

BCA

Business Council of Australia

Review of the Anti-
Discrimination Act
1977 (NSW)
NSW Law Reform
Commission

Submission of the Business
Council of Australia

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1. Overview

The Business Council of Australia appreciates the opportunity to contribute to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977 (NSW)* (the NSW Act).

BCA's brief input to this inquiry reflects the commitment of the Australian business community to non-discrimination in employment, and the experiences of BCA members seeking to drive positive policies, practices, and workplace change.

The BCA seeks to address two matters raised by the review and the terms of reference:

- Positive discrimination / special measures.
- Nationalisation, harmonisation, and consistency.

The BCA will be pleased to expand on this submission or to otherwise assist the inquiry. Please contact

Note: This submission focusses on discrimination in work, and not on the wider application of the Act.

2. Positive Discrimination / Special Measures

1. The first concern is an inconsistency between NSW anti-discrimination legislation, and approaches in other states and nationally.
2. BCA member organisations regularly take targeted initiatives to hire, retain, or provide specialist training and opportunities to groups that encounter particular labour market and other adversity. A number of BCA members for example pursue particular initiatives for the employment of indigenous Australians.
3. It has long been recognised that special measures, that may themselves have a differential effect, have an important role to play in reducing discrimination:
 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. (Art 1, Para 4, International Convention on the Elimination of All Forms of Racial Discrimination).
4. Commonwealth, state and territory legislation allows for such special measures, however the approach in NSW should be reviewed and brought into harmony with other systems.
5. Section 126A of the NSW Act provides an exemption for special needs programs and activities as follows:

126A Exemption for special needs programs and activities

- (1) *Nothing in Parts 3-4C renders unlawful anything done by a person in good faith for the purposes of or in the course of any program or activity for which certification is in force under this section as a special needs program or activity.*
- (2) *The Minister may certify a program or activity to be a special needs program or activity if satisfied that its purpose or primary purpose is the promotion of access, for members of a group of persons affected by any form of unlawful discrimination to which this Act applies, to facilities, services or opportunities to meet their special needs or the promotion of equal or improved access for them to facilities, services and opportunities.*
- (4) *Certification for a program or activity remains in force for the period specified in the certification or (if no period is specified) until the certification is withdrawn.*

- (5) *Certification may be withdrawn by the Minister at any time by giving notice in writing to the person who appears to the Minister to be the person who is in charge of the program or who has responsibility for the activity concerned.*
 - (6) *A person who is in charge of a program or activity may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision of the Minister under this section concerning the certification of the program or activity.*
6. Section 126 provides for the granting of exemptions by the President of the Anti-Discrimination Board.
7. Thus, exemption for positive or special measures and initiatives is possible in NSW, but only where an exemption is granted or after a process of Ministerial certification, and recertification in the case of longer run initiatives.
8. This stands in contrast to the more automatic and straightforward treatment of special measures in other jurisdictions, which are recognised and rendered lawful without any need to apply for certification. For example, s 12 of the Equal Opportunity Act 2010 (Vic) is as follows:

EQUAL OPPORTUNITY ACT 2010 - SECT 12 Special measures

Special measures

- (1) *A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.*

Examples

A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.

A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.

A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

- (2) *A person does not discriminate against another person by taking a special measure.*
- (3) *A special measure must—*
 - (a) *be undertaken in good faith for achieving the purpose set out in subsection (1); and*
 - (b) *be reasonably likely to achieve the purpose set out in subsection (1); and*
 - (c) *be a proportionate means of achieving the purpose set out in subsection (1); and*
 - (d) *be justified because the members of the group have a particular need for advancement or assistance.*
- (4) *A measure is taken for the purpose set out in subsection (1) if it is taken—*
 - (a) *solely for that purpose; or*
 - (b) *for that purpose as well as other purposes.*
- (5) *A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.*

Example

It may be reasonable to restrict eligibility for a special measure to people with the attribute who are of a particular age.

- (6) *A person who undertakes a special measure has the burden of proving that the measure is a special measure.*

(7) *On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.*

9. The contrast between the approach in NSW and other jurisdictions has been explained as follows:
- ...there is no relevant special measures provision under the Anti-Discrimination Act 1977 (NSW) (the NSW Act). It is therefore necessary for employers wanting to conduct targeted recruitment for Aboriginal and Torres Strait Islander people in New South Wales to apply for an exemption from that Act.
- In all jurisdictions other than New South Wales, the granting of an exemption is not a legal prerequisite for conducting a targeted recruitment strategy, as long as the recruitment program meets the requirements of a special measure. The purpose of an exemption is to exclude the application of a particular law to certain conduct which would otherwise breach that law. However, an action that meets the requirements of a special measure will not be unlawful, because it already falls within a recognised exception to discrimination law.¹
10. Our understanding is that outside of New South Wales such special measures:
- Are used positively, proportionately, and with little or no controversy, disputation, or litigation.
 - Are triggered by organisations wanting to proactively invest in employing more people from particular groups and cohorts, such as local indigenous communities.
 - Are generally actioned relying on the various requirements for special measures, such as those set out in the Victorian Act, rather than needing to seek a prior exemption or prior Ministerial permission or certification as is required in NSW. Employers approach this with good and clear purpose, and good will.
11. It is unclear why (a) there would need to be prior approval for special measures through a formal exemption or ministerial certification, and beyond that (b) why such an approach would be necessary in NSW and not on other states and territories, or at the commonwealth level.
12. Recommendation 2 below is to end the requirement for prior exemption or ministerial certification in NSW in favour of providing access to special measures more consistently with the process in other jurisdictions. This will allow BCA members and other organisations to pursue special measures based on their purpose, being undertaken in good faith, being proportionate etc, without needing to seek prior certification.
13. A nationally consistent approach to special measures will be particularly important to organisations operating across states and territories. An organisation wanting to run a special initiative to attract for example indigenous youth into work is likely to want to advance that initiative as a single national program, and there would be little to be gained by being forced into differential approaches state by state territory by territory. It would also be perverse if roll out were delayed in NSW compared to all other states and territories.

3. Nationalisation, Harmonisation, and Consistency

14. The second consideration arises from Term of Reference 12 *'the interaction between the Act and Commonwealth anti-discrimination laws'*, Term of Reference 1 *'whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards'*, and further terms of reference seeking clarity on powers and functions for the promotion of equality of opportunity between persons in NSW.
15. Australia has made considerable gains across the past two decades in applying our employment laws more consistently between different states and territories, through for example model laws in workplace health and safety, and the national application of the Fair Work Act 2009, particularly in the private sector. This shift towards greater consistency across Australia has encompassed shifts towards national

¹ <https://www.lexisnexis.com.au/en/insights-and-analysis/rule-of-law/2015/08dec2015-targeted-recruitment-and-special-measures-in-discrimination-law-creating-employment-opportunities-for-aboriginal-and-torres-strait-islander-people>

regulation using the Corporations Act, states referring legislative powers to the Commonwealth, and the active harmonisation of state and territory regulation using model legislation.

16. This shift towards more nationally consistent employment law should extend to anti-discrimination. Australia should move towards a single national anti-discrimination act, a single set of discriminatory grounds, a single human rights body, and the determination of all matters through commonwealth tribunals and courts, or state courts vested to apply commonwealth legislation.
17. Prior to nationalisation into a single system applying throughout Australia, there are options for harmonisation through model anti-discrimination legislation applied consistently at commonwealth, state and territory level.
18. This is particularly important to major organisations that operate across state and territory boundaries, that seek to apply nationally consistent policies and procedures in pursuit of anti-discrimination and workplace diversity, and that seek to apply nationally approaches to, for example the investigation of complaints, resolving disputes, sanctioning staff, or revising training.
19. A genuinely national anti-discrimination system would also:
 - a. Better support more organisations refocussing their efforts from being compliance-led and risk-focussed towards being values and initiatives led, rolled out across national organisations based on a consistent framework of core legislative requirements.
 - b. Support nationally consistent managerial and staff training and development, standardised and more consistent complaint investigation and procedures, and consistent incident investigation and dispute settlement.
20. Any major review of state or territory anti-discrimination legislation should tackle the question of whether overlapping, inconsistent regulation, mechanisms and bodies, and determinations represents the best mechanism for reducing workplace discrimination.
21. Australia needs to genuinely engage with the potential benefits of more nationally consistent approaches, and not be unduly bound to the legislative and institutional structures that have emerged to date.
22. We commend Recommendation 2, below, for consideration.

4. Key recommendations

Recommendation 1: Special measures be better encouraged and supported in NSW by amending the Anti-Discrimination Act 1977 (NSW) to remove requirements for prior exemption or ministerial certification of special measures, in favour of special measures being automatically recognised and legally protected when they meet prescribed requirements relating to their purpose and intent, being reasonable and proportionate, and ceasing once their purpose has been achieved.

Recommendation 2: NSW place on the agenda of the Standing Council of Attorneys-General options for greater harmonisation and standardisation between state, territory and national anti-discrimination legislation, including consideration of options for Australia to move to a single system of anti-discrimination law at the Commonwealth level.

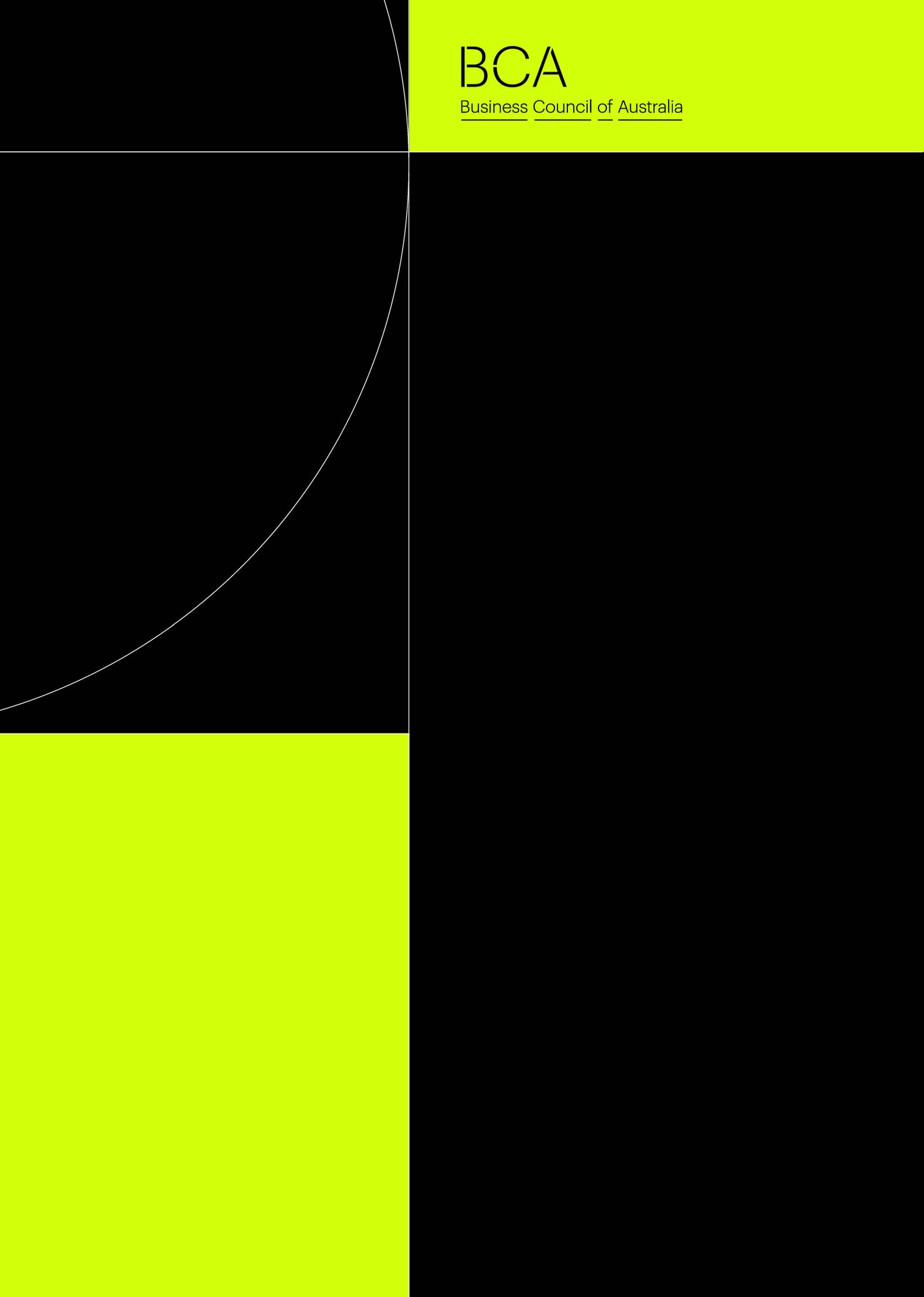
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