

# National People with Disabilities and Carer Council

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## **The Consolidation of Federal Antidiscrimination Laws: Submission by the National People with Disabilities and Carer Council**

This submission is made by the National People with Disabilities and Carer Council (NPWDACC) which represents Australians with disabilities and carers. The NPWDACC applauds the decision of the Australian Government to consolidate into one modern statute, the various antidiscrimination acts which are already on the federal statute book. The focus of this submission will be on those aspects of the statute proscribing discrimination against persons with disabilities, their families and carers. Thirty questions are set out in the helpful discussion paper, however, this submission will not seek to answer or to comment upon all of these questions. Instead, the submission will respond to those questions bearing most directly upon discrimination on the grounds of disabilities and on intersectional discrimination.

For ease of comprehension, this submission will set out the questions on which comment is warranted, and after each question the response of the NPWDACC will be set forth. However, the responses are written on the assumption that the readers will be familiar with the material so helpfully catalogued in the discussion paper.

**Question 1.** What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

**Response:** In the view of the NPWDACC, the current definitions of direct and indirect discrimination are unnecessarily complex. While it would be possible not to define discrimination at all, and thus to leave it to the courts to determine whether or not discrimination has occurred, it is suggested this course of action would be inadvisable. The Australian courts have had less experience with human rights than have their American and Canadian counterparts. Therefore, guidance needs to be given to courts, tribunals and administrators on what will constitute proscribed discrimination.

In most statutes, the proving of direct discrimination requires the comparator test to be applied, that is the situation of the complainant is juxtaposed with a mythical person without the relevant attribute. In many situations, and pregnancy is the clearest, the comparator test is difficult to apply. It is suggested that the comparison test be jettisoned in favour of the detriment test which operates in the ACT and in Victoria. Under this test, the question is simply whether the complainant suffered less favourable treatment on the grounds of the protected attribute? In other words, did the complainant suffer a detriment?

In relation to indirect discrimination, the current test of seeing whether the complainant has failed to comply or cannot comply with a neutral requirement or condition which has an adverse impact etc, is not merely complex but it is difficult to explain. On the other hand, the British test for indirect discrimination is simpler and more straight forward. One simply asks whether the creation of the adverse action can be justified where it is proportionate and where it seeks to achieve a legitimate aim.

It is the suggestion of the NPWDACC that this British test for indirect discrimination be adopted.

**Question 2.** How should the burden of proving discrimination be allocated?

**Response:** The current laws place the onus of proof on the complainant. However, under section 361 of the *Fair Work Act*, where a complainant alleges that the discriminator has contravened the provisions by taking action for a particular reason etc, a rebuttable presumption operates whereby the discriminator is presumed to have taken the action for that reason, until the discriminator proves otherwise. It is suggested that it would be sensible to harmonise the consolidation bill with the *Fair Work Act*. This could be achieved by placing a fair work rebuttable presumption into the new antidiscrimination statute.

**Question 3.** Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

**Response:** It is suggested that the special measures provisions be retained and fine tuned, certainly with respect to persons with disabilities.

**Question 4.** Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

**Response:** It is suggested that the duty to make reasonable adjustments be a stand alone duty in the proposed consolidation bill. It should certainly continue to apply to persons with disabilities, and it may be useful for it to apply to other attributes.

**Question 5.** Should public sector organisations have a positive duty to eliminate discrimination and harassment?

**Response:** Yes, of course. Such a duty should also be placed upon private sector bodies.

**Question 6.** Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

**Response:** a general provision outlawing harassment with respect to all attributes would strengthen our discrimination laws and would strengthen the current provisions proscribing harassment in the *Disability Discrimination Act 1992*.

**Question 8.** How should discrimination against a person based on the attribute of an associate be protected?

**Response:** The *Disability Discrimination Act* protects persons who are discriminated against because an associate is a person with the attribute of disability. The NPWDACC is of the view that this type of protection should be extended to all of the attributes covered in the consolidation bill.

**Question 10.** Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

**Response:** The consolidation bill should clearly cover intersectional discrimination, that is where a person is discriminated against on the grounds of two or more attributes. The NPWDACC suggests that intersectional discrimination be covered by an over-arching provision to this effect.

**Question 11.** Should the right to equality before the law be extended to sex and/or other attributes?

**Response:** Section 10 of the *Racial Discrimination Act 1975* is a general equality before the law provision. For its constitutional validity it relies upon article 5 of the Convention On The Elimination Of All Forms Of Racial Discrimination. It is suggested that further thought should be given to enacting a general equality before the law provision for persons with disabilities. This could be constitutionally supported by article 5 of the Convention On The Rights Of Persons With Disabilities.

**Question 12.** What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

**Response:** It is suggested that the current approach of specifying employment, education, the provision of services etc, works well and is understood throughout the Community.

**Question 13.** How should the consolidation bill protect voluntary workers from discrimination and harassment?

**Response:** The consolidation bill should clearly protect volunteer workers from discrimination. This is especially important for persons with disabilities who are often discouraged from volunteering because of lack of legal protection.

**Question 15.** What is the best approach to coverage of clubs and member-based associations?

**Response:** It is suggested that the best approach for covering clubs is to be found in the *Disability Discrimination Act*. Other Commonwealth anti-discrimination statutes only cover a much narrower group of clubs. The NPWDACC suggests that the consolidation bill adopts the approach in the *Disability Discrimination Act* with of course appropriate exceptions.

**Question 16.** Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

**Response:** Yes, the consolidation bill should apply to all partnerships irrespective of size.

**Question 17.** Should discrimination in sport be separately covered? If so, what is the best way to do so?

**Response:** Yes, the *Disability Discrimination Act* proscribes discrimination in the field of sport etc. It is suggested the consolidation bill also protect persons from discrimination in sport with appropriate qualifications and exceptions.

**Question 18.** How should the consolidation bill prohibit discriminatory requests for information?

**Response:** It is suggested that the Victorian provision as outlined in the discussion paper is an appropriate provision to cover discriminatory requests for information.

**Question 19.** Can the vicarious liability provisions be clarified in the consolidation bill?

**Response:** The vicarious liability provisions appear to work reasonably well in the Commonwealth antidiscrimination statutes.

**Question 20.** Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

**Response:** Yes, it would be advantageous for the consolidation bill to adopt a general limitations clause. As outlined in the discussion paper, the relevant Canadian provision would be a useful model for Australia. Although initially there may be some uncertainty re exceptions, in the long-run this more flexible approach will assist persons with disabilities.

**Question 21.** How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

**Response:** The requirement that the complainant be able to undertake the inherent requirements of the work, is an exception to discrimination in the *Disability Discrimination Act*. It would be sensible for the consolidation bill to adopt the inherent requirements test as set out in the *Fair work Act* as this would further harmonise Commonwealth antidiscrimination law.

**Question 22.** How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

**Response:** The Government does not intend to alter the current religious exemptions in Commonwealth legislation. Most States have similar exemptions covering sexual orientation and gender identity. It is unlikely that a consolidation bill which covers both sexual orientation and/or gender identity would not extend the exemptions to cover these attributes.

**Question 23.** Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

**Response:** The temporary exemptions process appears to work well and on balance should be retained. However, the consolidation bill should specify that when granting exemptions etc, the Australian Human Rights Commission should consider exemptions in the light of the objects of the consolidation bill.

**Question 24.** Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

**Response:** Action plans under the *Disability Discrimination Act* have been useful, however, greater use of them could be made by a much larger number of employers. It is suggested that they should be further promoted.

It is further suggested that further work be done on establishing co-regulation schemes to assist bodies to comply with the consolidation bill. The disability standards under the *Disability Discrimination Act* should most certainly be retained and where appropriate be expanded to other relevant aspects of life. However, the NPWDACC is concerned at the delay in reviewing and updating some of these standards and that in the development of the standards there has been a trading off of some rights.

**Question 25.** Are any changes needed to the conciliation process to make it more effective in resolving disputes?

**Response:** Conciliation is a useful method of resolving disputes, however, it would be appropriate to conduct further research into its utility. It is suggested that voluntary arbitration for the binding settlement of disputes should be made available because voluntary arbitration is usually speedier and cheaper than is curial resolution.

**Question 26.** Are any improvements needed to the court process for antidiscrimination complaints?

**Response:** The NPWDACC suggests that advocacy bodies, trade unions and other representative organisations be enabled to bring proceedings on behalf of complainants in the courts. It is further suggested that in discrimination cases, each party should bear its own costs. This would encourage more complainants and bodies to bring curial proceedings to protect these persons and bodies from proscribed acts of discrimination.

**Question 27.** Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

**Response:** On balance, it is the view of the NPWDACC that the inquiry powers of the Human Rights Commission should be broadened to enable the Commission to inquire into discriminatory practices in the States and Territories. This may require the establishment of formal cooperative arrangements with the States and Territories. It is further suggested that the consolidation bill enlarge the current powers of the Commission to report to Parliament on its monitoring of the level of discriminatory practices in Australia. It is also suggested that the powers of the commissioners with respect to Amicus Curie briefs be enlarged. The consolidation bill should provide that the commissioners may appear in matters on appeal from the Magistrates Court. Finally, it is suggested that the Commission be given broad investigative and enforcement powers. Put briefly, in appropriate matters the Commission should be empowered to enforce the provisions of the consolidation bill in the Federal Magistrates Court and in the Federal Court.

**Question 28.** Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the *Fair Work Act*?

**Response:** No, further fine tuning is not necessary at this point in time.

**Question 29.** Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

**Response:** No, further amendments are not necessary at this point in time.

**Question 30.** Should the consolidation bill apply to State and Territory Governments and instrumentalities?

**Response:** No, this is a field best left to State and Territory antidiscrimination law.