



NDS submission: Consolidation of Commonwealth Anti-Discrimination Laws

NDS supports the proposal to consolidate the Commonwealth anti-discrimination laws. The potential of this reform to reduce the overall complexity of the legislation, remove inconsistencies that currently exist between laws and ensure that simple, cost-effective mechanisms are available for resolving complaints should help reduce the regulatory and compliance burden on NDS member organisations. NDS also supports the commitment to not diminish existing protections through the consolidation process.

NDS addresses a limited number of issues in this submission.

Coverage

NDS notes that the draft Bill implicitly covers carers by reference to family responsibilities and to a carer's status (connected to children, older people or people with disability). It does not, however, expressly state that carers are covered by the draft Bill. In the interests of clarity and consistency with the *Fair Work Act* and with state and territory discrimination laws, NDS recommends the Bill be amended to explicitly cover discrimination on the basis of carer responsibilities.

The draft Bill does not address NDS's previously raised concern about protection from discrimination of victims of domestic violence (women with disability are more likely to experience domestic violence than other women). Further consideration of this issue is warranted.

NDS is pleased the definition of employment has been broadened to include 'voluntary or unpaid work'.

Definition of disability

Taken together, the definition of 'disability' in Section 6 and in Subsection 19(4) of the exposure draft substantially reproduces the definition in the Disability Discrimination Act (DDA).

An omission, however, is that the exposure draft has not included the amendment to the DDA in 2009 to make it clear that the definition of disability includes a genetic predisposition to a disability that is otherwise covered by the DDA. This amendment

was made to provide greater clarity—rather than to make a policy change—and it gave effect to recommendations that had been made by a 2004 Productivity Commission inquiry and a joint report of the Australian Human Rights Commission and the National Health and Medical Research Council (in 2003).

NDS believes the definition of disability should be amended to again be explicit that a genetic predisposition to a disability is covered.

Reasonable Adjustment

NDS supports the draft Bill's approach to reasonable adjustment (combination of Sections 23(6), 24(4) and 25). In the DDA, the explicit duty to make reasonable adjustments is outlined in the tests for direct and indirect discrimination; in the draft Bill it is part of the tests for determining whether conduct is justifiable or whether the inherent requirements exemption applies. The effect, however, is to retain the understanding of 'reasonable adjustment' currently in the DDA.

The inclusion in Section 25(3)(e) of 'any relevant guidelines prepared by the Commission' as a factor to be considered in the determination of a 'reasonable adjustment' is an appropriate addition.

Exceptions

Section 23 of the Bill sets out a new concept for Commonwealth anti-discrimination law, intended to align with the international human rights law concept of 'legitimate differential treatment'. In effect, it treats exceptions quite generally. Currently, Section 45 of the DDA is explicit; it outlines in detail the application of exemptions; this detail has not been replicated in Section 23.

The exception outlined in Section 31 (exception for court orders, determinations and industrial instruments) is of concern. The Explanatory Notes indicate that it replaces Section 47 of the DDA which provides detailed information relating to the payment of productivity-based wages.

NDS is concerned about the replacement of the phrase "...anything done by a person in direct compliance..." currently used in Section 47 of the DDA with "...if the conduct constituting the discrimination is necessary to comply with...". Given the range of wage assessment tools available, the choice of one tool over another may be argued not to be necessary to comply with the award, although it would be in direct compliance with the award. NDS foresees the possibility that an argument would be put forward that the choice of the one assessment tool (for instance, the BSWAT) was inappropriately chosen, it wasn't necessary to choose it, and therefore the exemption does not apply. This would be an unacceptable and inappropriate outcome. The ability to use a wage assessment tool to establish a productivity-based wage is essential to support the employment of some people with disability.

While NDS sees merit in the general approach to exceptions contained within Division 4, we are concerned that as it is drafted it may not be as clear for those who will have obligations under the Act. Supporting materials such as the Explanatory Notes must provide adequate detail to enable people to easily understand when exceptions may apply. In particular, NDS would like the Explanatory Notes to clearly

identify whether or not it is the Government's intention that Section 23 of the draft Bill addresses all the issues covered by section 45 of the DDA. NDS would also like the detail contained in Section 47 of the DDA to be replicated in Section 31 of the draft Bill.

Costs

NDS has considered carefully the issue of costs; and the issue is vexed.

On balance, NDS is supportive of the position outlined in Section 133—varying the usual position for litigation in Australia—that, in general, each party to a discrimination complaint that is taken to court should bear their own costs. At present, the risk of a costs order for an unsuccessful claim of discrimination is a significant disincentive for individuals to take action.

NDS believes this is an appropriate policy adjustment provided that, in application, the Australian Human Rights Commission does block the litigation of unmeritorious claims (without special leave of the court). This safeguard, together with Section 133(2), which enables the courts to award costs when it considers there are circumstances that justify it, should deter people from escalating unwarranted complaints to the court. The proposed change should facilitate access to justice while still allowing for courts to make costs orders based on the conduct of the parties and the merits of the complaint.

Burden of Proof

In principle—and when taken together with the removal of the comparator requirement from the meaning of discrimination (Section 19 and the Explanatory Notes)—the changed approach to the burden of proof of discrimination is supported. The complainant maintains responsibility for establishing that the conduct complained of actually occurred, with the respondent then required to provide evidence for the reason for their conduct and to demonstrate the applicability of any exceptions or defences relied on.

The effective operation of this process, it should be emphasised, requires the Australian Human Rights Commission to consistently and fairly terminate unmeritorious complaints.

NDS requests that the impact of this change be carefully monitored and considered in the three-year review provided by the draft Bill.

Compliance Codes

NDS supports the draft Bill's inclusion of co-regulation through the certification of industry standards or codes by the Commission for organisations and industries that choose to participate. Providing participating organisations that have complied with their certified codes or standards with a complete defence against discrimination is welcome.

December 2012

Contact: Dr Ken Baker
Chief Executive

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 800 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.