

## Review of the *Anti-Discrimination Act 1977*

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## **About Seniors Rights Service**

Established in 1986, Seniors Rights Service is a specialist statewide community legal centre that seeks to protect and advance the rights of older people. Seniors Rights Service seeks to raise awareness and empower older people to activate, uphold, extend and defend their individual rights. We provide accessible and confidential legal services as well as aged care and financial advocacy.

### **Our purpose: why we exist**

To advocate for older people, assisting them and their carers to claim their rights and support them in the exercise of those rights, so they enjoy a rich life as senior and respected members of the community with dignified and equitable access to the care and support they need.

### **Our role: what we do**

We give voice through advocacy, information through education and advice through legal services.

## **Acknowledgement of Country**

Seniors Rights Service acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture. We pay our respects to their Elders past and present.

## Introduction

Seniors Rights Service welcomes the opportunity to provide this submission into the review of the *Anti-Discrimination Act 1977 (ADA)*. The consultation paper provides a comprehensive analysis of the current discrimination laws in NSW, as well as in other states and territories and on a federal level. This submission is informed by our work as a specialist community legal centre, providing advice and assistance to older people across NSW. We seek to achieve a modern ADA that provides greater protection for older people so that they can enjoy their human rights free from discrimination of any kind.

## Test for discrimination

### Question 3.1: Direct discrimination

The test for direct discrimination can be improved by replacing the comparator test with the unfavourable treatment test. Often complainants struggle to provide an appropriate comparator for their situation in order for Anti-Discrimination NSW or the NSW Civil and Administrative Tribunal (**NCAT**) to determine if there has been discrimination or not.

The unfavourable treatment test appropriately allows the effect or consequence of the treatment of the complainant to be considered. The effect or consequence of the treatment is often key to determining if there has been discrimination. This test also acknowledges the complainant and their attributes directly, without regard to a hypothetical person in the same circumstances.

The unfavourable treatment test also allows unconscious bias to be examined as a contributing factor to the treatment of the complainant.

The unfavourable treatment test will make discrimination easier to prove, thereby providing better access to justice. A consistent criticism made by our clients is the difficulty in proving that unlawful discrimination has occurred, particularly where there exists more than one reason for the treatment of the complainant. This change in test will assist in addressing this issue.

### Recommendation 1

Replace the comparator test with the unfavourable treatment test.

### **Question 3.2: The comparative disproportionate impact test**

The comparative disproportionate impact test for indirect discrimination should be replaced so that the impact is assessed against the complainant to determine if they have been disadvantaged because of a protected attribute, rather than a comparator group. Indirect discrimination is extremely difficult for a complainant to prove and the current disproportionate impact test creates additional barriers for complainants to prove that unlawful discrimination has occurred.

As with direct discrimination, the focus should be on the actions of the respondent and their impact on the complaint, rather than on the disproportionate impact of the respondents' actions on a comparator group.

#### **Recommendation 2**

Replace the disproportionate impact test with a disadvantage test that assesses the effect that the condition or requirement imposed by the respondent has on the complainant.

### **Question 3.3: Indirect discrimination and inability to comply**

As noted above, it is preferable to focus on the disadvantage caused to the complainant by the respondent because of a protected attribute, rather than whether or not the complainant is able to comply with the requirement. With this focus, the “inability to comply” portion of the test for indirect discrimination is largely redundant and should be removed

Removing this portion of the test also removes the possibility that the test will be applied literally, excluding complainants who are capable of complying with the requirement but choose not to because the requirement would be determinantal to them. This particular concern was also raised by the Queensland Human Rights Commission.

#### **Recommendation 3**

The “not able to comply” portion of the test for indirect discrimination should be removed.

### **Question 3.4: Indirect discrimination and the reasonableness standard**

The reasonableness test should remain as part of the test for indirect discrimination, however further guidance should be given on the elements to be considered when determining reasonableness.

Seniors Rights Service agrees with both the Western Australia and New South Wales Law Reform Commissions endorsement of the Victorian model and recommends adopting a list of relevant circumstances similar to, or the same as, those listed in section 9(3) of the *Equal Opportunity Act 2010* (VIC). Specifically:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
- the cost of any alternative requirement, condition or practice;
- the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;
- whether reasonable adjustments or reasonable accommodation could be made to reduce the disadvantage caused.

The replacement of the reasonableness test with a proportionality test is not supported.

#### **Recommendation 4**

The reasonableness test should include specific circumstances to be considered when determining reasonableness, the same as or similar to those listed in section 9(3) of the *Equal Opportunity Act 2010* (VIC).

### **Question 3.5: Indirect discrimination based on a characteristic**

The prohibition on indirect discrimination should be extended to include characteristics that people with a protected attribute either generally have or are assumed to have. Discrimination laws should provide the widest protection possible to prevent and eliminate all forms of discrimination. This includes extending the scope of indirect discrimination to include characteristics.

### **Recommendation 5**

Extend the scope of indirect discrimination to include characteristics that a person with a protected attribute either generally has or is assumed to have.

### **Question 3.6: Proving indirect discrimination**

The onus of proof for both direct and indirect discrimination should shift from the complainant to the respondent after the complainant has met their burden of proof in establishing that it is more likely than not that there has been unlawful discrimination. The respondent would then need to prove that their actions were reasonable in the circumstances (noting the above comments in relation to question 3.4).

#### **Direct discrimination**

As submitted earlier, in direct discrimination matters, a complainant should be required to prove to the civil standard that:

- they have a protected attribute, and
- were treated unfavourably by the respondent because the complainant has a protected attribute.

Once the above has been established by the complaint, the burden of proof should shift to the respondent to prove that they did not treat the complainant unfavourably because, in whole or in part, the complainant has a protected attribute.

#### **Indirect discrimination**

As submitted earlier, in indirect discrimination matters, a complainant should be required to prove to the civil standard that:

- they have a protected attribute, and
- they were disadvantaged by the actions of the respondent because of a protected attribute.

Once the above has been established by the complaint, the burden of proof should shift to the respondent to prove that their actions were reasonable in the circumstances and due to such reasonableness, they did not unlawfully discriminate against the complainant.

**Recommendation 6**

After the complainant has met their burden of proof in direct discrimination matters, the burden shifts to the respondent to prove that they did not unlawfully discriminate against the complainant in whole or in part due to a protected attribute.

**Recommendation 7**

After the complainant has met their burden of proof in indirect discrimination matters, the burden shifts to the respondent to prove that they had a reasonable excuse for their actions and that due to such reasonableness, they did not unlawfully indirectly discriminate against the complainant.

**Question 3.7: Direct and indirect discrimination**

The distinction between direct and indirect discrimination should be retained as there are two separate and distinct actions that could result in discrimination. Namely, a respondent directly treating a complainant unfavourably because of a protected attribute, or a respondent imposing a requirement or condition relating to a protected attribute on a complainant that disadvantages the complainant.

It should however be recognised that discrimination can be direct, indirect or both, as recognised in the ACT in section 8(1) of the *Discrimination Act 1991* (ACT).

**Recommendation 8**

Define discrimination as being direct, indirect or both direct and indirect.

**Question 3.8: Intersectional discrimination**

The ADA should recognise intersectional discrimination and be drafted in such a way that enables the greatest protection from discrimination. The current narrow view of discrimination - that discrimination only occurs in relation to one attribute - does not meet current community expectations or standards. By way of example, it is not uncommon for clients of Seniors Rights Service to experience intersectional discrimination in relation to both age and disability.

The ADA should be updated to protect against discrimination based on one or more protected attributes (the ACT model), whether combined or distinct. For example:

- an employer not employing a person because of their age and disability status, or
- an employer that does not employ people that are over the age of 50 years or have a disability.

### **Recommendation 9**

Update the ADA to recognise discrimination based on one or more protected attributes.

## **Discrimination: protected attributes**

### **Question 4.1: Age discrimination**

#### **Changes in relation to the protected attribute of “age”**

Seniors Rights Service largely supports the current way that the ADA expresses and defines the protected attribute of “age”. This definition is broad and encompasses most aspects of life.

Greater protection for older people against age discrimination will be afforded through systemic changes to the ADA as noted above in relation to the appropriate tests to use, the elements to prove and who has the burden of proof in discrimination matters.

Additional protections should be considered in relation to how goods and services are delivered and not just the current considerations of whether or not goods and services:

- were refused based on a person's age, or
- the terms on which those services were provided were discriminatory based on age.

In many instances, services do not need to be refused because of a person's age. The provider of the service is able to make the situation so uncomfortable or unappealing that an older person will elect not to purchase the goods or service because of the way that they were treated because of their age.

### **Case study – Elizabeth**

Elizabeth is 71 years of age and enters a department store seeking to purchase a new dress. After looking at the clothes available, Elizabeth speaks with Jackie, one of the two Assistants

working in the store, asking to try on a dress that she has selected. Jackie doesn't say anything directly to Elizabeth as she shows her the changing rooms, however Jackie's face distorted in a look of disgust when Elizabeth made her request.

While trying on the new dress, Elizabeth hears Jackie speaking to the other Assistant. Jackie says: "I hope the old lady doesn't take all day, we close in an hour." and "I bet it smells like pee when she returns it. They all have incontinence."

After hearing these comments, Elizabeth feels embarrassed and ashamed. Elizabeth knows that other people were in the store when she entered the changing rooms and does not know if they are still in the store or if they heard Jackie's comments. Elizabeth stops trying on the dress, returns it to Jackie and leaves the store as quickly as she is able to.

As can be seen by the above case study, the store did not refuse service to Elizabeth based on her age, nor did they require Elizabeth to purchase the dress on different terms to anyone else. This is just one example of how services are delivered in a discriminatory way that are not fully covered by the current ADA.

Currently there is also no protection against vilification in relation to age. Jackie's public comments are representative of ageist and discriminatory attitudes towards people as they age, that do not align with acceptable community standards. Greater recognition is needed of the negative impact that such comments have on older people as well as improved protection for older people to prevent such attitudes becoming an acceptable form of lawful discrimination.

The ADA should follow the Northern Territory and Tasmania anti-discrimination legislation and include age as a protected attribute in relation to vilification. With the addition of a new provision of age vilification, the other protections within the ADA will be given greater coverage and effect.

### **Recommendation 10**

Create a new category of vilification – age vilification.

## Exemptions

The exemptions contained in Division 4 of Part 4G of the ADA are generally appropriate, however the exceptions relating to the provision of insurance and credit applications are too broad and extend the exception beyond what is reasonable in the circumstances.

Sections 49ZYT(a)(i) and 49ZYU(a)(i) of the ADA permit discrimination in the provision of insurance and credit respectively in relation to age, provided that it is "... based on actuarial or statistical data from a source on which it is reasonable to rely or, *if there are no such data, on such other data as may be available,*" (emphasis added).

Seniors Rights Service submits that this definition is too broad without sufficient justification which has the result of being overly cautious and provides a mechanism to deny an older person insurance or credit for no other basis than for a corporation to make money on discriminatory grounds. Indeed, in our experience, the unavailability of traditional credit exposes people to more predatory lending practices such as Buy Now Pay Later and Pay Day lenders. This behaviour is particularly pronounced in our clients who also identify as Aboriginal or Torres Strait Islander.

As it relates to credit, there are additional and sufficient safeguards relating to appropriate lending to ensure that any credit provided has sufficient security to ensure repayment. An exemption within the ADA for additional protection is not needed and has the opposite effect of being used as a means to discriminate unjustifiably against older people.

It is accepted that it is appropriate to take into account actuarial or statistical data, however where no such data is not available, it is submitted that any consideration of other data is not appropriate.

### Recommendation 11

Remove "or, if there are no such data, on such other data as may be available" from section 49ZYT(a)(i) of the ADA.

### Recommendation 12

Remove "or, if there are no such data, on such other data as may be available" from section 49ZYU(a)(i) of the ADA.

## Discrimination: Areas of public life

### Question 6.12: Additional areas of public life

Seniors Rights Service supports and endorses the considerable work of Dr Cathy Sherry in relation to discrimination in residential strata schemes, particularly the views expressed in the 2020 UNSW Law Journal article titled “Does Discrimination Law Apply to Residential Strata Schemes?”.

While residential strata schemes are “private” in the sense that they are not open to all members of the public and are limited to other lot owners, they are not “private” in the same way that a stand-alone home is to the owner of that home. Because strata schemes have common property and require engagement between unrelated parties, for the purpose of the ADA, they should be included in the ADA as an additional protected area.

#### Case study – Joan

Joan is 67 years old and is a lot owner living in a residential strata scheme. The entrance to the scheme is through a security door with a keycard swipe access. The keypad is located at shoulder height. Joan has mobility issues and currently uses a wheelchair. Joan approached the strata committee asking for modifications to the location of the keycard swipe pad so that she could reach it to enter and exit the building. The strata committee advised Joan that they would not carry out the modification and that Joan would need to obtain a special resolution or a common property rights by-law and thereafter maintain the entrance at her own cost, for the benefit of the whole building.

It is the experience of our clients that strata managing agents, strata committees and owners' corporations ignore requests for modifications to the common property that will enable older people with mobility issues or other people with a disability to access the common area. Joan's story is not an isolated one and Seniors Rights Service is seeing a significant increase in requests for assistance to obtain disability access modifications to common property.

#### Recommendation 13

The inclusion of residential strata schemes as an additional protected area in relation to all forms of discrimination within the ADA.

## Wider exceptions

### Question 7.10: Aged care accommodation providers exception

Seniors Rights Service agrees with the NSW Law Reform Commission's recommendation that section 59 of the ADA be repealed. There is no specific basis for this exception and no evidence that it provides a needed protection.

Should a need be identified for an exception, it is submitted that it can be implemented through a new "special measure".

#### **Recommendation 14**

Section 59 of the ADA be repealed.

## Harassment

### Question 9.7: Attribute-based harassment

As noted above there is an alarming increase in harassment towards older people. Seniors Rights Service is supportive of the ADA including prohibitions on attribute-based harassment in relation to age. As a basic human right, an older person should not be subjected to offensive, intimidating and humiliating treatment based on their age.

Such protection is in line with the current government priorities in relation to the:

- first National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023,
- findings of the Royal Commission into Aged Care Quality and Safety,
- draft National Plan to End the Abuse and Mistreatment of Older People 2024-2034,

#### **Recommendation 15**

Prohibit attribute-based harassment in relation to age within the ADA.

## Conclusion

Anti-discrimination laws in NSW are in significant need of modernisation, particularly to provide greater protection from discrimination, vilification and harassment for older people. There is also a need to reduce the exemptions available for lawful discrimination against older people in order to create a fairer and more just society.

Seniors Rights Service welcomes and supports the direction that the NSW Law Reform Commission is heading in relation to the review of the ADA. Seniors Rights Service looks forward to contributing to the second consultation paper.

## Recommendations

### **Recommendation 1**

Replace the comparator test with the unfavourable treatment test.

### **Recommendation 2**

Replace the disproportionate impact test with a disadvantage test that assesses the effect that the condition or requirement imposed by the respondent has on the complainant.

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