

## Comments on Amendments to the Discrimination Act

### Overall

AFI support the amendments

We particularly support the implementation of a positive duty in the ACT. The Bill provides a welcome requirement for organisations to step up and take active measures to put in place additional frameworks which prevent discriminatory practices. Through our submission we will comment on issues in the draft that are relevant to the rights of people with disability, however we note the broader remit of the legislation. We have made recommendations that aim to preserve the flexibility of the draft amendments and allow it to be applied to the unique circumstance of people with disabilities to achieve the best human rights outcomes. Issues of competing human rights are highly complex and context specific, and thus we promote solutions which allow for flexibility and nuance.

As a general comment we recommend:

- Providing more definitions throughout the Act to improve clarity
- The guidance and educative material accompanying the legislation is important – for instance it would be good to have cameos to explore the operation of the bill in different circumstances
- Expanding the regulation-making power provided to the Executive under the Act
- Requiring the Executive consider whether human rights requirements have been satisfied in making regulations under the Act
- That there be investment in community education, compliance frameworks and other resources for advocates and the ACTHRC to ensure that non-government sectors undertake an active program to identify and remove discriminatory practice during the three year period between it being enacted and coming into force

### Consultations

AFI has some concerns about the program of community consultation and outreach arranged in the preparation of these amendments. Discrimination law is legacy legislation which affects the most vulnerable and marginalised members of the ACT community, who are likely to have the most difficulty responding to submission requests or consultations. They also occasionally hold the potential for unintended outcomes. Going forward when drafting future amendments to the Discrimination Act we encourage well planned, accessible and transparent consultation and co-design with community. There needs to be rich and accessible information such as cameos exploring the ways that people experiencing discrimination or affected by the amendments would use the Act or be affected by its provisions.

## Clarity of the Act

We appreciate the intention for the amendments established in the discussion paper to make the reforms “clear, simple and user friendly”. We recommend that the draft be amended for clarity by including more definitions, and examples of potential operation of the section.

We recommend that a definition is provided for:

- what a ‘public function’ is
- what constitutes ‘privately organised sport’ or ‘privately organised competition’
- what constitutes ‘fair, safe and effective’ competition

For ease of understanding we also recommend that the draft includes detailed examples of how protections will operate when competing rights exist.

## Positive Duty and Grandfathering Clause

We wholly endorse the implementation of a positive duty in the ACT. We look forward to seeing it implemented and having its intended impact.

However, in effect the positive duty relies on another stream of individual complaints to be realised. Without this the requirements cannot be enforced. Efforts to prevent discrimination based on deterrence have had limited success in the past in the disability area. We note that section 48 of the Human Rights Commission Act allows the commission consider complaints under its own initiative. We recommend increasing the capacity of the Human Rights Commission to make use of own motion powers to investigate violations of the positive duty. Individual complaints processes have proved stressful and problematic to people with disabilities. Additionally, reliance on complaint mechanisms places the burden of enforcement on those who have experienced discrimination. Further, the implementation of a positive duty will have resource implications for advocacy bodies who support people through discrimination matters and who will alongside this be providing community education to support non-government sectors to meet their positive duty requirements. We recommend that this issue is considered in future funding arrangements for the HRC and advocacy bodies.

As critics of the Commonwealth DDA have argued, the use of complaints-based discrimination mechanisms to eliminate discrimination is problematic for people with disabilities because it occurs within an uneven power relationship. It places us in an adversarial relationship with employers, services, business and providers we rely on every day, and which sometimes have a sole provider/monopoly relationship with us. To ensure a positive duty is exercised and able to reduce discriminatory practice we recommend increased visibility and deployment of the Human Rights Commission's own motion powers to investigate violations of the act. Alongside this, community awareness raising of the commission's role and powers.

We understand the decision to stage implementation of the positive duty for non-government bodies. However, if the intermediate period is to be utilised to enable sectors to ‘get ready’ then there will need to be resourced public education work and compliance frameworks provided to communities, industries and the civil society.

## Exemptions for sports, religious bodies, and clubs

We agree with the exemptions for sporting groups, religious bodies, and clubs in certain areas, rather than a general exception. These exemptions should be accompanied by careful management and education to ensure responsibilities are widely understood by the communities. It is important not to convey the impression that these bodies are generally excluded from discrimination law. Combined with the grandfathering period we are concerned exceptions in the legislation may cause some sectors to become less proactive in the intermediate period. Strong public education and messaging to people in leadership positions is needed to avoid this outcome.

AFI has concerns about the wording of 33B. The exemption for discrimination on the grounds of a person's sex, disability, or age if it is 'necessary for fair, safe and effective competition' will allow unjust discrimination against people with disability and transgender people. The meanings of 'fair, safe and effective competition' need to be clarified and narrowed. If the meaning of this phrase is too vague, it will be used to arbitrarily exclude and discriminate. We also recommend the inclusion of a requirement that organised sports bodies must first genuinely trial reasonable adjustments to facilitate 'fair, safe and effective' competition prior to excluding someone from participation.

## Goods, services, and facilities

AFI understands the need and welcomes for protections for workers from abuse and discrimination in the work place. However, currently it is not clear how this would be implemented to guard against unwanted outcomes. Particularly we would like some clarity about how this protection will apply when the goods or services in question are essential services such as health care or services provided specifically to persons with a protected attribute such as in home care. We have concerns that organisations fearing litigation would require clients to justify any requests that could be perceived as discrimination (i.e. request for particular genders or cultural identity). This would not be trauma informed or respect their privacy. To address such fears, we would suggest including an example of how this provision works in such instances. We would like to see the Act mitigate against the potential for vexatious claims within a care worker relationship. These are areas of competing rights – a person with a disability has human rights to supports which maintain their bodily integrity and this includes people who may need behaviour supports or who hold challenging views and beliefs but also need disability supports. These are complex areas of practice requiring a nuanced approach.

## Superannuation

Under section 29 (2) a consumer may make a request for the data which forms the grounds on which they are being discriminated against. We recommend that the superannuation provider must be required to fulfil the requirements of both subsection 2(a) and 2(b), as opposed to one or the other. To ensure procedural fairness for consumers when dealing with superannuation service providers.