



4 December 2015

Willing to Work Inquiry  
Australian Human Rights Commission  
GPO Box 5218  
Sydney NSW 2001

By email: [ageanddisabilityinquiry@humanrights.gov.au](mailto:ageanddisabilityinquiry@humanrights.gov.au)

Dear Madam/Sir,

**Submission to the Australian Human Rights Commission's Willing to Work Inquiry into employment discrimination against older Australians and Australians with disability**

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the Australian Human Rights Commission's Inquiry into age and disability discrimination in employment.

**Kingsford Legal Centre**

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Kingsford Legal Centre is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. Kingsford Legal Centre provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom without our assistance would be unable to afford a lawyer. From July 2014 to June 2015, KLC provided 1658 advices and opened 281 new cases.

KLC provides a specialist employment law service within our catchment area as well as a NSW-wide specialist discrimination law service. Kingsford Legal Centre regularly acts for clients in discrimination matters at the Australian Human Rights Commission (AHRC), Anti-Discrimination Board NSW (ADB) and the Fair

Work Commission (FWC). Kingsford Legal Centre also provides advice on a wide-range of employment issues such as redundancy, disciplinary action, entitlements, and flexible work arrangements.

In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

The case studies in this submission are based on clients we have advised and represented in the period 2014—2015, de-identified to maintain confidentiality.

### ***Question 3: Data on Employment Discrimination***

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From July 2014 to June 2015, KLC provided advice to 460 clients on employment law issues and 231 advices on discrimination matters. During this time period, KLC represented 46 clients in discrimination matters. A substantial proportion of these matters involved discrimination in employment.

During this period, 29% of KLC's employment law clients reported earning less than \$40,000 per annum, while 56% reported earning less than \$60,000 per annum. Of the clients KLC provided employment law assistance to, 22% reported having a disability.

Other demographic information about KLC clients includes:

Proportion of clients 45-54 years old	23%
Proportion of clients 55-64 years old	13%
Proportion of clients over 65 years old	5%
Aboriginal and/or Torres Strait Islander	4%
Language other than English spoken at home	22%
Born outside Australia	50%

It is clear from this data that a significant portion of KLC's casework and advice provided in the discrimination in employment sphere is to clients with a disability. Our experience suggests that in many cases, the existing discrimination law framework does not adequately protect the most vulnerable members of society, including Australians with disability seeking or engaged in employment. These high statistics reflect the prevalence of disability discrimination in the workplace in Australia, and the ongoing stigma against people with a disability.

**Case study: Harry**

*Harry attended an interview for an executive assistant role with a large company and was offered the job the next day. Harry was very excited about this new job, as he had been looking for work for a few months. When the Human Resources Manager discussed the hours of work with Harry, Harry told the Human Resources Manager that he would need to leave work an hour early once a month to attend an appointment. The Human Resources Manager demanded Harry reveal what the appointment was for. Harry disclosed it was to see a psychiatrist, as he had been diagnosed with bipolar disorder, but that he was on medication and his illness was under control. The Human Resources Manager called Harry the next day and withdrew the job offer. KLC represented Harry at a conciliation, and successfully settled the matter for compensation, an apology and a commitment from the workplace to provide anti-discrimination training to its entire staff.*

Between July 2014 and June 2015, KLC provided ten advices and undertook casework for one client who faced age discrimination. These numbers are significantly lower than advices and casework for other types of discrimination. We believe that age discrimination is underrepresented in our data because of the specific difficulties older workers and job seekers face in identifying and reporting this type of discrimination. Older Australians who are seeking employment are often unable to prove they have been discriminated against on the basis of their age during the recruitment process, especially as employers rarely provide any reasons for not hiring an individual. Our anti-discrimination laws offer no protection from the prevalent prejudice amongst employers against long-term unemployed workers in our community. The effect of this prejudice is only compounded for older long-term unemployed workers.

**Case study: Jorge**

*Jorge was 55 years old. He had worked as a mechanic for 30 years for the same company, but was made redundant when the business ceased operating. Jorge unsuccessfully looked for work for over 12 months. Jorge got some interviews for mechanic positions, but never ended up being offered the job. Jorge felt that he was not getting offered jobs because of his age, but didn't feel he would be able to prove this was the cause. Being unemployed for a year damaged Jorge's self-esteem, future job prospects as well as his financial security.*

**Question 5: Current Laws and Protections**

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Effective anti-discrimination legislation is essential to combat systemic discrimination and achieve substantive equality. Strengthening existing disability and age discrimination legislation is of key strategic importance in shifting attitudes and prejudices against Australians with a disability and older workers, in order to increase their rates of participation in the workforce. The following section outlines issues where the current operation of the law fails to adequately protect workers with a disability and older workers from discrimination in employment, and recommends amendments to the law to achieve an adequate level of protection.

### **Providing advocacy organisations with standing**

#### *1. The toll of litigation on applicants*

The current system places the burden on individual applicants to pursue complaints of discrimination. This system fails to recognise that vulnerable applicants may not be in a position to pursue complaints due to their individual circumstances. Lodging a complaint, attending a conciliation conference or proceeding to court imposes a significant emotional and financial toll on applicants. For these reasons, many clients with strong complaints of discrimination choose not to pursue their claims. If advocacy organisations had standing to bring complaints, this would relieve the burden on individuals to undertake stressful and expensive litigation.

#### *2. Representative Actions*

There is currently a mismatch between the standing requirements of the Australian Human Rights Commission and the Federal Courts. Under the *Australian Human Rights Commission Act (Cth)*, a complaint can be made on behalf of one or more persons aggrieved by the alleged unlawful discrimination.<sup>1</sup> However, only an individual who is “an affected person in relation to the complaint” may make a subsequent application to the Federal Court or the Federal Circuit Court.<sup>2</sup> Further, under the Federal Court rules representative proceedings may only be commenced by a member of that representative class, of which there must be at least seven members with the same claim who consent in taking part.<sup>3</sup> As a result representative organisations

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<sup>1</sup> *Australian Human Rights Commission Act 1986 (Cth)*, s 46P(c).

<sup>2</sup> *Australian Human Rights Commission Act 1986 (Cth)*, s 46PO(1).

<sup>3</sup> *Federal Court of Australia Act 1976 (Cth)*, s 33C.

are unable to bring actions at the Federal Court level, on behalf of an individual or in their own right.

Given there is no effective mechanism by which issues of systemic discrimination can be dealt with, representative complaints are rarely made. A legislative anti-discrimination scheme seeking to prevent and respond to discrimination cannot rely solely on individuals to initiate and substantiate complaints about their particular sets of circumstances. Individuals often face significant power imbalances and have limited financial, time and emotional resources. Ultimately individuals must pursue their own interests, and strategic enforcement may never occur and development of precedent is likely to be slow and uneven. This prevents the law from providing clear and thorough guidance in the most efficient way.

Organisations and advocacy groups with a connection to the subject matter are in a unique position to identify systemic discrimination and should have standing to bring complaints in their own right. Enabling interested organisations to pursue representative complaints would relieve the burden on individuals to pursue complaints to higher jurisdictions, and produce outcomes that reach beyond the circumstances of one individual, thereby contributing to systemic change.

***Recommendation:***

*Provision should be made for complaints to be made to the AHRC and the Federal Court or Federal Circuit Court by groups or organisations on behalf of, or in the interests of, their member or members.*

Burden of Proof

The balance of power in the employee-employer relationship is unequal. This inequality should be addressed by shifting the burden of proof onto the respondent party to ensure a more equitable resolution of workplace disputes.

Under the ADA and the DDA, a major barrier to complainants is how the burden of proof operates in direct discrimination matters.<sup>4</sup> The complainant bears the burden of proof entirely, and has to prove, on the balance of probabilities, that their age or disability is a factor in the less favourable treatment they received.

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<sup>4</sup> *Disability Discrimination Act 1992* (Cth), s 5.

The current burden of proof requirements for direct discrimination matters under the ADA and DDA places too great an evidentiary burden on the individual complainant, who is often under-resourced. It is very difficult for the complainant to prove the employer respondent's state of mind without ready access to evidence which is generally held only by the respondent. In our experience this is especially the case in pre-employment matters, such as Harry's case study (see above). It is very difficult for complainants to have access to the evidence required to discharge the burden.

In contrast, a much more reasonable approach is that taken by s 361 of the *Fair Work Act 2009* (Cth)(FWA). Once an employee or prospective employee alleges that they were subject to adverse action, it is presumed that the adverse action was taken for a prohibited reason unless the employer proves otherwise. The burden is on the employer to rebut this assumption by submitting evidence that the operative reason behind the adverse action is not one of the prohibited grounds (e.g. disability discrimination). This strikes a fair balance as evidence as to the state of mind of the employer when they engaged in the action complained of will not easily be accessible to the employee.

We note that the introduction of a reverse burden of proof under the FWA has not led to the FWC or the federal courts being burdened with high numbers of claims. We submit that the reverse burden does not pose an unfair advantage for employees as employees are still required to present their case with sufficient clarity, as the motivation for adverse action must be clearly alleged and particularised.<sup>5</sup> Additionally, the evidentiary burden placed on employers is reasonable, and may be discharged by providing evidence of an alternative (not prohibited) reason for the adverse action alleged.<sup>6</sup>

Similarly, in indirect discrimination cases under the DDA the complainant faces a lesser burden as after they have established the discriminatory impact, the burden shifts to the respondent to prove that the discriminatory condition or practice was reasonable.

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<sup>5</sup> *Fox v Stowe Australia Pty Ltd* (2012) 271 FLR 372 [27].

<sup>6</sup> See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, where the High Court held that to discharge the reverse onus and remove the presumption the employer had acted for a prohibited reason, it was sufficient for the employer to provide evidence of an alternative reason for the adverse action alleged.

We submit that the ADA and DDA should be amended to implement a rebuttable presumption for direct discrimination. This would closely align the onus between direct and indirect discrimination with the FWA. We believe that the existing onus for direct discrimination under the ADA and DDA is unreasonable, and reinforces the injustices suffered by complainants by denying them suitable legal recourse.

#### Narrow interpretation of 'disability' under the FWA

The FWA does not provide a definition of 'discrimination' or 'disability'. The courts have interpreted s 351 of the FWA narrowly, and have displayed a reluctance to draw on jurisprudence or the DDA to assist in defining the protected attributes.

The court's approach to defining disability under the FWA results in many applicants having their case dismissed when they are unable to establish that they had the protected attribute of 'disability'<sup>7</sup>, even though their cases would clearly fall within the definition of disability under the DDA. This narrow interpretation of s 351 of the FWA has recently been confirmed in *RailPro Services Pty Ltd v Flavel* [2015], where Justice Perry held that under s 351 of the FWA, the employer's adverse action needs to be done for a proscribed reason, which must be a *substantial and operative reason* (emphasis added).<sup>8</sup> In contrast, under s 10 of the DDA, there is no such requirement that the proscribed reason be the 'substantial' reason. Additionally, Justice Perry held that while under the DDA, disability includes "perceived, as opposed to actual disability", this is not the case under FWA.<sup>9</sup>

This narrow interpretation of disability discrimination under the FWA has led to an inconsistency of outcomes across the federal jurisdiction, and has had the effect of precluding vulnerable applicants from pursuing cases of unlawful discrimination. This means that complainants can have vastly different outcomes based on the jurisdiction they choose, for essentially similar actions. The complexity of the law in this area significantly disadvantages complainants

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<sup>7</sup> See for example *Construction, Forestry, Mining and Electrical Union v Leighton Contractors Pty Ltd* (2012) 208 FCR 386; *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677; *Hodkinson v Commonwealth* (2011) FMCA 171.

<sup>8</sup> *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 [86].

<sup>9</sup> *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 [112].

who do not have access to timely legal advice, which in our experience is difficult to obtain.

**Recommendation:** *That s 351 of the FWA be amended to provide a definition of disability in line with the definition under the DDA.*

#### Reasonable adjustments and unjustifiable hardship

Kingsford Legal Centre considers that imposing a duty to make reasonable adjustments to accommodate the needs of people with disabilities is of fundamental importance to the realisation of substantive equality and the elimination of discrimination.

The concepts of reasonable adjustments and unjustifiable hardship can be difficult to understand for all parties involved. Our experience is that some employers will refuse to make adjustments or claim unjustifiable hardship when the adjustment requested could easily be accommodated.

#### **Case study: Fatima**

*Fatima had worked in the same office job for 5 years, when the office was renovated. Fatima gets migraines, and previously had a desk away from the windows, as strong light could aggravate her health condition. After the office renovation, she was placed at a desk facing a window. She raised this with her supervisor, asking to be moved to an empty desk facing a wall. Her supervisor refused to let Fatima move desks. Fatima got a letter from her doctor detailing her condition and the reasonable adjustment required. The supervisor refused to make the adjustment, saying it would cause unjustifiable hardship. The employer did not provide any detailed reasons. Fatima ended up resigning from her job. The employer could have made the adjustment without any cost by simply allowing Fatima to swap desks.*

Our view is that the tests for reasonable adjustment and unjustifiable hardship should reflect the remedial and protective context within which these concepts operate. Currently, a failure to make a reasonable adjustment is not, of itself, a standalone cause of action.

#### Costs jurisdiction



Currently matters which are not resolved at conciliation at the Anti-Discrimination Board NSW are heard in the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT). In proceedings before the Tribunal, parties generally bear their own costs.<sup>10</sup> It is our experience that many complainants choose to use the NSW discrimination complaints system, rather than the federal system. This is the case even when the DDA provides significantly greater legal protection to people with disabilities than the *Anti-Discrimination Act 1977* (NSW).

At the federal level, if matters are not resolved at conciliation at AHRC, a complainant can proceed to the Federal Circuit Court or Federal Court. As the federal courts are costs jurisdictions, if a complainant loses their case in the federal courts, they will usually be ordered to pay the other side's legal expenses. The risk of an adverse costs order is a significant barrier to applicants, whom are already under-resourced when compared to the vast majority of respondent employers. Respondents, who often have comparatively greater access to legal representation and other resources, have a significant advantage with regard to possible litigation costs. Essentially, this acts to suppress the ability of applicants to negotiate fairly at conciliation— resulting in settlements at conciliation that do not reflect the seriousness of the discriminatory conduct or the strength of the evidence in the case, largely because of the risks and pressure of litigation in a costs jurisdiction against better-resourced respondents. We also are of the view that limited costs protections by Legal Aid grants as well as recent changes to Legal Aid NSW's policy on contributions make it more difficult and unlikely that complainants, even with a grant of Legal Aid, are able to obtain meaningful damages. This must be considered in the context of the risk of costs orders in litigation, with complainants often deciding that the risk of litigation is not worth potentially meagre benefits.

As a result of this reticence to litigate discrimination matters, Courts at the federal level are unable to develop robust jurisprudence in discrimination cases, as even strong claims are settled because applicants are fearful of potential costs orders against them. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative role within the community. We observe that many issues in discrimination law remain untested, with the law not evolving

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<sup>10</sup> *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1).

through case law. As a result there is a lack of clarity on many test issues and as a result our advice to clients is equivocal. This is important to consider in the context of costs issues at court, as well as the limited and difficult nature of representative actions in the federal courts. In our view the costs issues of litigation in the federal courts as well as increased scope for representative actions would improve the evolution of discrimination law through case law.

This lack of consistency in cost jurisdictions between State Tribunals such as NCAT and the federal courts disproportionately impacts applicants with limited resources, and reduces their ability to access remedies through the federal courts. This serves to undermine the legislative objects of preventing and prohibiting disability discrimination.

Kingsford Legal Centre submits that the approach to costs under the FWA is more appropriate. Where claims of age or disability discrimination are made under the FWA in the Federal Circuit Court or Federal Court, each party generally bears its own costs. A costs order can only be made against a party if the proceedings are instituted vexatiously or without reasonable cause; the party's unreasonable act or omission caused the other party to incur costs; or the party failed to participate in the matter when it was at the FWC stage<sup>11</sup>. This approach strikes a more appropriate balance, as it allows applicants with meritorious claims to pursue them without the risk of a costs order, as long as they abide by directions.

***Case study: Avram***

*Avram worked in a warehouse and was repeatedly harassed and threatened at work by his supervisor about being overweight. The supervisor called Avram a "heart attack waiting to happen". Avram lodged a disability discrimination complaint to the Australian Human Rights Commission. He argued that even though he did not have any current disabilities, he was being treated unfairly on the basis of a presumed future liability. The matter did not settle and Avram lodged at the Federal Circuit Court. The matter settled before hearing for a very low amount, as Avram was scared of losing his home if he lost at hearing and had a costs order made against him. There remains very little case-law guidance on the issues of imputed and future disabilities.*

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<sup>11</sup> *Fair Work Act 2009* (Cth), s 570.

**Recommendation:** *For discrimination complaints, the Federal Circuit Court and Federal Court should become a no costs jurisdiction, apart from cases that are frivolous, vexatious or unreasonable.*

### Civil penalties

In our experience, where the complainant chooses to go through the federal courts system, most discrimination cases settle before being litigated. These matters often settle on terms not reflective of the seriousness of the discrimination, or the strength of their case, resulting in inadequate compensation. Our experience is that compensation offered in settlements is generally very low (often in the range of \$3,000 - \$5,000), which mirrors the relatively small amounts awarded by tribunals in discrimination matters. In cases that reach the federal court system, the costs incurred in running a case could easily surpass the amount awarded. Complainants who are eligible for a grant of aid from Legal Aid NSW end up having to pay the majority of any award or settlement towards repaying Legal Aid NSW's costs.

The difficulty of applicants pursuing complaints, and the relatively small amounts of compensation settled for at conciliation or awarded by the courts is often only a slap on the wrist for employers who unlawfully discriminate against workers with a disability. Currently, the ADA and DDA do not provide for pecuniary penalties to be imposed on respondents for breaches of these Acts. In contrast, the FWA has civil penalty provisions in place, including for breaches of the general protections provisions. A breach of the general protections provision can lead to the courts imposing a pecuniary penalty to a maximum of 300 penalty units for a corporation (\$54,000) or 60 penalty units for an individual (\$10,800).<sup>12</sup> The potential exposure to substantial pecuniary penalties acts as an incentive for respondents to obey the law and not engage in discriminatory conduct. Kingsford Legal Centre recommends that the ADA and DDA be amended to allow the courts to impose civil penalties on employers for breaching these Acts. This provision could be similar to that in the FWA, to ensure greater consistency across the federal anti-discrimination jurisdictions.

### **Recommendation**

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<sup>12</sup> *Fair Work Act 2009* (Cth), ss 539, 546.

That the ADA and DDA be amended to allow the courts to impose civil penalties on employers for breaching the ADA and DDA, and to allow the courts to order that these penalties be paid to the applicant.

### Conciliation processes and power imbalance

Although the costs are lower in conciliation, and the process can lead to flexible resolution to the satisfaction of both parties, the conciliation process can disadvantage the complainant as there is often a power imbalance. This is particularly evident where the respondent is a company or a government agency, and the complainant is unrepresented, often due to a lack of funds and the insufficient resourcing of the legal assistance sector. This often results in the complainant agreeing to terms of settlement which inadequately address the injustice they have suffered.

In KLC's experience, the conduct of conciliations varies significantly, both within and between jurisdictions. At the AHRC, the complainant often has half a day set aside for their conciliation. However, the FWC generally only sets aside 90 minutes for each conciliation. This difference in time afforded for the complainant to be heard often impacts how the complainant responds to the process, as the limited time afforded often does not provide an appropriate forum for complainant to hold their employer to account, as the individual is unable to fully express the effect that the discrimination has had on them – which is often the most valued outcome of a conciliation. In KLC's experience, some jurisdictions do not have sufficient processes in place to ensure that conciliations are accessible, compounding the discrimination experienced by the complainant. Kingsford Legal Centre recommends that all conciliators receive anti-discrimination training and that processes be implemented to ensure that complainants with a disability can participate fully in conciliation processes.

#### ***Case study: Jackie***

*Jackie had a hearing impairment. Jackie's preferred method of communication was to lip read. Jackie worked for a mid-sized company as an events assistant. One day at work, a new supervisor repeatedly yelled instructions at Jackie. Jackie was unable to hear these instructions, and as a consequence could not follow these instructions. Jackie's employment was terminated as a result. KLC assisted Jackie to lodge a complaint of disability discrimination. KLC requested permission to represent Jackie at the conciliation, but this request was denied.*

*At conciliation, a hearing loop was provided, but Jackie was not comfortable with using a hearing loop, and expressed a preference for lip reading. The conciliator wore a face-mask during the conciliation as she had a cold, which prevented Jackie from participating fully in the conciliation process. Jackie came out of the conciliation very upset, having not understood what was happening and unable to effectively participate in the conciliation.*

### Conciliation agreements

There is no effective mechanism to enforce conciliation agreements. This is a significant problem with the Commonwealth anti-discrimination system. The process of enforcing conciliated agreements should be low-cost and straight forward. In KLC's experience, although many complainants successfully settle at the AHRC, often the respondents do not comply with the terms of the settlement agreement.

There is also no accurate way of determining in how many 'settled' matters the respondent fails to fully comply with the agreement. Applicants and their representatives often spend many months chasing the respondent to ensure compliance. In our experience, many matters that 'settled' at the AHRC are never finalised according to the terms agreed.

The effectiveness of discrimination conciliation agreements would be improved if they could be registered with a federal court and enforced as court orders. Many state and territory anti-discrimination statutes provide for a mechanism whereby conciliation agreements are registered with a court or tribunal.<sup>13</sup> The provisions in s 164(3) of the *Anti-Discrimination Act 1991* (Qld) and s 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements.

#### **Case study: Mei**

*Mei settled a complaint of disability discrimination with her former employer for \$5, 000 and a written statement of service. Despite both parties signing a deed*

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<sup>13</sup> See, *Anti-Discrimination Act 1977* (NSW), s 91A(6); *Equal Opportunity Act 2010* (Vic), s 120; *Anti-Discrimination Act 1991* (Qld) s 164; *Anti-Discrimination Act 1998* (Tas), s 76; *Human Rights Commission Act 2005* (ACT), s 62.

*of settlement, the former employer failed to make payment of the settlement sum. Mei spent 3 months chasing the former employer for payment. This was stressful and caused Mei a lot of anxiety as she was in financial difficulty. After waiting over 6 months to resolve her discrimination matter at conciliation, Mei did not have the energy nor resources to enforce the deed.*

**Recommendation**

That the DDA and ADA be amended to provide for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.

Domestic workers

Currently, the ADA and DDA fail to provide protection against discrimination for domestic workers, which means it is not unlawful for an employer to discriminate against domestic workers in the hiring, termination or terms of employment.<sup>14</sup> Kingsford Legal Centre recommends that section 15(1) of the DDA and 18(3) of the ADA be repealed, in order to provide comprehensive protection against discrimination, in line with Australia's international human rights obligations.

**Recommendation**

That section 15(1) of the DDA and section 18(3) of the ADA be repealed, so that domestic workers are protected from discrimination

**Question 7: Intersectional Challenges**

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Kingsford Legal Centre believes that discrimination law in Australia fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination. The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community — that is, people experiencing complex forms of discrimination.

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<sup>14</sup> *Age Discrimination Act 2004* (Cth), s 18(3); *Disability Discrimination Act 1992* (Cth), s 15 (1).

Intersectional, or compound, discrimination is where a person's identity includes more than one attribute of potential discrimination—for example, a person with a disability who is an Aboriginal woman.

The current approach in Commonwealth anti-discrimination law is to identify a 'ground' of discrimination in an 'area' of life. Where an individual seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation with a comparator without that characteristic. In the absence of an explicit discriminatory comment about one of these attributes, it can be an impossible task to prove that the discrimination was linked to any one attribute in isolation of the others.

In KLC's experience, the definition of direct discrimination and the development of the 'comparator' test has fundamentally constrained the development of discrimination law. The legal test that requires a comparison of the treatment of someone without the particular characteristic has impacted on the ability of people facing complex forms of discrimination where there is no genuine comparator. Furthermore, the exact characteristics attributed to the comparator (often hypothetical) often determine whether a case can succeed or fail. Lack of clarity over the characteristics of the comparator can lead to ambiguity as to whether a case of discrimination is strong. In the context of the costs jurisdiction of the federal court system, this creates further disincentives for complainants to pursue their case.

In order for Commonwealth anti-discrimination law to adequately protect and promote the rights of persons and groups experiencing complex forms of discrimination, it should recognise intersectional discrimination as a separate ground of discrimination. Anti-discrimination law should aim to look at the 'whole person' when considering discrimination and not artificially segment the experience of people experiencing discrimination.

In order to achieve this, KLC submits that the comparator test be removed, and that the DDA and ADA be amended to include intersectional discrimination as a distinct ground of discrimination.

Finally, KLC recommends that as intersectional discrimination often impacts on individuals who are facing systemic disadvantage, a finding of intersectional discrimination should have a positive impact on the awarding of damages to

reflect the impact of intersectional discrimination on individuals and to further prohibit such conduct. The ability of the courts to award civil penalties, as discussed above, could be used to penalise respondents who unlawfully discriminate against applicants on the basis of more than one attribute.

*Case study: Kevin*

*Kevin was an indigenous man with a disability. Kevin was employed as a cleaner through a recruitment agency. One day, Kevin's boss made a number of racial slurs and asked Kevin why he wasn't waiting in line for welfare with the rest of his kind. The boss and colleagues also made fun of the way Kevin talked, as he had a speech impediment. Kevin was really upset by this conduct, and complained to the recruitment agency. His employment was terminated as a result. Kevin came to KLC for advice. We assisted him to lodge a discrimination complaint. Kevin settled at conciliation for \$1,000 despite having a strong case, as he decided it was too risky to take the matter to court.*

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,  
KINGSFORD LEGAL CENTRE

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