Aboriginal Health and Medical Research Council of NSW

Submission on the Review of the *Disability Discrimination Act* 1992

November 2025

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About the AH&MRC

The AH&MRC, formerly the Aboriginal Health Resource Co-op (AHRC) was established in 1985 following a recommendation of the Brereton Report by the NSW Aboriginal Task Force on Aboriginal Health in 1982-83.

The AH&MRC assists the ACCHO Sector across NSW to ensure they have access to an adequately resourced and skilled workforce to provide high-quality health care services for Aboriginal communities.

As the Peak Body for Aboriginal Health in NSW the AH&MRC represents the rights and interests of 52 Member Services. The AH&MRC is committed to the delivery of four key priorities. These are:

- Aboriginal Community Control and Innovation
- Education and Workforce
- Research and Data
- Governance and Finance

The AH&MRC works collaboratively with the ACCHO Sector across NSW to ensure accessibility, sustainability and adequate resourcing of a skilled workforce providing comprehensive primary health care services for Aboriginal communities.

The AH&MRC welcomes the opportunity to make a submission to the Attorney-General's Department review of the Disability Discrimination Act 1992 (DDA) on behalf its members.

As the peak body for Aboriginal health in NSW, we acknowledge Aboriginal and Torres Strait Islander people as the Traditional Owners of the lands on which we work and live. We respectfully use the term "Aboriginal" to refer inclusively to both Aboriginal and Torres Strait Islander people.

Summary and Key Recommendations

In response to the Attorney-General's Department Review of the Disability Discrimination Act 1992 (DDA), the AH&MRC advocates for the DDA to be more inclusive for Aboriginal people with disability, their lived experience, and perspectives.

- The AH&MRC recommends:
    - Incorporating culturally inclusive and human rights-based models of disability into the DDA to ensure it considers and is inclusive of the perspectives and lived experience of Aboriginal people with disability
    - Transitioning away from the current deficit-based definition of disability in the DDA.
    - Explicitly referencing Aboriginal people in the DDA:
        - to recognise and address the multilayered, overlapping intersectional discrimination that is faced
        - to enhance protections across multiple discrimination grounds.
    - Introducing a clearly defined positive duty in the DDA for all duty holders to proactively prevent discrimination and mandate appropriate staff training.

AH&MRC response

The Attorney-General's Department Review of the DDA (the Review) is one component of the Australian Government's response to the Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (The Disability Royal Commission). The proposed changes to the DDA will significantly impact Aboriginal people who are twice as likely to experience disability than other Australians, whilst children are twice as likely to be developmentally not on track at school entry. [1] [2] Despite this, communities do not access disability services or early intervention supports at a rate commensurate with their level of need.[3] Barriers in accessing culturally safe and inclusive services across many systems is a significant factor of service utilisation.[4]

Understanding the legacy of colonisation is essential to shaping a legislative environment that reflects lived experience for Aboriginal people. This legislative foundation is critical to addressing systemic discrimination and structural barriers and to enable stronger protections, now and into the future.

The AH&MRC draws the Review's attention to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to which Australia is a signatory. Articles 21 and 22 affirm Indigenous peoples' right to improved economic and social conditions without discrimination. Governments are required to take effective action to ensure ongoing progress, with special attention to be paid to the rights and needs of Indigenous people with disabilities.[5]

1. The DDA's current definition of disability is deficit-based and reflects an outdated, ableist, medical model of disability and is not applicable for many Aboriginal people

The current disability definition in the DDA frames disability as a deficit against a perceived 'normal' level of functioning.[6] Aboriginal and Torres Strait Islander perspectives and identities are diverse, encompassing over 250 distinct nations, languages, and cultures. However, as acknowledged in the Review's Issues Paper, Aboriginal concepts of disability are different to Western concepts of disability[7] and instead emphasise inclusion and community contribution.

The human rights model of disability established by the United Nations Convention on the Rights of Persons with Disability (CRPD), recognises disability as an aspect of human diversity and humanity. [8] However, the AH&MRC urges the Commonwealth Government to go a step beyond the human rights model of disability, by also aligning DDA amendments with the cultural model of inclusion developed by Dr Scott Avery and the First Peoples Disability Network

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[1] Australian Institute of Health and Welfare. (2015). The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples, 2015. https://www.aihw.gov.au/getmedia/584073f7-041e-4818-9419-39f5a060b1aa/18175.pdf.aspx?inline=true

[2] Williamson et al, 2019) Williamson, A., Gibberd, A., Hanly, M. J., Banks, E., Eades, S., Clapham, K., & Falster, K. (2019). Social and emotional developmental vulnerability at age five in Aboriginal and non-Aboriginal children in New South Wales: A population data linkage study. International Journal for Equity in Health, 18(1), 120. https://doi.org/10.1186/s12939-019-1019-x

[3] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[4] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. (2023). Final report: Volume 9, First Nations people with disability (p. 2). Australian Government.

[5] United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295). https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

[6] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[7] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[8] United Nations. (2006). Convention on the Rights of Persons with Disabilities. https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.

(FPDN).[9] While this model includes the human rights model, it also recognises the diversity of cultures, languages, knowledge systems and beliefs of Aboriginal and the importance of enabling participation in society in ways that are meaningful to individuals with disability. [10] The model seeks to improve well-being through positive affirmation, rather than merely mitigating the adverse impact of difference.[11]

Implications for the sector

Incorporating these models into the DDA will make the legislation more inclusive for Aboriginal people with a disability. Strengthening the legislative framework to specifically consider Aboriginal people and their lived experiences will help inform health service provision at the local, state and Commonwealth levels. It will also inform the need for health service provision to be appropriately funded. ACCHOs are an important avenue to improve the availability of culturally safe health services and supports for Aboriginal people living with disability, but this can only occur if ACCHOs are appropriately funded to do so. For these reforms to have real impact, ACCHOs must be adequately funded to deliver culturally safe, individualised services. Without increased investment, legislative changes risk being symbolic rather than transformative for community health outcomes.

2. Aboriginal people with disability experience intersectional discrimination which must be addressed in the DDA

Existing social and legal frameworks in Australia have failed to address the compounding impacts of intersectional discrimination experienced by Aboriginal people. The comparator test should be removed from the DDA as the comparator approach fails to acknowledge and reflect intersectional discrimination.[12]

A key form of intersectional discrimination for Aboriginal people living with disability is informed by experiences of systemic and interpersonal racism and ableism. However, this may also experience additional intersecting forms of discrimination including those based on age, gender, sexuality, or geographic location.

Australia's current legislative frameworks, (including the current DDA), inadequately address intersectional discrimination. There is a clear disconnect between how the law focuses on separate and distinct 'grounds' of discrimination and how it is actually experienced.[13] Aboriginal people often face multiple, overlapping forms of discrimination characterised by compounded disadvantage. A 2020 report published by the Australian Social Policy Association revealed that between 2014 and 2015, 42% of Aboriginal people with a disability experienced racism compared to 32 percent of those without a disability.[14] The report also found that 20% of Aboriginal people with disability avoided settings such as healthcare or education because of instances of racism, compared with 11% without a disability.[15] This research further highlights the urgent need for legislative and policy reform.

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[9] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[10] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[11] Avery, S. (2018). Culture is inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability. First Peoples Disability Network (Australia), Sydney

[12] Blackham, A., & Temple, J. (2020). Intersectional discrimination in Australia: An empirical critique of the legal framework. University of New South Wales Law Journal, 43(3). Advance online publication. https://doi.org/10.53637/onmf2821

[13] Blackham, A., & Temple, J. (2020). Intersectional discrimination in Australia: An empirical critique of the legal framework. University of New South Wales Law Journal, 43(3). Advance online publication. https://doi.org/10.53637/onmf2821

[14] Temple, J. B., Wong, H., Ferdinand, A., Avery, S., Paradies, Y., & Kelaher, M. (2020). Exposure to interpersonal racism and avoidance behaviours reported by Aboriginal and Torres Strait Islander people with a disability. Australian Journal of Social Issues, 55(4), 376–395. https://doi.org/10.1002/ajs4.126

[15] Temple, J. B., Wong, H., Ferdinand, A., Avery, S., Paradies, Y., & Kelaher, M. (2020). Exposure to interpersonal racism and avoidance behaviours reported by Aboriginal and Torres Strait Islander people with a disability. Australian Journal of Social Issues, 55(4), 376–395. https://doi.org/10.1002/ajs4.126

The DDA should make explicit reference to Aboriginal people that recognises and addresses multilayered intersectional discrimination. This change is needed to address systemic discrimination and help remove some of the structural barriers faced by Aboriginal people.

Implications for the sector
A stronger legislative foundation relevant to lived experience can better inform and guide government policy, programs, and processes which in turn can facilitate culturally safe health services. ACCHOs are an important avenue for the provision of culturally safe health services for Aboriginal people, including those living with disability. ACCHOs are operated by Aboriginal people for Aboriginal people and deliver holistic models of care that consider the social and cultural determinants of health.

To fully realise the benefits of a strengthened legislative framework, systemic barriers that limit the ability of ACCHOs to deliver primary health care and disability supports effectively, need to be concurrently addressed. Well documented barriers such as complexity navigating NDIS eligibility, planning and service coordination continue to go unaddressed for those needing support. Without the legislative consideration of intersectional discrimination, ACCHOs may lack systemic backing to provide appropriate support to assist Aboriginal people navigating complex systems and to bridge gaps created by systemic inequities. This stretches already limited resources.

The DDA must recognise the overlapping barriers experienced by Aboriginal people with disability to ensure services are aligning with community needs.

3. Introducing a positive duty in the DDA is essential and must include provisions for all duty holders to proactively prevent discrimination

A positive duty under the DDA should apply to all government entities whose actions, decisions and systems have the potential to create or perpetuate discrimination particularly within essential service systems.

Aboriginal people with disability experience compounded and intersectional discrimination across various systems. The Disability Royal Commission found that governments and service systems frequently fail to prevent discrimination and that structural and systemic barriers are a significant cause of harm. Aboriginal people with disability are over-represented in health, child protection and justice systems and face discrimination that is often normalised and dismissed. Alongside a broader evidence base, the Lowitja Institute and FPDN have identified that there are routine failures in culturally safe service provision including inadequate accommodations, racism and lack of coordinated support for Aboriginal people.[16] [17]

These forms of discrimination often arise through system design, policy settings and funding decisions. A positive duty must apply to entities with the power and responsibility to change systems and move beyond responding to complaints after harm occurs.

The Disability Royal Commission emphasised that regulation alone is insufficient without a proactive obligation to eliminate and prevent discrimination. This is reinforced by the National Agreement on Closing the Gap to which all government bodies are signatories. The Agreement requires mainstream institutions to identify and eliminate racism and embed culturally safe and responsive practices.[18]

[16] https://www.lowitja.org.au/resource/culture-is-key-towards-cultural-determinants-driven-health-policy/
[17] Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (DRC)
[18] https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/6-priority-reform-areas/three

Implementation of positive duty needs to be supported with appropriate investment in workforce capability, policy reform and system redesign. Therefore, duty holders should be responsible for associated costs of building capability, embedding preventative approaches and expanding culturally safe service

Implications for sector

Australia is a signatory to Article 25(b) of the UN Convention on the Rights of Persons with Disabilities which mandates the provision of health services needed specifically because of disability, including appropriate early identification and intervention and services designed to minimise or prevent further disabilities, including among children[19]. However, this obligation is not being met for many Aboriginal children with a disability and/or with developmental delays.

Aboriginal children are statistically more likely to experience developmental delays or cognitive impairments by the time they reach school age.[20] There is a need for targeted early childhood identification and intervention supports for children with disability and/or developmental delays and their families. Without early intervention, children can face lifelong challenges such as reduced educational engagement, and increased risk of interactions with the criminal justice system.[21]

Despite this, barriers to accessing diagnostic and functional assessments remain a significant challenge. These assessments are often costly, complex, and difficult to obtain outside major urban centres. Targeted early childhood screening and supports must be culturally safe and disability rights informed.

The ACCHO sector already plays a critical role in bridging service gaps and providing culturally safe and community-led care. However, the responsibility cannot rest solely on ACCHOs. Introducing a positive duty requirement would ensure that mainstream duty holders, such as schools, hospitals, early childhood services and government agencies are required to prevent discrimination. This would drive system-wide reform to create environments where culturally safe early childhood screening and diagnosis are a standard practice. Positive duty should oblige duty holders to work in partnership with ACCHOs and Aboriginal communities in designing and delivering supports.

[19] United Nations. (2006). Convention on the Rights of Persons with Disabilities. https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.

[20] Australian Government. (2015). Australian Early Development Census national report 2015. https://www.aedc.gov.au/resources/detail/2015-aedc-national-report

[21] https://www.aihw.gov.au/getmedia/eb9fb8d3-3a5b-427e-bee5-8b19547e3364/aihw-ihw-294-ch4-children-thriving.pdf

Recommendations

The AH&MRC recommends:

1. That the DDA be amended to incorporate both the human rights models reflected in the UN CRPD and the Cultural Model of Inclusion, ensuring the Act fully reflects and responds to the needs of Aboriginal people with disability.
2. The DDA be amended to explicitly reference Aboriginal people to:
    a. Recognise and address overlapping forms of intersectional discrimination
    b. Enhance protections across multiple forms of discrimination based on race, age, gender, sexuality and other social domains
3. Introducing a clearly defined positive duty requiring all duty holders to:
    a. Take proactive and reasonable steps to eliminate discrimination before it occurs
    b. Ensure staff receive mandatory and ongoing cultural safety and disability-inclusion training, including training specific to the needs of Aboriginal children, families and communities.



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