



Vision Australia Submission to Review of NSW Anti-Discrimination Act 1977

Submission to: NSW Law Reform Commission

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Introduction

Vision Australia is providing this short preliminary submission to the review of the NSW Anti-Discrimination Act 1977 (the Act, the ADA) being conducted by the NSW Law Reform Commission (the Commission) so that we can highlight some areas that require modernisation. Anti-discrimination legislation is a primary mechanism for preventing and redressing instances of individual and systemic discrimination, and its effectiveness will be (and has been) reduced if it uses outdated language, terminology and concepts, and if it fails to take account of social, economic, and technological change.

Our comments are focused exclusively on the part of the Act dealing with discrimination on the ground of disability, except that we note that the current structure of the Act makes it difficult or impossible to pursue complaints alleging discrimination based on more than one protected attribute. The importance of intersectionality has been widely recognised since the Act came into force, and it has most recently been discussed at length in the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. An overhaul of the Act's current structure is therefore timely and necessary.

Vision Australia is not funded as an organisation that provides individual or systemic advocacy in NSW, and so we have had only limited experience assisting people who are blind or have low vision to use the Act, and we therefore do not expect that our comments will, in general, be surprising or unique. Nevertheless, we believe it is important to document the experiences that we have had so that they can inform discussion as the review progresses.

Removing Inconsistencies with Commonwealth legislation

Over the past few years, we have provided input into a number of reviews of anti-discrimination legislation in several Australian jurisdictions. A theme of the input we have provided is the importance of achieving consistency between jurisdictions, but especially between each jurisdiction and the Commonwealth Disability Discrimination Act 1992 (the DDA). When people who are blind or have low vision contemplate using anti-discrimination legislation in an attempt to remedy an instance of discrimination that they have experienced or may experience, they usually give initial, quasi-default, consideration to lodging a complaint under the DDA, and then compare the possible course and outcomes (including the outcome represented by a failure of conciliation) with the alternative approach of lodging a complaint under the anti-discrimination legislation in their local jurisdiction. This comparison is made more difficult if there are inconsistencies between the two pieces of legislation that have no substantive judicial impact but which reflect different drafting practices. One example is that the DDA refers to discrimination in the “terms and conditions” on which goods and services are provided, whereas the Act only refers to “terms”. We think that it is far from obvious to the average person with a disability whether there is a meaningful distinction between a term and a condition (notwithstanding that the phrase “terms and conditions” is quite common in general use), and it may be necessary to seek clarifying expert legal advice when other aspects of a potential complaint are straightforward, at least insofar as they are ventilated through the informal conciliation mechanisms offered by anti-discrimination legislation. The need to seek legal advice is one factor that deters individuals from pursuing remedies for discrimination, and it should be minimised. Accordingly, we strongly recommend that local legislation be made consistent with the DDA as far as possible and to the extent that it reflects contemporary understandings of human rights. At the same time, we also believe that in practice the DDA has been fatally degraded over time through a number of Federal Court decisions (e.g., the so-called Sklavos decision), the negative consequences of which have not been addressed, as well as by other factors such as the voluntary nature of conciliation and the need for individuals to take action in the Federal Court if that voluntary conciliation is not successful or does not occur. Achieving consistency with the DDA should not be prioritised over protecting and asserting the rights of people with a disability.

We recommend that in reviewing the Act the Commission should consider:

- Modernising the definition of “disability” to make it consistent with the DDA;
- Establishing a positive duty to provide (reasonable) adjustments along the lines of the DDA;
- Amending the section of the Act dealing with discrimination in the provision of goods and services to reflect the scope and language of the equivalent section (S.24) of the DDA;
- Extending the scope of the Act to include relevant areas of life that are encompassed by the DDA (such as transport, access to premises, and the provision of facilities).

We note that Volume 4 of the Final Report of the Disability Royal Commission includes a number of Recommendations for reform of the DDA. One example is Recommendation 4.25, which recommends the replacement of all references to “reasonable adjustments” with “adjustments”. We think it would be appropriate for the Commission to consider the implications of these Recommendations as part of its review of the Act, particularly if it seems likely that they will be incorporated into the DDA.

Assistance Animals

One area where the Act requires modernisation is its provisions relating to assistance animals (S.49B(3)). The Act refers to “dog” rather than “assistance animal”. While in practice almost all animals that are specially trained to assist a person with a disability are dogs, it has become common practice to refer to “assistance animals”, and we recommend that the Act be amended accordingly.

The Act also limits the types of disabilities that can be assisted by dogs to vision, hearing and mobility. Since the Act was promulgated in 1977, people with other disabilities have benefited from assistance animals, including dementia, diabetes, and epilepsy. We recommend that the Act be amended to allow a person with any disability covered by the Act to have or be accompanied by an assistance animal.

Over the past decade or so there has been an increase in the number of assistance animals that are trained by the user or by an organisation that has no external accreditation. We have heard and observed numerous instances where animals have not been toilet-trained, or where they have become aggressive or demonstrated other inappropriate behaviours while supposedly assisting their handlers in public. While there may be well-behaved animals that have been trained by non-accredited individuals or organisations, our view is that this is the exception rather than the rule, and their ongoing prevalence has the effect of increasing the likelihood that discrimination will increase for people whose assistance animals are well-trained.

On balance, we therefore believe that it is necessary to prescribe those organisations that are nationally or internationally accredited to train assistance animals. This has been done in some jurisdictions, such as the Northern Territory, and we strongly recommend that the Commission consider this approach in its review of the Act.

Vilification

The Act currently includes provisions relating to vilification on the ground of several protected attributes (race, transgender, etc.) but disability is not included. The DDA does not have a vilification provision, but we recommend that the Act be amended so that vilification on the ground of disability is unlawful. We note that the Disability Royal Commission includes a similar recommendation in its Final Report with reference to the DDA (Recommendation 4.30), together with a Recommendation that the construction of “harassment” be extended to include one-off or isolated instances of harassment.

Systemic Discrimination

The prevention and removal of systemic discrimination against people with a disability must be a primary objective of anti-discrimination legislation. In the Commonwealth jurisdiction the development of Disability Standards under s31 of the DDA has sought to promote this objective in public transport, access to buildings (premises), and education. While the Disability Standards have to varying degrees and in various ways fallen short of community expectations and have delivered suboptimal outcomes for people with a disability, our view is that they have made society more accessible and inclusive than it would otherwise have been. Ironically, it has proven to be extremely difficult for a person with a disability to pursue a complaint alleging a breach of one of the Disability Standards, and this is one area that needs to be reformed in the context of the DDA.

In NSW the Act does not provide for the development of disability standards, but s120A does allow the Board to develop and promote “codes of practice” to give guidance to “persons in a specific area of conduct” about the kinds of activities that may be in breach of the Act and, conversely, activities that would prevent or remove discrimination. We are not aware of any such code of practice that has ever been developed to assist people who are blind or have low vision, and we think that part of the review should involve an investigation of how this section of the Act has been used and whether it needs to be strengthened.

Under s95 of the Act, the President or the Minister may refer complaints directly to the NSW Civil and Administrative Tribunal, and s119 allows the Board to carry out investigations, research and inquiries “For the purpose of eliminating discrimination and promoting equality and equal treatment of all human beings”. These functions have the potential to address areas of intractable systemic discrimination, but if they have ever been used at all, they are certainly not used on a scale commensurate with the systemic discrimination that people with disability face in their daily lives.

The NSW Disability Inclusion Act 2014 contains objects and principles designed to promote equality and inclusion for people with a disability. The Disability Inclusion Act also provides for the development of a State Disability Inclusion Plan, and individual Disability Inclusion Action Plans. As part of its review of the ADA we recommend that the Law Reform Commission consider how the ADA can incorporate the objects and principles of the Disability Inclusion Act and promote and uphold its requirements.

We believe that the effectiveness of complaints-based legislation continues to be reduced by the challenges that people with a disability face when lodging complaints: they are time-consuming to prepare and their progress once lodged can be extremely slow; they can be emotionally draining to pursue and the inherent uncertainty of a satisfactory outcome can cause significant anxiety and stress that can have a long-lasting deleterious effect on health and well-being. Access to expert legal advice and assistance is usually not easy to obtain, and people may experience financial burdens just so they can attempt to remedy an instance of unlawful discrimination.

In our experience, it has always been fairly rare for people who are blind or have low vision and who experience discrimination in their daily lives to lodge disability discrimination complaints, but it is becoming even rarer as the effectiveness of relevant legislation is eroded and perverse respondents find ways of exploiting that erosion. It is therefore more important than ever for legislation such as the ADA to be strengthened and, in particular, for it to contain effective and proactive ways for the administering body to investigate and address systemic discrimination by government, industry and the community. The creation of clear, enforceable and enforced positive duties to make (reasonable) adjustments and to prevent discrimination must be a key part of this process of reform, because such duties can help to prevent discrimination and reduce the burden of lodging individual complaints, especially when they are combined with proactive measures mentioned above.

Conclusion

The release of the Disability Royal Commission's Final Report heralds a new vision for an Australia that is truly inclusive of people with a disability. It refers to:

“a future where people with disability live free from violence, abuse, neglect and exploitation; human rights are protected; and individuals live with dignity, equality and respect, can take risks, and develop and fulfil their potential.”

The serendipitous conjunction of the release of the Disability Royal Commission's Final Report and the NSW Law Reform Commission's review of the ADA provides a unique, once-in-a-generation opportunity for this vision to shape the future of anti-discrimination legislation in NSW as it affects people with a disability.

About Vision Australia

Vision Australia is the largest national provider of services to people who are blind, deafblind, or have low vision in Australia. We are formed through the merger of several of Australia's most respected and experienced blindness and low vision agencies, celebrating our 150th year of operation in 2017.

Our vision is that people who are blind, deafblind, or have low vision will increasingly be able to choose to participate fully in every facet of community life. To help realise this goal, we provide high-quality services to the community of people who are blind, have low vision, are deafblind or have a print disability, and their families.

Vision Australia service delivery areas include: registered provider of specialist supports for the NDIS and My Aged Care Aids and Equipment, Assistive/Adaptive Technology training and support, Seeing Eye Dogs, National Library Services, Early childhood and education services, and Felix Library for 0-7 year olds, employment services, production of alternate formats, Vision Australia Radio network, and national partnership with Radio for the Print Handicapped, Spectacles Program for the NSW Government, Advocacy and Engagement. We also work collaboratively with Government, businesses, and the community to eliminate the barriers our clients face in making life choices and fully exercising rights as Australian citizens.

Vision Australia has unrivalled knowledge and experience through constant interaction with clients and their families, of whom we provide services to more than 30,000 people each year, and also through the direct involvement of people who are blind or have low vision at all levels of our organisation. Vision Australia is well placed to advise governments, business and the community on challenges faced by people who are blind or have low vision fully participating in community life.

We have a vibrant Client Reference Group, with people who are blind or have low vision representing the voice and needs of clients of our organisation to the board and management.

Vision Australia is also a significant employer of people who are blind or have low vision, with 15% of total staff having vision impairment.