



Physical Disability Council of NSW
Ordinary People Ordinary Lives

Attorney-General's Department

Discussion paper

The Consolidation of Commonwealth Anti-Discrimination Laws

Submission of the Physical Disability Council of NSW

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Introduction

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disability across New South Wales. Physical disability is part of the lives of approximately 937,000 residents, from young children and their representatives to aged people. PDCN, appreciates the opportunity to provide input to the consolidation of Commonwealth Anti-Discrimination Laws. PDCN views anti-discrimination legislation as an important aspect of Australia's legal system and vital to creating a community that assist people with physical disability to live ordinary lives. To provide people with physical disability an opportunity to comment on how anti-discrimination legislation enabled, or did not enable them to address their experiences of discrimination. PDCN has drawn on the experiences of people across NSW to respond to questions asked in the discussion paper.¹

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?

PDCN supports the introduction of a unified test for discrimination. In establishing the testing criteria, the Canadian model discussed by Dr Belinda Smith contends that "Once the applicant has proven a *prima facie* case of discrimination, the respondent employer is required to prove:

1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.²"

Establishing such a test will remove the artificial separation between direct and indirect discrimination simplifying discrimination law, making it easier to understand and use for those who believe they have been discriminated against.

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

Historically, the burden of proof has been on the complainant in discrimination cases. PDCN believes that modeling burden of proof obligation for direct discrimination after the UK model, where the burden of proof shifts to the respondent once the complainant has established a *prima facie* case of discrimination. PDCN understands that this represents a departure from jurisprudence but views this departure as necessary to produce effective legislation.

¹ PDCN Survey Consolidation of Commonwealth Anti-discrimination Legislation 2011

² Dr Belinda Smith, Submission 12 and Law Council of Australia, Submission 59, to the SDA Report (available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm>

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

PDCN supports the use of the reasonable adjustments provision in the DDA but would support making it a standalone positive duty as is seen in Victorian Act and this protection should be extended to all protected attributes.³ The role of explicitly stating reasonable adjustments as a positive duty will help encourage organisations to be more proactive.

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

The currently policy environment, particularly around disability has been focusing on creating more socially inclusive communities. The Productivity Commission recommends that the National Disability Insurance Scheme devote a significant portion of its funding to helping raise disability awareness.⁴ PDCN believes public sector organisations have a positive duty to eliminate discrimination. Such an obligation would help develop a whole of government approach to reduce all forms of discrimination and harassment.

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

Yes, as the distinction between harassment and discrimination varies amongst jurisdictions. PDCN contends that this variance could be removed by adopting a view of harassment similar to that of the EU which states harassment shall be deemed to be a form of discrimination, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the member states.”⁵ This definition, provides a broad grounds for harassment ensuring that harassment is viewed as a form of discrimination.

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

PDCN supports the extending of coverage of associates to all protected attributes under one provision creating consistency and clarity in the Consolidated Bill.⁶

³ Attorney Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 61 p17

⁴ Productivity Commission 2011 Disability Care and Support p10

⁵ EU Council Directive 2000/78/EC <http://osha.europa.eu/en/legislation/directives/sector-specific-and-worker-related-provisions/osh-related-aspects/council-directive-2000-78-ec>

⁶ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 79 p22

Question 10. Should the Consolidated Bill protect against intersectional discrimination? If so, how should this be covered?

Yes. The introduction of intersectional discrimination claims will reduce confusion, allowing those who feel they have been discriminated against to put forward a claim even if it does not fit under only one prohibited ground.⁷ PDCN is familiar with the negative role of restrictive categories where individuals have decided not to place complaints

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

PDCN maintains that all people should have the right to equality before the law.

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

PDCN understands that the Tasmanian Act provides the simplest approach by prohibiting discrimination by or against a person engaged in *any* activity, as long as it is 'in connection with' specific areas of public life.⁸ PDCN would support this as it provides the greatest clarity to stakeholders.

Question 13. How should the Consolidated Bill protect voluntary workers from discrimination and harassment?

The implementation of greater protections for volunteers in terms of work cover should be mirrored in anti-discrimination legislation. As such, PDCN would support volunteers being considered employees for the purpose of the act. This would bring the obligations of employers regarding volunteers in line with their obligations under the Work Health and Safety Act 2011 which stipulates that volunteers, like employees are considered a "Person conducting a Business or Undertaking and are thus must meet their obligations under the act so far as is reasonably practicable, to provide a safe and healthy workplace for workers or other persons."⁹

Question 14. Should the Consolidated Bill protect domestic workers from discrimination? If so how?

PDCN recognises that domestic workers have needed protection due to past abuses and exploitation, and hence should still be protected in a Consolidated Bill. Domestic workers are commonly poorly paid, unskilled, from poor socio- economic backgrounds and non-unionised backgrounds.

⁷ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 87 p24

⁸ Tasmanian Act, subsection 22(1).

⁹ Work Cover Authority of NSW (2011)

<http://www.workcover.nsw.gov.au/newlegislation2012/Employersandbusinesses/Pages/dutiesofapersonconductingabusinessorundertaking.aspx>

In Australia the term 'domestic worker' is not used to identify employees who deliver domestic duties, but some similarities can be seen between domestic workers and attendant care workers who also deliver a range of personal, domestic and social supports, and share many of the tasks common to many domestic workers. However for the purposes of clarity PDCN makes a clear division between 'domestic worker' as discussed in the paper and 'attendant care workers'.

PDCN views domestic workers as providing maintenance and cleaning services in a private dwelling. In contrast, an attendant care worker provides personal care services in addition to domestic tasks. PDCN contends that for a positive relationship to exist between attendant care worker and client it is essential that both parties have some safe-guards. PDCN believes attendant care workers should be excluded from the Consolidated 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.

People employing staff need provisions that will cover all aspects of employment, including hiring, retrenchment, salary, training, occupational health and safety. The DDA already includes provisions on employment in Section 15, but needs to include provisions for the purposes of employment within a person's private household.

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

PDCN supports the use of the DDA approach in determining what clubs and member based organisations are covered in the consolidated bill.¹⁰ The DDA method provides broader coverage and improved protections for people who have other protected attributes. This will provide protection for unlicensed clubs of less than 30 members.

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

To indicate to the business community that the discrimination is not appropriate there must be legislation indicating that no partnership is exempt from anti-discrimination legislation. This will ensure that those with protected attribute(s) are able to form partnerships with protection from discrimination.

Question 17. Should discrimination in sport be separately covered? If so, what is.

PDCN supports the adoption of the Victorian model in this instance which provides protection to all protected attributes but gives specific exemption for sex and gender identity (where strength,

¹⁰ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 114 p31

stamina or physique of competitors is relevant) and permits the restriction of competitive sporting activity to people who can effectively compete, to people of a specified age or age group or to people with a disability.

Question 18. How should the Consolidated Bill prohibit discriminatory requests for information?

PDCN believes that the Consolidated Bill should adopt the Victorian approach where a person is not allowed to request information unless it is necessary to do so for non-discriminatory purposes. The person requesting the information must not disclose the information unless it is necessary to do so for non-discriminatory purposes, nor can that person produce or disclose that information in court.¹¹ This protection is easier to understand and will insure that the privacy of the individual will be respected.

Question 19. Can the vicarious liability provisions be clarified in the Consolidated Bill?

PDCN would support the use of a unified test for vicarious liability in the Consolidated 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 relationships (for companies) between the company directors, employees and agents as well as the relationship between employer, employee principle and agent. The test used in the case *Carlton V Richmond Club LTD* is the most appropriate test, as emphasis was placed on the employer/ company taking all reasonable steps, thereby encouraging them to actively address instances of unlawful discrimination and harassment.

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

Yes the consolidated bill should adopt a general limitations clause. A general limitations 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 objectives

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

Yes, the Consolidated Bill should have a provision similar to the EU directive in this instance by creating a provision allowing differential treatment based on a particular attribute. This would only be allowable in limited circumstances where the attribute constitutes a genuine and

¹¹ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 132 p34

determining occupational objective and where the objective is legitimate and the requirement proportionate¹².

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

PDCN believes that temporary exemptions hold a unique place in anti-discrimination legislation allowing recipients immunity to discrimination on those grounds for a period defined. This they should be granted only on four conditions

1. That are part of a timeline to eliminate the reason for the granting of the exemption
2. That the process be overseen by an independent body such as the Commission
3. That the goals set during the general exemption period be legally binding to the recipient.

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?

In its work PDCN has become very familiar with the use of action plans as a way of providing guidance to duty holders under Commonwealth anti-discrimination law. Consequently, PDCN has identified that five standards what would give greater clarity to duty holders.

1. Objective(s) be measurable
2. Measurement tools and method be elucidated in the action plan
3. Individual designated role responsible of each aspect of the plain is clearly identified
4. Goals of the action plan are legally binding in relation to implementation
5. Regular review by duty holder

PDCN believes that the adoption of these standards will give duty holders a clearer understanding of what is required of them under anti-discrimination law. They could play a key role in ensuring against vicarious liability as, with the recommended standards, they provide clear evidence of an organisations commitment to remove discrimination from their workplace. In addition to use of standards for action plans PDCN would contend that a modification to section 64 of the Disability Discrimination Act 1992 would also be warranted.¹³ In particular, the PDCN would support the introduction of a mandatory requirement to disclose an action plan to the Commission.

¹² Council Directive 2000/78/EC of 27 (November 2000) Establishing A General Framework For Equal Treatment In Employment And Occupation 23

¹³ DISABILITY DISCRIMINATION ACT 1992 http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/ sect 64

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

As part of its preparation for this submission PDCN published a survey questioning the current functioning of the DDA and their experiences engaging with it. The results of the survey indicate that the compulsory nature of the conciliation process leads many to believe that no significant change will result of their complaint and this has discouraged some from taking their complaint further and others from complaining at all.¹⁴ In addition the difficulty in achieving systemic change through conciliation has meant that some are unwilling to engage in the process.

Consequently, PDCN would support the use of non compulsory conciliation in the new consolidated bill¹⁵ and also offering mediation to discrimination complaints.¹⁶

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

In considering the impact of the court process on anti-discrimination complaints it is clear that the cost of litigation and the recommendation of remedies needs to be addressed. The costs of litigation is a significant area of concern as the risk of bearing the cost of litigation is defiantly a barrier in taking a discrimination claim to court. This has been highlighted in a survey conducted by PDCN where a respondent cited personal financial risk as a motivator for not pursuing their complaint.¹⁷ To help reduce the risk of litigation PDCN supports the recommendation of the Productivity Commission where individuals pay their own litigation costs. Further, the court should have the power to consider cost orders along the guidelines of the *Family Law Act 1974*¹⁸

In addition to litigation costs PDCN supports the inclusion of corrective and preventative court orders as examples of the orders that the court can make.¹⁹ This will provide guidance to courts and other stakeholders on the powers of the court in anti-discrimination cases.

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?

The PDCN Survey highlighted that the Commission is perceived as an organisation that is enthusiastic in its role. However, the role and function is limited to an extent that is detrimental. Changes that would enable the Commission to become more effective include:

Empowered to conduct formal inquiries into broad systemic discriminatory matters into the broad systemic discriminatory matters across jurisdictions²⁰

¹⁴ PDCN Survey Consolidation of Commonwealth Anti-discrimination Legislation 2011

¹⁵ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 192 p47

¹⁶ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 198 p48

¹⁷ PDCN Survey Consolidation of Commonwealth Anti-discrimination Legislation 2011

¹⁸ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 204 p49

¹⁹ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 205 p49

1. Is allowed to appear *amicus curiae* in appeals from decisions made by the federal court and the Federal Magistrates Court.²¹
2. Be empowered to investigate potential breaches of commonwealth anti-discrimination laws without an individual complaint being made²²
3. Gaining an enforcement role following conciliation²³
4. A provision under the bill that separates the powers of the Conciliation function from other areas of the Commonwealth to reduce perceived conflict of interest²⁴

²⁰ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 215 p51,52

²¹ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 220 p52

²² Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 223 p53

²³ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 224 p53

²⁴ Attorney-Generals Department (2011) Consolidation of Commonwealth Anti-discrimination Laws para 226 p53