



Submission to the Consolidation of Commonwealth Anti-Discrimination Laws

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1 February 2012

The Disability Discrimination Legal Service (“DDLS”) is an independent, community organisation that supports individuals in disability discrimination matters. It is a not-for-profit association that provides free support to persons with disabilities. The DDLS also provides community legal education and undertakes law and policy reform projects in the areas of disability discrimination.

A Committee of volunteers manages the DDLS. The majority of the DDLS Management Committee is comprised of persons with disabilities. In addition to this, the DDLS’s work is supported by the efforts of volunteers, some of whom also have disabilities.

The DDLS is an active member of the community legal sector, particularly in respect of matters concerning people with disabilities. It is a member of the Federation of Community Legal Centres, and is primarily funded by the Federal Attorney General’s office.

DDLS is of the view that further changes to the Disability Discrimination Act are required in order to fully achieve its objectives, in particular the need to make significant changes to the manner by which a discriminatory conduct is prosecuted. Hence, we welcome the opportunity to have input into the consolidation of federal antidiscrimination laws and thereby provide suggestions in relation to the provisions of Act that would-be incorporated into the consolidated legislation.

Meaning of Discrimination

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?

1.1 DDLS is of the view that the current definition of direct discrimination under section 5(2) the DDA has blurred the distinction between direct and indirect discrimination and recommends the abolition of the classification of direct or indirect discrimination. We submit that once it is accepted that there is a positive duty to provide reasonable adjustments to a person with a protective attribute, the requirement to comply with a condition, requirement or practice is inherent in the failure to provide those adjustments. Hence discrimination is really committed as follows:

- a. unfavourable treatment of a person by reason of an attribute; or
- b. the failure to provide reasonable adjustments

- 1.2 DDLS however recommends that discrimination instead be characterised or classified as “aggravated discrimination” if the discriminatory conduct of unfavourable treatment is characterised as follows:
- a. Subjecting a person to detriment that amounts to harassment or vilification; or
 - b. If there are more than one attributes for which the person was discriminated.

1.3 The characterisation of the conduct being aggravated discrimination may serve to reflect that unlawful discrimination may happen innocently or unwittingly, and hence would emphasise the need to be vigilant in preventing such conduct. A case of aggravated discrimination may also serve as guidance in relation to the quantum of damages that maybe awarded by the court.

Definition of Disability

- 1.4 The definition of attribute should include an imputed attribute, ie. a person is discriminated against because of an assumption about his or her sex, or gender preference .

We also take this opportunity to recommend that the following paragraphs be added after the definition of disability under the corresponding section.

“A person may make a claim of disability discrimination notwithstanding the person’s personal belief or view that the disability for which the person was discriminated is not a disability.

Example: Jane is deaf. Deafness is a disability under the Act. Jane, like many deaf persons are proud of their deafness and do not consider being deaf a disability.”

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

DDLS recommends the burden of proof under the FWA, specifically that after the complainant has demonstrated unfavourable treatment, then the respondent has to prove that the unfavourable treatment was not by reason of any protected attribute. In a claim of failure to provide reasonable adjustments, after the complainant has demonstrated that the Respondent was aware or ought to have been aware of the adjustments requested, the respondent needs to prove that the adjustments required are unreasonable and would cause unjustifiable hardship.

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

The DDLS endorses the definition in the UNCRPD, being:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

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

Yes

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

Yes.

It is unlawful for a person to harass another person by reason of that person's attribute or the attribute of that person's associate. The test of whether a conduct constitutes harassment or not does not require an intent to harass but whether another person who has the same attribute as the aggrieved person would consider the conduct as harassment.

Protected Areas of Public Life

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

Yes

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

As per the areas defined under the DDA.

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

A volunteer worker should have the same rights as a paid worker in relation to claims of sexual harassment, religious or racial discrimination. A volunteer worker should have the same rights as a paid worker in relation to disability discrimination in the termination of employment where:

- a. The person has been a volunteer employee for at least 12 months; and
- b. The work performed by the person is of a substantial contribution to the employer, with the employer having the burden of proof that the work performed by the person is of a substantial contribution to the employer. Substantial contribution includes working for more than 8 hours a week.

Question 14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

Yes, a domestic worker should have the same rights as a non domestic employee in relation to claims of sex discrimination or any type of harassment in employment. A domestic worker should have the same rights as a non domestic employee in relation to claims of religious or racial discrimination in the termination of employment.

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

Club and member-based associations should be given a broader meaning. It should include an organisation or association of persons that:

- a. has a legal personality separate from its members; or
- b. has a set of officers, and conduct its activities on a regular basis or
- c. has at least 10 members and a written constitution and by laws; or
- d. has a common fund of at least \$1,000 at any given time.

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

Yes

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

The Act does not need to cover sport separately provided it restates the provisions of Section 28 of the DDA and substitutes the term "attribute" for "disability".

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

Discriminatory requests for information should be prohibited prior to the relationship (ie. pre-employment, prior to the offer of position).

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

- 19.1 The vicarious liability provisions should state that companies, employers or principals are vicariously liable if the unlawful discriminatory conduct was committed or performed by a director, employee or agent in their position as director, employee or agent. The vicarious liability is not negated by proof that the director, employee or agent acted outside the scope of their authority but by proof that the company, employer or agent took all reasonable steps to prevent the commission of unlawful discrimination.
- 19.2 The liabilities of persons who cause, instruct, induce, aid or permit also need to be clarified so that the person liable does not need to have any relationship with the aggrieved person and that liability arises from the mere conduct of causing, instructing, aiding or permitting. For example, if the spouse (who is not in any way connected with the employment) of a manager, assists the manager in discriminating against an employee, then the person so aiding the discriminator is also liable under the Act although there is no relevant relationship or area of discrimination as between the aider and the aggrieved person.

Exceptions and Exemptions

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

As per the current test.

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

- 22.1 ... There should be no religious exemptions in relation to discrimination on the grounds of sexual orientation or gender identity where the subject matter of the claim relates to a religious organisation's conduct of a commercial enterprise, or provision of education, or other services to the public, or the employment of persons in such commercial enterprise or provision of education or other services to the public.
- 22.3 An exemption may apply in relation to the hiring, employment or termination of employment with respect to the positions of assistant or immediate administrative or support personnel employed in the office of a religious leader, where the office is used and dedicated primarily to support the performance of

the religious leader in religious functions and duties to members of their religion. This may include a personal assistant, secretary, or an in house security personnel.

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?

As per current guidelines

Complaints and Compliance Framework

The DDLS concurs with the reservations expressed by the Discrimination Law Experts' Group Consolidation Submission dated 13 December 2011 pg 18, in relation to individually based complaints and their effect on reducing discriminatory conduct.

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?

- 24.1 It is our experience that voluntary action plans are ineffective in ensuring compliance, and we would anticipate co-regulation or self-regulation to be similarly ineffective. It is a concern that compliance with action plans registered with the Australian Human Rights Commission may be used as a defence in discrimination cases.
- 24.2 The history of complaints received by the DDLS often reflects a lack of willingness to make reasonable adjustments for people with disabilities, rather than confusion as to what their responsibilities are. Therefore, we believe that a more binding requirement on businesses/government is necessary.
- 24.3 Special measures may be effective depending on their nature.
- 24.4 Standards are preferable, however these must be detailed and clear, unlike the current *Disability Standards for Education 2005* which allow excessive interpretation resulting in ineffectiveness, and do not reflect more progressive comparable international legislation such as the *Individual with Disabilities Education Act 2004* (U.S.).

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

- 25.1 While it is currently ostensibly an offence for a person to fail to provide information sought by the Commission, attend a conference as directed, and provide false or misleading information, it is our experience that the Commission does not use in enforcing these powers, and therefore they are of little use. In reality, we are unaware if many, or indeed any, the respondents have been brought to task for failing to comply with these requirements. The process of enforcing these requirements seems a barrier to them being helpful to complainants.
- 25.2 Most if not all complaints brought to the Federal Court are subjected to court mediation, therefore we endorse the option of complainants being able to proceed directly to court without conciliation at the Commission.
- 25.3 The time taken from lodging a complaint to attending conciliation at the Commission can be between 3 to 9 months. This is not acceptable, particularly where the discriminatory conduct is ongoing and harmful. The Commission requires the resources to deal with complaints expeditiously.

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

Remedy

- 26.1 The DDLS supports the views and recommendations expressed by the Discrimination Law Experts' Group Consolidation Submission pg 23-25 in relation to the ability of the court to award remedies that address prospective conduct as well as awarding damages for past discriminatory conduct.

Representative Actions

- 26.2 The DDLS supports the recommendation that representative bodies should be to bring actions to federal courts.
- 26.3 It is our experience and observation that some respondents defend alleged discriminatory conduct by attempting to malign the complainant, not unlike the history of the treatment of women attempting to prosecute for sexual assault. The ability of representative bodies bringing action takes the burden from individuals who may not have the confidence to endure litigation, and disallows respondents from diverting courts from the discriminatory conduct at hand by focusing on the complainant. It would allow systemic discrimination to be addressed.

Litigation costs

- 26.4 The DDLS strongly believes that the threat of costs if unsuccessful, and indeed the finances required to pay a lawyer if pro bono assistance cannot be found, places significant barriers for individual complainants bringing complaints, and therefore to the elimination of discrimination in Australia.
- 26.5 Ironically, complainants who have no assets at all may feel more comfortable proceeding with legal action than the socio-economic group that could be seen to be the "average". Any individual who has any financial interest in their own house, for example, is from our experience unlikely to proceed with litigation in the federal courts.
- 26.6 In relation to litigation costs, the DDLS does not recommend each party to a discrimination case bear their own costs. While it is possible that some complainants may be fortunate enough to receive pro bono assistance, such assistance is difficult to find in matters such as employment and education discrimination where the alleged discriminatory conduct takes place over a number of years and trials may run from one to four weeks. Such a situation (the lack of legal assistance) immediately precludes complainants proceeding with their action.
- 26.7 The DDLS supports the views expressed by the Discrimination Law Experts' Group Consolidation Submission dated pg 25-26 and their recommendation that in relation to successful complainants, where *"respondents that have financial capacity to contribute to their costs, we recommend that there should be power to award costs against such a respondent."* Such a requirement would not only remove the fear of paying costs if unsuccessful, but encourage law firms and barristers to take on discrimination matters, knowing that they will be paid.
- 26.8 It is inappropriate in our view, for complainants to spend any damages they may receive as a result of the successful discrimination case on the payment of lawyers.
- 26.9 Suffice to say, community legal centres that are able to provide assistance to individuals free of charge should be funded adequately to do so. Currently centres such as the DDLS accept individual complaints but qualify our assistance to them due to our inability to take on court work due to a lack of resources. The DDLS has 2.6 EFT staff including administrative staff. We are expected to cover the state of Victoria. Such funding pays lip service to people with disabilities who wish to avail themselves of our services. It is entirely probable that complainants may settle on terms less favourable due to our inability to commit to assisting them in running the court case. This is not assisting the aims of the DDA.

- 26.10 In addition to the cost of lawyers, there are a number of other costs that are also barriers to individuals pursuing discrimination matters in the courts.
- 26.11 The DDLS, by virtue of its stakeholder group (that is people with disabilities), is often assisting people who are on a government pension and therefore for all intents and purposes, have no money at all with which to pursue litigation. Conversely to the outcome of individuals due to their financial status set out in paragraph 26.5, complainants who have no assets and therefore may feel more comfortable proceeding with the risks of costs if unsuccessful, are unable to afford many of the other costs associated with the court case. Such costs include:
- a. transcript;
 - b. expert reports;
 - c. payments to experts to attend court;
 - d. costs of subpoenas;
 - e. costs of conduct money;
 - f. videoconferencing fees.
- 26.12 In our experience, respondents are usually government departments, private business, or non-government but partially government funded entities such as universities, TAFEs and so on. All such respondents are able to afford lawyers and the other miscellaneous costs that are associated with litigation. This makes a significant difference in the ability of a party to effectively run its case.
- 26.13 The DDLS recommends that if individual complainants continue to be expected to enforce antidiscrimination legislation, that funds be set aside to allow complainants who cannot afford it to access funds for reasonable costs associated with litigation.

Judicial Education

- 26.14 It is unclear whether such a requirement could be legislated; however it is clear from various decisions that the failure of some members of the judiciary to appreciate the impact on a person of their attribute affects judgement.
- 26.15 For example, in *Walker v State of Victoria*¹, the applicant, Alex Walker, was a boy with multiple disabilities including Asperger's Syndrome - a social and communication disorder - Severe Pragmatic Language Disorder, and

¹ Walker v State of Victoria [2011] FCA 258. The

Attention Deficit Hyperactivity Disorder (ADHD). Expert testimony and medical reports tendered in evidence set out that a child who has these disabilities, when the environment (in this case, a school) is not able to be adjusted appropriately, will not be able to comply with the standards of behaviour expected of children without Alex's disabilities. However, Alex was frequently referred to in the Court's decision as engaging in 'misconduct'. The judicial commentary, instead of treating Alex's 'behaviours' at the school as manifestations of disabilities that the school had not provided for, put the responsibility on Alex to comply with the existing standards, and therefore failed to reflect an understanding of his disabilities. In doing so, the Court's approach did not appear to follow the spirit of the 2009 amendment to the Disability Discrimination Act 1992 (Cth), which includes in the definition of disability: "*To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*"

- 26.1 There is no doubt that a lack of understanding of disability, indigenous status, and other attributes covered by various discrimination laws is unhelpful to the fair hearing of discrimination matters.

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?

- 27.1 It is important to note that any functions undertaken by the Australian Human Rights Commission, either current or proposed, require adequate resourcing. Currently, we believe the Commission is not adequately resourced to efficiently carry out its current functions, led alone any expanded functions.

Formal Inquiries

- 27.2 It is the view of the DDLS that the Commission's current inquiry powers which are limited to acts of the Commonwealth are untenable if the aim is to allow individuals to make complaints under the international instruments as listed in the Discussion Paper.
- 27.3 In Victoria, for example, the two largest providers of services to people with disabilities are the Department of Education and Early Childhood Development through its schools, and the Department of Human Services through its own and subcontracted agency disability services.
- 27.4 The limitation of the Commission to inquire only in to acts of the Commonwealth ensures that people with disabilities are unable to

make complaints against the agencies most likely to discriminate against them, or breach their human rights.

- 27.5 This leaves people with disabilities to exhaust domestic remedies before they are able to take advantage of these international human rights instruments. The exhaustion of domestic remedies may take a number of years, as do complaints to the United Nations. Therefore, any remedy or finding will often come far too late to avoid significant detriment to the individual.
- 27.6 We recommend that the Commission is able to inquire into acts and practices by the States and Territories which infringe human rights.

Amicus Curiae

- 27.7 The DDLS supports the Commission's current ability to perform the role of *amicus curiae* however believes the current lack of resourcing prevents it from performing this role effectively.

Investigation of Alleged Unlawful Discrimination

- 27.8 The DDLS recommends that the Commission be able to investigate issues of discrimination without an individual complaint, and bring actions relating to those. The Commission is well-placed to see trends in discrimination complaints and is therefore in a position to identify systemic discriminatory practices and investigate and act on such practices.
- 27.9 In relation to a perceived conflict of interest, the Commission already has a Legal Department that could be viewed as providing assistance to complainants. The conciliation section of the Commission could be separated from any new department that dealt with inquiries and actions, however if both functions were seen to be incompatible living under one organisation, due to the current ineffectiveness of the individual complaint mechanisms, we believe it is more important for the Commission to be able to investigate and bring actions in relation to discriminatory practices, both individual and systemic, than it is to conciliate complaints.
- 27.10 It is possible that ADR services could be provided by alternative bodies if such services were seen to be in conflict with any new powers of the Commission in relation to investigations and inquiries.

Interaction with Other Laws and Application to State and Territory Governments

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

The DDLS believes that there should be no exemptions for acts done in direct compliance with State or Territory laws.