



Promoting opportunities. Protecting rights. For older Victorians.

COTA Victoria & Seniors Rights Victoria

Submission to the review of the Disability Discrimination Act 1992

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1 About Us

Council on the Ageing (COTA) Victoria is the leading not-for-profit organisation representing the interests and rights of people aged over 50 in Victoria. For over 70 years, we have led government, corporate and community thinking about the positive aspects of ageing in the state.

Today, our focus is on promoting opportunities for and protecting the rights of people 50+. We value ageing and embrace its opportunities for personal growth, contribution, and self-expression. This belief brings benefits to the nation and its states alongside communities, families, and individuals.

[Seniors Rights Victoria \(SRV\)](#) is the key state-wide service dedicated to advancing the rights of older people and the early intervention into, or prevention of, elder abuse in our community. It is the only Community Legal Centre dedicated to preventing and responding to elder abuse within Victoria.

SRV has a team of experienced advocates, lawyers, and social workers who provide free information, advice, referral, legal advice, legal casework, and support to older people who are either at risk of or are experiencing elder abuse. SRV supports and empowers older people through the provision of legal advice directly to the older person.

2 Overarching comments

COTA Victoria and SRV hear regularly from older Victorians with a disability who have experienced discrimination in workplaces, services and other areas of public life. We see how gaps in legal provisions and processes can leave people without redress. We also see the need for greater proactive effort and accountability to prevent this discrimination.

As such, we welcome the Australian Government's review of the *Disability Discrimination Act 1992* (DDA). We support reforms that implement the Disability Royal Commission (DRC) and align with the UN Convention on the Rights of Persons with Disabilities and progress towards a UN convention on the rights of older persons.

Our submission focuses on the relevance and accessibility of key DDA provisions for older people – noting that those over 65 represent 40% of all those with a disability while an estimated 51% of Victorians over 65 have a disability. Some 40% of older people report experiencing age-related discrimination – a significant proportion of which is likely to have a disability component (see: <https://cota.org.au/report/state-of-the-older-nation/>).

The context for our response is what we believe to be significant under-recognition of ageing factors in DDA complaints, as well as in Disability Standards and Disability Action Plans. As COTA Victoria has noted elsewhere, inequity in access to disability supports for older people can itself be seen as a form of discrimination (see: <https://cotavic.org.au/policy/publication/disability-supports-for-older-victorians-agenda-for-action/>).

Given the common overlap and ambiguity as to whether age or disability is at stake, the DDA and *Age Discrimination Act* must be more interoperable. We note that the current review is not covering the overall antidiscrimination framework, nor interfaces with state laws. Nonetheless, the DDA can lead a shift to a more intersectional approach starting with the age-disability nexus.

More broadly, we support all enhancements to the DDA that drive a shift from a complaints-driven system that relies on individuals towards proactive systemic prevention of discrimination, systemic compliance and access to justice. This should include a stronger regulatory role for the Australian Human Rights Commission (AHRC), a standalone duty to make adjustments, clear legal tests that do not unfairly burden complainants, and more specific Disability Standards.

3 Definitions of disability

The current definition is reasonably comprehensive but has a strong medical focus, including language likely to be offensive to some people with a disability. We concur with disability bodies arguing for a move away from deficit-oriented language. Older people have a very common and broad experience of disability and do not want this to be seen as inherently negative or abnormal.

We agree with the need for a broad definition but also emphasise the importance of maintaining a clear distinction between ageing and disability. While ageing increases the likelihood of certain disabilities, this is not an inherent or necessary part of ageing. We are keen to maintain the integrity of the age discrimination framework and would not want to see ageing issues overly subsumed into a disability framework.

With this in mind, it may be useful to explicitly state that disability should not be taken to include normal processes of ageing but may overlap with or be complicated by age and frailty. Further detail on the relationship between ageing and disability can be found in our recent publication *Disability Supports for Older Victorians: Agenda for Action* (see: <https://cotavic.org.au/policy/publication/disability-supports-for-older-victorians-agenda-for-action/>).

A key issue for older people is dementia, a progressively disabling condition that needs to be admissible under the DDA. For this to work effectively, the DDA must include reference to cognitive function and associated behaviours. Reference to behaviours should be integral to the definition rather than included as a footnote as at present.

In distinction to NDIS requirements, the DDA definition is not limited to serious and long-term impairment. We believe this is appropriate given the Act's purpose in guiding judgement as to whether an unfair action against a person has been made based on a perceived disability at a particular time.

At the same time, a stronger social model of disability framing could be achieved by turning points (h) to (k) in the existing definition into a stand-alone clause that specifies that the disabilities covered in (a) to (g) may be the basis of unlawful discrimination if applied to a person who no longer has the disability, is merely predisposed to it, or is wrongly believed to have it.

4 Addressing intersectionality

There are two distinct aspects of this issue as it relates to age:

- discrimination against an older person involving both ageing and disability factors that overlap or may be difficult to distinguish;
- discrimination against an older person that is clearly about disability but where this is substantively influenced by a person's age, gender, sexuality or race.

Current arrangements under the DDA, as we understand it, can recognize the role of other attributes but then pursue the complaint through the courts as if it were a disability case solely. This approach has strengths and weaknesses. On one hand it maintains a clear focus and transparent criteria for assessing whether disability has driven the discrimination. On the other hand, it does not properly allow consideration of the combined impact of age and disability on the discriminating action. This means that an applicant may need to choose the attribute that is most relevant or likely to be successfully argued, and potentially make separate cases.

The solution to this limitation – without reforming the entire federal anti-discrimination system – could be to allow for complaints to be lodged and pursued on a “disability plus other” basis. This would apply to cases where disability is clearly a major factor, but another attribute is believed to have played a significant role. This category of complaints could be required to be cross-referred and assessed across relevant other legislation and divisions of the AHRC.

We believe there is a particularly strong case for applying this concept to age as a parallel basis for a DDA complaint. This would allow for a proper investigation of the two attributes, ensuring that the *Age Discrimination Act* criteria were fully applied to the age-related elements of the case.

We would also like to see the DDA require the AHRC to formally consider the impact of other attributes - gender, sexuality and race as well as age – on the way in which the complainant's disability is perceived and responded to. For example, an 85-year-old from a non-English speaking background whose dementia is not well recognized owing to age-related frailty and poor English language skills. This could clarify that the discriminating action was in fact disability related. In other cases, such consideration may make it clear that an attribute other than disability needed to be the focus of findings.

5 Direct and indirect discrimination

The key issue for older people here is the ease and practicality of making a case for having been treated unfavourably due to a disability. The DRC proposal to remove the element of comparison with another real or hypothetical person seems to be a sensible simplification. This would change the definition of discrimination from “less favourable” to “unfavourable” treatment but should still carry the implication of being treated less well than would otherwise be expected.

Shifting to a detriment test would helpfully put more emphasis on the harm or disadvantage resulting from the discriminating action. This would keep the focus on preventing or redressing a poor outcome for the individual rather than merely procedural fairness. It would also avoid the complications that currently apply to use of a comparator test where multiple attributes are involved.

At the same time, changing the ultimate burden of proof from the Applicant to the Respondent would be in the interests of older people with a disability who are unlikely to have access to the information needed to explain why a certain decision or action was taken by a service, employer or organization. It is reasonable to expect the Applicant to make a primary case that discrimination occurred (the person was treated unfavourably) and that disability appeared to be part of the cause. The possible role of ageing should be considered at this stage.

Regarding indirect discrimination, we agree with the DRC recommendation to remove the additional element of “reasonableness” as a defence against discrimination, on the basis that this lacks the necessary clarity and specificity. A “legitimate and proportionate” test may provide a more rigorous approach requiring a potentially discriminating requirement to be justified in terms of any broader objectives.

6 Disability Action Plans

COTA Victoria recognizes the value of Disability Action Plans (DAPs) in developing sound organizational approaches to preventing and minimizing harm from disability discrimination. Such plans should be promoted as a key way for organisations to commit to and progress compliance with positive duties and Disability Standards. The DDA can usefully reinforce Victorian legislation which mandates development and publication of DAPs for certain organisations.

We would like to see a supportive developmental approach, similar to that of Reconciliation Action Plans, whereby the recognized authority (in this case, the AHRC) reviews draft plans and offers improvement suggestions before endorsing them, rather than a rigid approach involving rejection of plans. Guidelines on the content of plans should be developed on this basis.

In Victoria DAPs may be developed and presented as integrated plans with other equity and inclusion plans, especially in workplaces and service organisations. This integrated approach should be promoted as an option that advances a more intersectional perspective and deals effectively with the overlapping issue of age discrimination.

7 Offensive behaviour and vilification

COTA Victoria believes that offensive behaviour, harassment, and vilification are very closely linked to discrimination against older people. All are forms of elder abuse and underpinned by both ageism and ableism. For this reason, we support the DRC proposals for a broader DDA provision making public acts likely to offend, insult, humiliate or intimidate people with a disability (or perceived to have a disability) unlawful. Given the strong overlap between older age and disability, this measure can be an effective protection against elder abuse in the public sphere.

This strengthening of the DDA should be modelled on existing provisions in the *Racial Discrimination Act* and the recently introduced Victorian *Justice Legislation Amendment (Antivilification and Social Cohesion) Act 2025*. The definition of offensive behaviour should include the online and social media environment and operate to reinforce the *Online Safety Act 2021 (Cth)*.

8 Recommendations

1. Amend the definition of disability in the DDA to better reflect a social model of disability, remove deficit-based language and ensure inclusiveness of all forms of disability common in older people.
2. Allow DDA complaints to be lodged and pursued on a “disability plus other attribute” basis with ageing being a priority complementary attribute to be assessed in accordance with requirements of the *Age Discrimination Act*.
3. Require the AHRC to formally consider the impact of other attributes - gender, sexuality and race as well as age – on the way in which the complainant’s disability is perceived and responded to.
4. Replace the comparator element of the complaint process with a simpler detriment test and place the ultimate burden of proof regarding the cause of the discrimination on the respondent.
5. Reinforce the role of Disability Action Plans and allow the AHRC to provide support and guidance on plans, including encouragement for integrated plans that reflect the overlap with age discrimination matters.
6. Strengthen DDA provisions on offensive behaviours and vilification as a supporting measure to protect against elder abuse.