

# Response to the Consolidation of Commonwealth Anti-Discrimination Laws

## Discussion Paper

### Introduction and Overarching Comments

The Australian Centre for Disability Law (ACDL) advises and represents clients within New South Wales on matters concerning disability discrimination. We also provide advice and representation to clients with disability across Australia on broader human rights matters. In addition, ACDL engages in various law reform, continuing legal education, and community legal education activities.

ACDL is supportive of a single Equality Bill (hereafter referred to as the Consolidation Bill). Our response is a reflection of what we perceive is in the best interest of people with disability.

It is imperative that the Consolidation Bill enshrines all the international conventions aimed at achieving equality and which Australia is a signatory to, including the Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Elimination of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).

### Meaning of Discrimination

**Q1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and more preferable? If not, can the consistency of the separate tests for direct and indirect discrimination be improved?**

ACDL supports the definition of discrimination set out in the submission put forward by the discrimination law experts.<sup>1</sup> We would like to highlight important aspects that we think should be included in the definition.

The discussion paper points out both that the *Disability Discrimination Act 1992* (DDA) and the *Racial Discrimination Act 1975* (RDA) include a fourth step in proving indirect discrimination which requires the complainant to prove that they do not or cannot comply with the condition, requirement or practice. It is ACDL's position that this fourth step should not be included in the Consolidation Bill. As the discussion paper notes, there is no clear policy reason to for this step and it is likely to be confusing for those unfamiliar with the case law.<sup>2</sup>

In order to make the term 'reasonableness' easier to interpret and to make it clearer to duty holders, ACDL supports including an indicative list of factors relevant to determining reasonableness. For example, whether the policy is legitimate and proportionate, the feasibility of overcoming the disadvantage and the nature and extent of the disadvantage imposed<sup>3</sup>.

ACDL supports a shift away from direct and indirect discrimination towards a unified test as long as it promotes greater protection. It is our position that both the terms direct and indirect discrimination

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<sup>1</sup> Discrimination Law Experts Group, [Consolidation of Commonwealth Anti-Discrimination Laws Submission](#) (December, 2011), pp. 8-9

<sup>2</sup> Commonwealth Attorney-General's Department, [Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper](#) (September 2011), p. 13

<sup>3</sup> *Ibid.*, p. 13-14

may be misleading; direct discrimination implies that there must be a degree of intent and indirect discrimination may give the impression that this act of discrimination is less important. Therefore, it is essential that indirect discrimination is incorporated into a unified test of discrimination .

A unified test would eliminate the need for a comparator which has made complaints complicated.<sup>4</sup> This was best demonstrated in *Purvis v New South Wales*<sup>5</sup> where the High Court separated behaviour from disability, making the comparator a student that exhibited the same behaviour but without the disability.

There has also been difficulty determining whether direct or indirect discrimination is applicable in a particular matter.<sup>6</sup> ACDL has run a number of cases which could have been run as either direct or indirect discrimination.

ACDL supports the net detriment test replacing the comparator as this would be clearer for the courts to interpret. We feel that this should be based on the net detriment test set out in s. 8 of the *ACT Discrimination Act 1991*.

**As part of the unified definition, the term ‘relevant circumstances’ should be included.**

## **Q2. How should the burden of proving discrimination be allocated?**

It is ACDL’s position that the burden of proof should be shared. We support the direction that the Fair Work Act as well as the UK, United States, New Zealand and South Africa have taken in turning the burden of proof on the respondent once the complainant has made a prima facie case of discrimination<sup>7</sup>. However, the respondent should be given the opportunity to rebut the complaint.

Furthermore, it is imperative that the respondent be made to prove that disability or other protected attributes was not a contributory factor in the less favourable treatment and whether the treatment was justifiable within the principles of what is considered unlawful.

Reversing the burden of proof is particularly beneficial for people with disability because a respondent is always in a better position to obtain required evidentiary materials especially in terms of the direct thoughts of the respondent.

## **Q3. Should the Consolidation Bill include a single special measure provision that covers all protected attributes? If so, what should be taken into account in defining that provision?**

Special measures are an important mechanism in overcoming entrenched, historical discrimination such as the types of discrimination experienced by people with disability. In the interests of uniformity, it is ACDL’s position that the Consolidation Bill should include a single special measure provision that covers all protected attributes. The CRPD explicitly does not contain a special measures provision in a temporary context, given the potential is that some measures the temporary nature can be incongruent with the permanent nature of impairment, therefore special measures need not always be of a temporary nature when they apply to people with disability.

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<sup>4</sup>Discrimination experts roundtable, p. 6

<sup>5</sup> {2003} HCA 62

<sup>6</sup>Discrimination experts roundtable, p. 6

<sup>7</sup> Commonwealth Attorney-General’s Department op.cit ., p. 15

Importantly, special measures should have the effect of assisting equality, in the sense of a gaining a sustainable benefit. Discrimination should not be permitted in the implementation of a special measure. For example, a disability service should not be permitted to discriminate against its target group.

**Q4. Should the duty to make reasonable adjustments in DDA be clarified, and if so, how? Should it apply to other attributes?**

ACDL supports making the duty to make reasonable adjustments a stand alone positive duty as it would provide clarification on the obligation. Failure to make reasonable adjustments would be a separate type of discrimination to direct and indirect or the unified test as we propose, and would still be subjected to the defence unjustifiable hardship.

**Q5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?**

In light of the DDA, it is imperative that public sector organisations have a positive duty to eliminate discrimination and harassment. Although the public sector should lead by example in eliminating discrimination and harassment, it is disappointing to note that approximately 95% of ACDL's discrimination cases are against public sector agencies.<sup>8</sup>

**Q6. Should the prohibition against harassment cover all protected attributes?**

The prohibition against harassment should cover all protected attributes and all protected areas of public life. As the DDA currently stands, it explicitly protects people with disability against harassment in employment, education and the provision of goods and services. This has led to uncertainty about the general coverage of harassment. Therefore, by having a stand alone provision, covering all protected attributes and all protected areas of public life, the uncertainty about general coverage of harassment in the DDA will cease<sup>9</sup>.

**Protected Attributes**

**Q8. How should discrimination against a person based on the attribute of an associate be protected?**

In order to achieve clarity, it is necessary that associates of persons with all attributes are protected under the Consolidation Bill. As protection based on the attribute of an associate differs from the RDA and DDA, the DDA definition should prevail because it captures broader range and people and perhaps be broadened to include colleagues and friends of the person with the particular attribute<sup>10</sup>.

**Q9. Are all the current protections based on these attributes appropriate?**

It is ACDL's position that the protected attributes should be extended to cover the attributes covered by the International Labour Organization, apart from a relevant criminal record.<sup>11</sup> It would

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<sup>8</sup> This information was taken from the Australian Centre for Disability Law's version of the Community Legal Centres Information System

<sup>9</sup> Commonwealth Attorney-General's Department op.cit., p. 19

<sup>10</sup> Ibid., p. 22

<sup>11</sup> Ibid., p.23

be prudent to also incorporate characteristics such as the use of a device, being accompanied by an assistant or assistance animal as these elements were seen as important inclusions in the DDA 2009 amendments.

**Q10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?**

The Consolidation Bill should protect against intersectional discrimination. For example, if an aboriginal woman with disability is discriminated against it is difficult to determine upon which ground the discrimination has taken place. ACDL has had a number of cases involving intersectional discrimination.

It is ACDL's position that the Consolidation Bill should provide that a discrimination complaint may be made on more than one protected ground. Courts could then also consider the aggravated disadvantage from the intersection of protected characteristics.

**Protected Areas of Public Life**

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

It is ACDL's position that the right to equality before the law should be extended to all protected attributes. In regards to people with disability, this would be in keeping with Article 5 of CRPD. However, we note that there are some existing limitations associated with guardianship and mental health laws. ACDL advocates for changes to these laws so that they have the least impact on a person's equality before the law.

**Q. 12 What is the most appropriate way to articulate areas of public life to which anti-discrimination laws apply?**

It is ACDL's position that the Consolidation Bill should adopt the approach recommended by the *SDA Report*, including a general provision prohibiting discrimination and harassment in any area of public life as the RDA takes this approach. However, the Consolidation Bill should not incorporate a parallel to subsection 9(1) of the RDA which also requires the discriminatory act to have the purpose or effect of impairing 'any human right or fundamental freedom' as its interpretation caused confusion for the courts.<sup>12</sup>

This would in effect broaden the areas of public life protected under anti-discrimination laws.

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

This is a critical issue for ACDL, given that people with disability comprise a significant proportion of the voluntary workforce. Therefore, it is essential that voluntary workers are protected from discrimination and harassment. This increased protection would lead to increased economic benefits by encouraging volunteerism.<sup>13</sup> This is particularly important for Community Legal Centres, such as ours, given that we rely so heavily on volunteers.

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<sup>12</sup> Ibid., p. 27

<sup>13</sup> Ibid., p. 28

Therefore, voluntary workers should be listed as a protected area of public life.

**Q. 14 Should the consolidation bill protect domestic workers against discrimination? If so, how?**

The status quo is that existing Commonwealth anti-discrimination laws do not include protected area of public life.

This question is pertinent to ACDL, particularly considering that a number of people with disability rely on domestic workers for personal care. It is important for the Consolidation Bill to strike a balance between the right to equality for domestic workers and the right to privacy of people with disability.

It is ACDL's position that attendant care workers be excluded from the Consolidation Bill because of the very personal nature of the role and that it is more of a private relationship than that of a relationship in the public sphere.

**Q. 15 What is the best approach to coverage of clubs and membership based organizations?**

It is ACDL's position that there needs to be a uniform definition of a club in the Consolidation Bill. Given that the DDA has the most expansive definition of a club, it is our position that the DDA definition is maintained.<sup>14</sup>

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

It is ACDL's position the Consolidation Bill should apply to all partnerships, regardless of size. In relation to employment, the inherent requirements of the job exemption and the reasonableness test would apply.

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

It is ACDL's position that discrimination in sport should be separately covered because of the unique physicality characteristics required in sport. Perhaps the best way to do so is by using the Victorian *Equal Opportunity Act 2010* (Victorian Act) as a model. The exemptions in the Victorian Act in relation to gender, age and disability apply.<sup>15</sup>

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

The ACDL would like the current provision in the DDA prohibiting discriminatory requests for information to be maintained. The best way to do this is to maintain the existing test.<sup>16</sup>

**Q. 19 Can vicarious liability be clarified in the Consolidation Bill?**

It is ACDL's position that there should be a unified test for vicarious liability in the Consolidation Bill which should follow the test in the *Age Discrimination Act 2004* (ADA) and the DDA. These Acts have the broadest test as they cover the relationships (for companies) between the company, directors, employees and agents as well as the relationship between employer and employee and principal and

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<sup>14</sup> Ibid., p. 31

<sup>15</sup> Ibid., p. 33

<sup>16</sup> Ibid., p. 34

agent.<sup>17</sup> Furthermore, in cases relating to harassment, it would be impossible to prove that an employer had authorised the conduct without a unified test.

The test used in the case of *Caton v Richmond Club Ltd*<sup>18</sup> is the most appropriate test, as emphasis was placed on the employer/company taking all reasonable steps. By requiring companies and employers to take all reasonable steps, it encourages them to actively address instances of unlawful discrimination and harassment<sup>19</sup>.

### **Exceptions and Exemptions**

#### **Q. 20 Should the Consolidation Bill adopt a general limitation clause? Are there specific exemptions that would need to be retained?**

It is ACDL's position that the Consolidation Bill should adopt a general limitations clause. A general limitation clause would clarify that conduct which is necessary to achieve a legitimate and proportionate means of achieving that objective is not discrimination. This provides greater flexibility than having set objections.

Although, there is some concern as to how the courts will interpret the general limitations clause, it is ACDL's position that, the benefits will outweigh this uncertainty.<sup>20</sup>

#### **Q. 21 How should a single inherent requirement/genuine occupational qualification exception from discrimination in employment operate in the Consolidation Bill?**

It is ACDL's position that a provision similar to the EU Directive would be appropriate for the consolidation bill. The Directive allows member states to include in anti-discrimination legislation, in limited circumstances, a provision allowing different treatment based on a particular attribute to be justified if the attribute constitutes a genuine and determining occupational objective and where the objective is legitimate and the requirement is proportionate. This test has been adopted by the UK Act.<sup>21</sup>

### **Exemption for religious organisations**

We would like to see the exemption for religious organisations abolished so that religious organisations are unable to discriminate on any grounds across all protected attributes. If religious organisations were granted an exemption in the Consolidation Bill, equality would be severely compromised.

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

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<sup>17</sup> Ibid., p. 35

<sup>18</sup> [2003] NSW ADT 202 at para 175

<sup>19</sup> Ibid., p. 36

<sup>20</sup> Ibid., p. 37

<sup>21</sup> Ibid., p. 39

ACDL notes that the DDA has been in existence for twenty years and there has been little evidence that temporary exemptions have been effective, therefore, it is ACDL's position that temporary exemptions should no longer be available for discrimination on the grounds of disability.

### **Complaints and Compliance Framework**

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

It is ACDL's position that action plans should be maintained and perhaps extended to other attributes.<sup>22</sup>

We also see co-regulation as a mechanism that would provide greater certainty and guidance to duty holders. This could involve industry working with the Australian Human Rights Commission (AHRC) and other stakeholders to provide industry specific detail to improve compliance.<sup>23</sup> Preparing a co-regulatory code or standard with the Commission and the community could assist in educating business about Commonwealth anti-discrimination laws. Furthermore, the quality of the co-regulatory code and legislative compliance could be enforced by a requirement that the code be approved by the Commission AHRC as well as getting them recertified on a regular basis. This enables would enable the co-regulation codes to be compliant with all Commonwealth anti-discrimination laws.<sup>24</sup>

We do not think that co-regulation is an appropriate measure for prohibiting discrimination because we feel that discrimination is best regulated by the AHRC as they have the knowledge and understanding of human rights law.

It is ACDL's position that a better regulation mechanism would be to maintain the disability standards as they provide a clear benchmark against which to judge a service. However, we acknowledge that applying the standards across the board may be difficult due to their level of technicality.

ACDL also believes that it would be useful for the AHRC to certify certain special measures for a specified period of time. This would enable businesses to adopt equal opportunity measures with more certainty.<sup>25</sup>

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

ACDL believes that conciliated agreements ought to be capable of registration and enforcement. Voluntary arbitration may be suitable for people with disability, given that it provides a binding

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<sup>22</sup> Commonwealth Attorney-General's Department op.cit., p. 44

<sup>25</sup> Ibid., p. 46

decision at a relatively low cost.<sup>26</sup> Therefore, it is our position that parties should be able to go straight to adjudication.

**Q. 26 Are any improvements needed to the court process for anti-discrimination complaints?**

ACDL is in favour of allowing representative complaints by advocacy organisations and AHRC. Although, representative complaints as proscribed by the DDA do not currently have standing under the Federal Court rules, we would like to see more certainty. This will make the complaints process more efficient and user friendly. It will also assist in cases of systemic disadvantage which are more difficult to raise with an individual complaint.<sup>27</sup> It could also lead more consideration of important issues by judicial officers which will lead to greater certainty of obligations over time.<sup>28</sup>

We are supportive of the AHRC having the power to grant corrective and preventative orders.<sup>29</sup>

There needs to be more explicit guidance given to Courts in the legislation on the issue of damages to be awarded and the quantum of damages should reflect both the harm caused by discrimination and the difficulties faced by the applicant in obtaining a remedy. For example, the *Anti-Discrimination Act 1998 (TAS)* allows for damages for humiliation.

Currently there is no security as to costs in discrimination legislation. ACDL believes there needs to be a provision in place which guarantees cost capping in discrimination matters. This was most recently demonstrated in the case of *King v Jetstar Airways Pty Ltd (No 2)*<sup>30</sup>. The complainant lodged a disability discrimination complaint against Jetstar's two wheelchair policy and when she lost that the respondents moved to have the cap removed following the conclusion.

ACDL also submits that the Court cannot require a party in proceedings under this Division to give an undertaking as to damages. The reason for this is that many applicants in human rights claims are economically and socially disadvantaged persons. They are not able to give undertakings with respect to damages. An application by a respondent for such an undertaking has the potential to entirely frustrate a human rights claim if granted by the Court. In our work we are finding that the threat of making such an application is becoming more frequent as part of the pre-trial manoeuvres of some respondents.

The legislation should incorporate more positive provisions in relation to the value of equality and the personal and social harm caused by discrimination.

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

ACDL supports the harmonisation of the definition of human rights in the AHRC Act.<sup>31</sup>

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<sup>26</sup> Ibid., p. 47

<sup>27</sup> Ibid., p. 48

<sup>28</sup> Ibid., p. 48

<sup>29</sup> Ibid., p. 49

<sup>30</sup> [2012] FCA 8

<sup>31</sup> Commonwealth Attorney-General's Department op.cit., p. 51

It is our position that the Commission's inquiry powers be expanded to examine matters within a state or territory and under state and territory laws.<sup>32</sup> This power could be derived from the external affairs power, section 51 of the Commonwealth Constitution linking it to our international obligations under human rights treaties.

ACDL would like to see all the Discrimination Commissioners be given the power to monitor the elimination of all forms of discrimination and report to parliament.<sup>33</sup> This is crucial in working towards the elimination of discrimination as well as raising awareness of the issue of discrimination. It also makes the parliament accountable.

We support specialist commissioners being granted the power to intervene or act *amicus curiae* in unlawful discrimination matters without having to seek leave of the court.<sup>34</sup>

The AHRC should be granted the power to investigate potential breaches of Commonwealth anti-discrimination laws without an individual complaint being made.<sup>35</sup> This will ensure that systemic issues of discrimination are brought before the courts.

The AHRC should also be able to have an enforcement role. This includes the ability to bring breaches of conciliated agreements before the courts as well issuing compliance notices for both breaches of the Act and breaches of conciliation agreements.<sup>36</sup> This is critical for people with disability as they often have limited financial capacity and therefore do not want to risk having a costs order made against them. Further, people with disability are more likely to be reliant on poorly resourced specialist Community Legal Centres to provide legal advice and representation in discrimination matters while the matters are defended by well-resourced government departments and private corporations.

### **Interaction with Other Laws and Application to State and Territory Governments**

#### **Q. 28 Should the Consolidation Bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing interactions with the Fair Work Act?**

There is currently significant overlap between the Commonwealth anti-discrimination laws and the Fair Work Act.

First, there is interaction between the Fair Work Act provisions regulating discriminatory modern awards and enterprise agreements and Commonwealth anti-discrimination laws. Complaints about breaches of Commonwealth anti-discrimination laws in terms of modern awards and enterprise agreements can in effect be dealt with by Fair Work Australia.<sup>37</sup> Therefore, this area should be left in the jurisdiction of Fair Work Australia.

Another potential interaction is between the Fair Work Act's general protections against discrimination in the workplace and the Commonwealth Anti-Discrimination laws. The Fair Work Act

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<sup>32</sup> Ibid., pp. 51-52

<sup>33</sup> Ibid., p. 52

<sup>34</sup> Ibid., p.52

<sup>35</sup> Ibid., p. 53

<sup>36</sup> Ibid., p. 53

<sup>37</sup> Ibid., p. 56

extends discrimination to cover various actions by the employer. The Consolidation Bill should incorporate this.<sup>38</sup>

**Q. 29 Should the Consolidation Bill make any amendments to provisions governing interactions with other Commonwealth, State and Territory laws?**

ACDL has concerns about the interaction with State and Territory laws and the extent to which Commonwealth laws 'cover the field' and prevent the States and Territories from legislating against discrimination as per section 109 of the Constitution.<sup>39</sup>

It is ACDL's position that State and Territory legislation should be prevented from deviating from international law standards.<sup>40</sup>

We support the Consolidation Bill enabling existing State and Territory anti-discrimination systems to remain in place.

**Q. 30 Should the Consolidation Bill apply to State and Territory Governments and instrumentalities?**

ACDL supports the Consolidation Bill applying to State and Territory Governments and instrumentalities.<sup>41</sup>

**Important issues that were left out of the discussion paper that we feel should be included in the Consolidation Bill**

A number of important issues relating to discrimination laws were omitted from the discussion paper.

Firstly, there was no mention of vilification. ACDL calls for the extension of vilification to cover all attributes, including disability. We propose that the Consolidation Bill adopts Part IIA of the Race Discrimination Act 1975. We also support the creation of a corresponding offence in the Commonwealth Criminal Code. In order for this to be effective, there needs to be a joint investigation framework between the Federal Police and AHRC incorporated into the legislation to deal with the associated criminal offences (eg incitement, victimisation, and vilification).

Secondly, the paper fails to mention anything about the need for training on the Consolidation Bill and the duties that duty holders are bound by, particularly at the managerial level. In order for the Consolidation Bill to be effective in its goal of achieving equality, it must include a training provision. As was recommended in the *Meeting The Equality Act 2010: Learning From Disability Equality Schemes In Higher Education In England Report*, senior managers should all attend disability equality events and training as well as be accountable for disability equality.<sup>42</sup>

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<sup>38</sup> Ibid., p.56

<sup>39</sup> Ibid., p. 57

<sup>40</sup> Ibid., p. 57

<sup>41</sup> Ibid., p. 59

<sup>42</sup> Equality Challenge Unit, [Meeting the Equality Act 2010: learning from disability equality schemes in higher education in England](#) (September, 2011), p. 59