

February 2012

NDS Submission

Consolidation of Commonwealth Anti-Discrimination Laws

The proposed consolidation of Commonwealth anti-discrimination laws offers the potential to reduce the overall complexity of the legislation and to remove the inconsistencies that currently exist between laws. NDS supports the initiative, including the commitment not to diminish existing protections, and welcomes the intention to reduce the regulatory burden on parties by ensuring that simple, cost-effective mechanisms are available for resolving complaints of discrimination.

Much has changed in the disability sphere in the 20 years since the introduction of the Disability Discrimination Act (DDA), not least Australia's signing of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The Australian Government should consider how the proposed consolidation of human rights legislation can assist it to implement its obligations under this Convention.

NDS notes that the exposure draft of the legislation is due in early 2012. Once it is introduced into Parliament, organisations will need to understand if they are fulfilling their obligations. Peak bodies are an effective vehicle for delivering targeted (sector-relevant) information and support and should be funded to assist in the broad education campaign that will be required to educate the community on the new legislation.

Meaning of discrimination

NDS notes that the DDA currently identifies both direct and indirect discrimination. A unified test may be simpler, particularly if it: relieved parties of having to choose which test to apply; avoided the confusing distinction between the two forms of discrimination; and made obligations clearer (organisations would still need support to understand their obligations). NDS believes further investigation into the merits of a unified test is warranted to assess whether it was a preferred options for parties.

Burden of proof tests need to be practical and fair to both parties. Noting the inconsistency of approach between anti-discrimination laws and the Fair Work Act (FWA)—which results in some complainants choosing to bring actions under the FWA when possible—consideration should be given to whether the burden of proof should be shared. This could be supported by the use of a questionnaire (as in the United Kingdom) where the respondent is asked to complete questions before going to court and the answers help determine whether to continue with the case. Care would need to be taken to ensure that this approach to establishing burden of proof would not lead to onerous record keeping by parties.

The special measures contained within the DDA should be preserved within the consolidated bill.

While the DDA is the only Commonwealth Act to contain an explicit duty to make reasonable adjustment (being contained in the tests for both direct and indirect discrimination) it provides a positive obligation on duty holders to take practical steps to

address the disadvantage caused by a disability. It should be noted that the UNCRPD refers to a similar concept—that of ‘reasonable accommodation’.

NDS supports the inclusion of a positive duty for public sector organisations to eliminate discrimination and harassment. Using employment as an example, it is worth noting that the employment rate of people with disability in the Australian Public Service (APS) continues to fall. The [APS Commission's 2010–11 Report](#) shows a disability employment rate of 3.0 per cent (down 0.1 per cent from the previous year) and an engagement rate (1.2 per cent) which is the lowest in a decade. The inclusion of a positive duty could help reverse the poor record of public service agencies in employing people with disability.

NDS would support the prohibition against harassment being extended to cover all protected attributes, in all specified areas of public life. While the DDA explicitly prohibits disability harassment in employment, education and the provision of goods and services, some uncertainty about the general coverage of harassment remains. Clarifying this within the consolidated bill is warranted.

Protected attributes

Discrimination against a person based on an attribute of an associated person is currently prohibited within the DDA. This feature should be incorporated for people with disability into the consolidated bill.

Given that women with disability are more likely to experience domestic violence than other women, NDS believes that further consideration should be given to protecting from unlawful discrimination all victims of domestic violence (particularly in the areas of employment and accommodation).

With respect to intersectional discrimination, it is logical that it is addressed in the consolidated bill. This would provide greater protection against discrimination of people with disability who also have another characteristic that may be discriminated against (such as old age).

Protected areas of public life

The right to equality before the law is, in principle, an important protection for all Australians. Implementing this for people with disability would assist Australia to meet its obligations under Article 5 of the UNCRPD (we note Australia has expressed reservations on supported or substituted decision-making arrangements and compulsory treatment). While NDS acknowledges there are practical problems to achieving equality before the law for some people with disability—as noted by the Productivity Commission in its Review of the Disability Discrimination Act—the obligations under the UNCRPD suggest that this area should be revisited. Even though drafting such a provision requires very careful consideration (to achieve the right balance with legal regimes such as guardianship) it should be investigated.

NDS supports the inclusion within the consolidated bill of a protection for volunteers from discrimination and harassment (volunteers are covered under other Acts such as the new Model Work Health and Safety Act). Many people with disability volunteer and should be protected from discrimination and harassment; arguments that this would reduce volunteering options should be rejected. Governments should support volunteering, including by people with disability. Allowing discrimination of some in favour of pursuing

another aim is not justified; information and education should be well-targeted to counteract any potential negative consequences.

NDS notes with interest the current exceptions to the prohibition against discrimination for domestic workers in a private dwelling. Australian governments, through the Council of Australian Governments, are currently working to establish a National Disability Insurance Scheme which will give much greater choice and control to people with disability over the supports they receive, and how and when they receive them. An increase in the direct employment of support workers by people with disability in their own homes is expected over time. The consolidation of the anti-discrimination acts needs to consider whether the anticipated growth in these arrangements—made possible by the use of government funds—warrants them being excluded from this proposed legislation. NDS is interested in having further input on this issue.

The provisions for the regulation of clubs and other member-based associations are complex, with obvious differences under the DDA and the Sex Discrimination Act (SDA). NDS recommends that the consolidated legislation should reflect the approach used in the DDA (the definition used in the SDA may result in a diminution of protection for people with disability).

NDS recommends that the regulation of sport reflect that contained within the DDA, which prohibits discrimination on this ground with explicit exceptions. Facilitating the participation of people with disability in sport and assisting them to participate broadly in society are desirable goals.

Prohibiting discriminatory requests for information is important. The Victorian Equal Opportunity Act 2010 prohibits requests for information that could be used to discriminate against the person on the basis of a protected attribute unless the information is to be used for a non-discriminatory purpose (the person making the requests bears the burden of proving it is for a non-discriminatory purpose). This should be reflected in the consolidated bill even though, as noted in the discussion paper, it may cause a small increase in the obligations of the duty holder.

Exceptions and exemptions

The Commonwealth ant-discrimination laws differ significantly in the area of exceptions and exemptions. NDS is aware that people with disability are regularly discriminated against by the use of unnecessary requirements, particularly in the area of employment and particularly associated with what are listed as genuine occupational qualifications or requirements. A consolidated bill should aim to reduce the frequency of this occurrence (though it will require careful drafting).

In principle, temporary exemptions, with their ability to provide flexibility, have played an important role in achieving change. In some cases, however, they have been abused (by unnecessarily delaying the obligations on duty holders). They should be allowed under the consolidated bill, but within limits.

Complaints and compliance framework

A thorough information and education program will be required to support the introduction of a consolidated bill. With resourcing, peak bodies are well placed to provide this support

to their members; they are an efficient and effective method of educating a large proportion of potential duty holders as well as potential complainants.

The effectiveness of Standards and Action Plans to provide guidance is varied. The National Standards for Disability Services are well known, well accepted and, in a number of jurisdictions, externally monitored. They are an important element in ensuring the provision of high quality services to people with disability.

The Disability Standards for Education, however, have largely failed to improve the access children with disability have to mainstream education institutions. This, in part, relates to the fact that there is no compliance regime: some process to measure compliance with standards is needed.

Disability Action Plans have been useful in encouraging some organisations, government agencies and businesses to focus on access issues for people with disability.

Currently, conciliation under the DDA is compulsory. NDS considers it worthwhile to investigate whether any additional dispute resolution mechanisms should be made available (particularly to minimise the costs and stresses experienced by parties seeking resolution of a complaint).

NDS is aware that the Commission currently has the ability to undertake general investigations into areas of interest such as the employment of people with disability. This function can be constructively used to shed light on an issue that may involve discrimination but may also be impacted by other barriers. This ability to consider broad issues of disadvantage should be retained.

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About National Disability Services

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes around 700 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.