



## Submission

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### Consolidation of Anti-Discrimination Laws

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#### People with Disability Australia Incorporated

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# 1. Introduction

People with Disability Australia (PWD) welcomes the opportunity to make the following submission on the Discussion Paper for the Consolidation of Commonwealth Anti-Discrimination Laws.

PWD supports the view outlined in the Discussion Paper that consolidation of Commonwealth Anti-Discrimination laws:

“provides an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social , economic and cultural life of our community” (page 5, point 2).

We also support the view outlined in the Discussion Paper that consolidation of Commonwealth Anti-Discrimination laws “will not lead to a reduction in existing protections in federal anti-discrimination legislation” (page 6, point 10).

Our submission is made in the context of these views with a specific focus on improving the effectiveness of legislation in addressing the discrimination and human rights violations experienced by people with disability.

## 1.1 About us

PWD is a national peak cross-disability human rights organisation that has been providing representation, information, advocacy, training and complaints handling for 30 years. Our primary voting membership is made up of individuals with disability and organisations primarily constituted by people with disability. PWD also has a large associate membership of other individuals and organisations committed to the disability rights movement.

PWD was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own. We are governed by a Board of Directors, drawn from across Australia, all of whom are people with disability.

We are part of an international network of disabled peoples’ organisations through Disabled Peoples International (DPI).

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated.

PWD strongly supported the introduction of the *Disability Discrimination Act 1992 (DDA)*. On many occasions, we have made complaints using anti-discrimination legislation, including the DDA on behalf of our members and constituents. We also assist individuals with disability to use anti-discrimination legislation, including the DDA as a means of seeking redress for disability discrimination.

PWD played a key role in the development of the UN Convention on the Rights of Persons with Disabilities (CRPD). On behalf of the Australian Government, and in partnership with

the Australian Federation of Disability Organisations (AFDO) and the National Association of Community Legal Centres (NACLC), we facilitated two national consultations during the development of the CRPD and another to consider ratification of the CRPD.

PWD also participated in several of the Ad Hoc Committee meetings that took place at the United Nations in New York, making numerous interventions into proceedings and achieving significant inclusions and changes to the draft text. We are currently working with other disability representative, advocacy and legal organisations to prepare the NGO CRPD Shadow Report for the UN CRPD Committee review of Australia's progress in implementing CRPD.

## **2. Our comments**

In making our comments to the Discussion Paper, PWD will only be responding to areas of key importance to our members and constituents.

### *2.1 General comment - International Human rights obligations*

In PWD's submissions to the National Human Rights Consultation and the National Human Rights Action Plan Baseline Study, we outline the commonplace experience of discrimination and human rights violations faced by people with disability in Australia.

The resounding opinion expressed by people with disability during our consultations for these submissions was that they felt let down by current human rights processes, legislative protections and complaint mechanisms.

The DDA is now 20 years old, and in light of Australia's ratification of the CRPD in 2008, there is an urgent need to audit and update the DDA to ensure it complies with CRPD obligations.

The National Human Rights Consultation Committee Report noted that:

“...[a] large number of submissions focused on the inadequacies of anti-discrimination legislation and recommended that the Federal Government audit and amend antidiscrimination legislation to ensure that it complies with Australia's human rights obligations” (September 2009, Recommendation 4)

PWD's overall response to the Discussion Paper is that the consolidation of Commonwealth anti-discrimination laws provides an opportunity to this.

**Recommendation: A consolidated Commonwealth equality law should focus on substantive equality and eliminating discrimination. It should be clearly and explicitly underpinned by Australia's international obligations on human rights. This would mean that interpretation of a consolidated Commonwealth anti-discrimination law would be in accordance with international human rights obligations.**

### **2.2 Meaning of discrimination**

PWD agrees that the meaning of discrimination, made up of direct and indirect discrimination is inconsistent, complex, misleading and uncertain:

- The need to choose between ‘direct’ and ‘indirect’ discrimination is often an artificial distinction that causes an unnecessary layer of complexity for complainants – for example, discrimination against a person with intellectual disability who is unable to understand the complex language and jargon contained in government information could ‘fit’ indirect discrimination (the requirement to understand complex information is a condition that disadvantages the person) or direct discrimination (the person’s impairment directly affects their ability to understand complex language and jargon).
- In relation to the definition of ‘direct discrimination’, the ‘comparator test’ is often difficult, and in many cases impossible to apply as a ‘a comparator’ cannot be identified to prove there has been differential treatment – for example, people with disability experiencing discrimination within segregated residential environments have no practical recourse to anti-discrimination law as there is no clear ‘comparator’ to prove differential treatment.

CRPD makes no distinction between ‘direct’ and ‘indirect discrimination’. Article 2 states:

*"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;"*

**Recommendation: A consolidated Commonwealth equality law should include a unified test for discrimination that incorporates the elements of direct and indirect discrimination, and that excludes the need for a ‘comparator test’.**

### **2.3 Burden of proof**

A significant limitation of anti-discrimination legislation in Australia is the onus on the individual to firstly make a complaint and secondly to prove that unlawful discrimination occurred. People with disability do not or are reluctant to make complaints under these circumstances, as it “requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair” (Discussion Paper, page 15).

The Discussion Paper highlights the Fair Work Act and a number of overseas jurisdictions that “require the respondent to demonstrate that there was no discriminatory reason for their actions once the complainant has made out the other elements of direct or indirect discrimination”. PWD agrees with this approach.

**Recommendation: A consolidated Commonwealth equality law should shift the burden of proof to the respondent, so that once the complainant establishes a prima facie case of discrimination, the respondent must prove why their conduct was not discriminatory.**

### **2.4 Special measures**

PWD strongly supports the concept of ‘special measures’ as a means of achieving substantive equality. This concept is recognised under international law, and in keeping

with our arguments in 2.1. above, this concept should be part of a consolidated Commonwealth equality law.

However, the special measures provisions in the DDA are unnecessarily narrow and negatively framed. They only itemise particular measures and circumstances where these measures will not be considered unlawful. They are also inconsistent with other ‘special measure’ provisions in other anti-discrimination Acts.

**Recommendation: A consolidated Commonwealth equality law should include a single ‘special measures’ provision that applies consistently and broadly to all attributes, and is framed as a positive obligation to achieve substantive equality.**

## ***2.5 Reasonable adjustments***

PWD supports the view that a consolidated Commonwealth equality law should include a standalone positive duty provision for reasonable adjustment, and this provision should apply to all covered attributes.

PWD believes that a reasonable adjustment provision should improve on and simplify the current reasonable adjustment provision contained in the DDA, and agrees with the Discussion Paper that the Victorian Equal Opportunity Act provides one approach to this.

**Recommendation: A consolidated Commonwealth equality law should include a standalone positive duty provision for reasonable adjustment in relation to all protected attributes.**

## ***2.6 Attribute-based harassment and vilification***

PWD argues that a consolidated Commonwealth equality law should prohibit harassment and vilification on the basis of all protected attributes and in all areas of public life. This would address the considerable variations in provisions relating to harassment amongst Australian jurisdictions, as well as address the incidence of vilification experienced by many groups of people, including people with disability.

Tasmania is the only jurisdiction in Australia that covers vilification on the basis of ‘disability’. People with disability have no redress for acts of vilification, contributing to a common perception that vilification is not an issue for people with disability.

**Recommendation: A consolidated Commonwealth equality law should prohibit harassment and vilification on the basis of all protected attributes and in all areas of public life.**

## ***2.7 Protected attributes***

PWD strongly supports Government’s commitment to include sexual orientation and gender identity as new protected attributes in a consolidated Commonwealth equality law. This is an area of considerable concern to PWD members who experience discrimination, vilification and harassment on the basis of their disability and their sexual orientation, gender identity or intersex identity.

The Discussion Paper asks for information on how “sexual orientation and gender identity be defined” (page 22). PWD argues for inclusive terminology that would achieve the broadest coverage of people in terms of sexual orientation, gender identity, gender expression and intersex identity. This was also a clear view expressed during the consultations conducted by the Australian Human Rights Commission (AHRC) for the consolidation of Commonwealth anti-discrimination laws.

**Recommendation: A consolidated Commonwealth equality law should provide the broadest coverage of people in terms of sexual orientation, gender identity, gender expression and intersex identify.**

## ***2.8 Intersectional discrimination***

Many people with disability do not utilise anti-discrimination law as it does not address the specific discrimination that arises as the result of the intersection between more than one attribute, for example Aboriginal or Torres Strait Islander people with disability, women with disability etc.

Intersectional discrimination has been fully discussed in the submission provided by Women with Disabilities Australia (WWDA) and Women with Disabilities ACT (WWDACT). PWD has endorsed this submission.

**Recommendation: A consolidated Commonwealth equality law should provide for express recognition and inclusion of intersectional discrimination, so that the law applies to discrimination based on one or more protected attributes or a combination of attributes.**

## ***2.9 Equality before the law***

PWD supports the right to equality before the law to be extended to all protected attributes.

We have concerns that the views of the Productivity Commission, which are referred to in the Discussion Paper (page 26) may be persuasive in excluding people with disability because of concerns about the possible effect on guardianship and mental health legislation.

PWD argues that the views expressed by the Productivity Commission review of the DDA were made prior to ratification of CRPD, and reflect an uncritical analysis of guardianship and mental health legislation and an acceptance of the status quo in this area. PWD argues that guardianship and mental health legislation and administrative regimes require significant review and reform in light of the obligations contained CRPD, including Article 5, Equality and Non-Discrimination and Article 12, Equal Recognition before the Law.

We strongly argue that the right to equality before the law, as expressed in CRPD provide a compelling need to ensure that people with disability are afforded the same protections with regard to equality before the law as others.

We believe that any concerns about the effect on legislation, which has been reviewed against CRPD and which aims to support people with disability to exercise their rights could be dealt with by other means within a consolidated Commonwealth equality law. For example, a qualification could be included that states that the right to equality before the

law does not preclude appropriate and effective legislative safeguards that are consistent with international human rights law.

**Recommendation: A consolidated Commonwealth equality law should include the right to equality before the law and this right should cover all protected attributes, including 'disability'.**

## ***2.10 Complaints and compliance framework***

The onus on addressing breaches of Commonwealth discrimination law falls largely on individuals to make complaints to the Australia human rights commission. There are significant limitations with the individual complaints system, not only because it places a significant burden on individuals but also it is a poor means of addressing repeat discriminators, entrenched practices and systemic discrimination.

PWD is generally supportive of **the recommendations made in the submission by the AHRC (see sections 8.2 – 8.10) that address a range of compliance and regulatory measures** that would assist in systemic reform:

- Information, education and compliance promotion activities;
- Development and publication of compliance guidelines;
- Development of voluntary compliance plans by regulated entities;
- Recognition or certification of compliance plans;
- Recognition or certification of industry codes and other co-regulatory measures;
- Recognition of codes or standards developed by other regulatory and expert bodies;
- Exemptions;
- Development of regulatory standards;
- Reporting by regulated entities; and
- Inspection and audit functions for the regulator or administering body.

In addition to these measures, PWD strongly supports the following measures for ensuring the effectiveness of a consolidated Commonwealth equality law:

- **AHRC's formal inquiry functions should be expanded to enable AHRC to inquire into any human rights issue or concern in Australia;**
- **AHRC should have the power to enter into enforceable undertakings and issue compliance notices for breaches of human rights;**
- **AHRC should have the right to intervene in all cases that raise significant human rights or discrimination issues;**
- **Provisions for representative complaints to be made by the AHRC and by representative, advocacy and public interest organisations with a legitimate concern in a particular human rights or equality matter;**
- **Provision for a no-costs jurisdiction for discrimination complaints;**
- **Adequate funding for AHRC, legal aid, community legal centres, and advocacy organisations.**