Are there any other issues with the Disability Discrimination Act that should be considered as part of this review?

Human Rights Act and interaction with a reformed Disability Discrimination Act

Reforms to the Disability Discrimination Act can also be strengthened by the introduction of a Human Rights Act. As shown in Victoria, Queensland, and the Australian Capital Territory that have both discrimination laws and a Human Rights Act (in Victoria called a Charter), the positive rights in a Human Rights Act improve the interpretation and operation of discrimination acts by including the rights such as the right to equality before the law, the right to privacy, and the right to dignified treatment that can be included in determining whether a person has been discriminated against. An Act’s ‘dialogue model’ can be used to challenge laws and regulations that are in themselves discriminatory. Conversely, reformed and modernised discrimination laws help with the operation of a Human Rights Act by complementing the rights outlined in an Act must be enjoyed by all without discrimination. The Disability Royal Commission recommendations included both positive rights and reforms to discrimination law.ⁱ The Disability Royal Commission’s terms of reference precluded it from considering a Human Rights Act. Instead, it recommended a Disability Rights Actⁱⁱ. However, the July 2024 joint statement of 12 disability representative organisations advocating for a Human Rights Actⁱⁱⁱ shows reveals support for a Human Rights Act alongside reforms and modernisation of the Disability Discrimination Act. On 30 May 2024, the Parliamentary Joint Committee on Human Rights inquiry into Australia’s human rights framework recommended that a Human Rights Act^{iv} be introduced. ALSWA endorses this recommendation as part of any reforms to the Disability Discrimination Act.

ⁱ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report, Volume 4: Realising the human rights of people with disability, Commonwealth of Australia, Recommendations 4.01 - 4.34

ⁱⁱ Ibid, page 107

ⁱⁱⁱ Strengthening protection of the rights of people with disability through a national Human Rights Act (HRA), Position Statement by Disability Representative Organisations (DROs), 19 July 2024, accessed at <https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/>

^{iv} Inquiry into Australia’s human rights framework, Parliamentary Joint Committee on Human Rights, Commonwealth of Australia, May 2024, Recommendations 1 to 4