



**Submission of Arnold Bloch Leibler to the Inquiry into the provisions of
the Disability Discrimination Amendment Bill 2003 by the Senate Legal
and Constitutional Committee of the Parliament of Australia**

13 February 2004

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

Table of Contents

1	Introduction.....	3
2	Legalised marginalisation of persons on the basis of unjustifiable perceptions.....	4
3	The legal uncertainty of the Bill	5
4	Constitutionality of the proposed amendments.....	8
5	Implications of the Bill for employers and employees.....	11
6	Conclusion	15

1 Introduction

- 1.1 Arnold Bloch Leibler, lawyers and advisers, (“ABL”) has a strong and longstanding commitment to the practice of law in the public interest.
- 1.2 Through its involvement as an active and proud member of the Public Interest Law Clearing House (Vic) Inc (“PILCH”), ABL recently hosted a forum held by PILCH and the Disability Discrimination Legal Service. The purpose of the forum was to enable community legal centres, private law firms, community organisations, drug treatment services and welfare agencies to discuss together their concerns about the proposed amendments to the *Disability Discrimination Act 1992* (Cth) (“the Act”). The forum included more than 130 participants.
- 1.3 This purpose of this submission to the Inquiry into the provisions of the Disability Discrimination Amendment Bill 2003 (“the Inquiry”) by the Senate Legal and Constitutional Committee of the Parliament of Australia (“the Committee”) is to draw the Committee’s attention to some significant legal issues arising from the proposed amendments to the Act by the Disability Discrimination Amendment Bill 2003 (Cth) (“the Bill”). In particular, we draw on the firm’s expertise in employment and public law to provide an overview of the Bill’s potential impact, particularly on employers and their businesses.
- 1.4 This submission does not seek to provide a comprehensive treatment of all the possible legal implications arising from the Bill’s proposed enactment. Various of the other submissions to the Inquiry, particularly that of PILCH and Clayton Utz lawyers, deal comprehensively with many of the other legal issues of relevance and great importance.
- 1.5 This submission does not deal also with the broader societal impacts of the Bill. The critical issues here are fully dealt with in the submissions of those community organisations, service providers and agencies with the necessary “on the ground” experience and expertise, and we defer to them.

2 Legalised marginalisation of persons on the basis of unjustifiable perceptions

- 2.1 The Bill provides that it is not unlawful to discriminate against a person on the grounds of her or his disability, if the disability is an 'addiction to a prohibited drug' and the person is 'addicted to the drug at the time of the discrimination'. If the person is 'undergoing a program, or receiving services' at the time the discrimination takes place, then the discrimination based on that person's drug addiction will be unlawful.
- 2.2 We are concerned that the Bill, if enacted, would legalise the marginalisation of a vulnerable minority group – persons with a drug addiction, which will inevitably serve only to perpetuate the negative and destructive stereotypes about drug addiction. The Bill's underlying principle of lawful discrimination against a person based on his or her membership of a group of persons defined by reference to perceived behaviour and/or a medical condition is totally anathema to us at Arnold Bloch Leibler.
- 2.3 There is absolutely no indication in the Bill or its explanatory memorandum ("EM") that there has been any serious consideration given to the need for safeguard mechanisms to prevent the future extension of the concept of legalised marginalisation of disenfranchised and powerless groups at risk of social and economic disadvantage. This is of further grave concern to us at Arnold Bloch Leibler.
- 2.4 The cornerstone principle of the Bill, that discrimination of a desperate and marginalised group in society is now legal, seriously risks harming Australia's inclusive and democratic values, which generations of Australians have established and sought to maintain. In 2004, Australia should be seeking to introduce measures to overcome disadvantage and social problems in a positive, empowering way, rather than preparing to legalise the marginalisation of a minority group deemed to be "undesirable".

3 The legal uncertainty of the Bill

‘Addiction’, ‘undergoing a program’ and ‘receiving services’

- 3.1 The Bill is vague and nebulous, in large part because of its use of such undefined and uncertain terms as ‘undergoing a program’ and ‘receiving services’. This absence of definition is, in part, purposeful. The EM to the Bill states with rhetorical flourish that ‘program’, ‘services’ and ‘treatment’ are not defined by the Bill to ensure that the definition of treatments and services is not ‘limited’ and that ‘people who are attempting to put their lives back on track are not inadvertently left out’. But the difficulty is that the meanings behind these words are deceptively complex, and inevitably encompass a variety of behaviours and circumstances that are instantly open to differing and subjective interpretations.
- 3.2 ‘Undergoing a program’ and ‘receiving services’ are loose concepts. The EM states that ‘drug recovery treatment and services have a wide scope’ and that ‘receiving services’ may cover ‘regular visits to a counsellor, priest or doctor’. It is true that people seek out a range of different treatments to address problematic drug use. But it is far from clear whether the Bill contemplates all of these treatments or those persons, for example, on a waiting list to enter a program.
- 3.3 The word ‘addiction’ has also been left undefined, but it is unclear whether this is by design or accident. The EM does not shed any light here. The concept of addiction is complicated and its meaning in the context of the Bill is not resolved by resorting to dictionary definitions that offer the ‘ordinary’ sense of the word. ‘Addiction’ has been defined by the Oxford English Dictionary as the ‘state of being addicted to a drug ... a compulsion and need to continue taking a drug as a result of taking it in the past.’ This provides no clear path for legislative interpretation. For example, it is unclear how many times a person needs to take a prohibited drug to be ‘addicted’, or whether a person may be ‘addicted’ notwithstanding the fact that she or he may not be currently using or because she or he has temporarily relapsed.
- 3.4 Given the extremely broad spectrum of possibilities for defining ‘addiction’, ‘program’ and ‘services’, employers, landlords and service providers face enormous difficulties in ascertaining whether a person is addicted, and then whether that person is ‘undergoing a program’ or ‘receiving services’. Neither the Bill nor the EM clarifies whether, to avoid committing a potentially discriminatory act, potential respondents to a complaint under the Act should enquire whether a potential complainant under the Act is undergoing a program. If it cannot be determined whether a person is undergoing treatment, it is

almost impossible to know whether a discriminatory act will be lawful or unlawful. In this specific context, the Bill will inevitably create great uncertainty for employers, landlords, service-providers and others who are required to be fully cognisant of its provisions.

The amendments viewed within the broader context of the Act

- 3.5 The uncertainty of the Bill's terms is compounded by the fact that it is totally inconsistent with the broader context of the Act and all other anti-discrimination legislation. In selectively excluding a particular disability from the protection of the Act, the amendments seriously offend the foundational principle of anti-discrimination on which the Act is built.
- 3.6 The objectives of the Act, stated in section 3, are liberal: to eliminate discrimination against people with disabilities; to ensure their equality before the law; and to promote recognition and acceptance of people living with disabilities within the community.
- 3.7 The definition of 'disability' under the Act is similarly comprehensive and unqualified. Disability is defined by section 4(1) of the Act as:

- “(a) total or partial loss of the person’s bodily or mental functions; or*
 - (b) total or partial loss of a part of the body; or*
 - (c) the presence in the body of organisms causing disease or illness; or*
 - (d) the presence in the body of organisms capable of causing disease or illness; or*
 - (e) the malfunction, malformation or disfigurement of a part of the person’s body; or*
 - (f) disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
 - (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*
- and includes a disability that:*
- (h) previously existed; or*
 - (i) previously existed but no longer exists; or*
 - (j) may exist in the future;’ or*
 - (k) is imputed to a person.”*

No particular disorders or disabilities are mentioned as examples. This is deliberately designed to avoid restricting the scope of the definition (similar protection exists in Victoria under the *Equal Opportunity Act 1995*, whereby it is unlawful to discriminate against someone on the grounds of their 'impairment').

- 3.8 It is difficult if not impossible to reconcile the content of the Bill's proposed amendments with the broader context of the Act. The amendments proposed by the Bill restrict the application of the Act to drug addicts, an already severely marginalised group, and will serve only to further stigmatise this vulnerable group. To reiterate, of serious concern to us at Arnold Bloch Leibler is the fact that the amendments could be interpreted as an invitation to discriminate, as it would no longer be unlawful to do so if the Bill's amendments become operative.
- 3.9 The potential promotion of discrimination against people with a disability cannot in any way be considered consistent with the stated aims of the Act. This inconsistency with the Act, and anti-discrimination legislation more generally, compounds the uncertainty created by the lack of definition of the Bill's key terms, and will inevitably provoke a number of legal test cases.

4 Constitutionality of the proposed amendments

Legislative power of the Commonwealth

- 4.1 It is axiomatic that the lawfulness of any legislation enacted by the Commonwealth Parliament relies on its strict accordance with the provisions of the Commonwealth Constitution. Consequently, the Parliament's source of authority for making valid legislation is to be found in the heads of power enumerated in the Constitution.¹
- 4.2 The High Court has identified some of the legislative powers upon which the Act relies for its constitutionality in section 12 of the Act.² Section 12 explicitly outlines the scope of the Act. The Act clearly relies on the following (non-exhaustive) list of powers:
- external affairs power, section 51(xxix);
 - territories power, section 122;
 - Commonwealth "public service" power, section 52(ii);
 - incidental power, section 51(xxxix)
 - corporations power, section 51(xx);
 - banking power, section 51(xiii);
 - insurance power, section 51(xiv); and
 - trade and commerce, section 51(i).
- 4.3 As no express provision is made in the Bill for further or alternative sources of constitutional authority, it can only be presumed that the proposed amendments rely on the powers impliedly referred to in section 12 of the Act.

External affairs power

- 4.4 The objects of the Act parallel the aims and purposes of the relevant conventions.³ For example, one of the objects set out in section 3 of the Act is "to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community". Equality before the law is enshrined in the *International Covenant on Civil and Political Rights*,⁴ which has been said by the Commonwealth

¹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

² See *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, [6] (Gleeson CJ).

³ *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, [79] (McHugh and Kirby JJ). The relevant conventions include the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

⁴ Opened for signature 19 December 1966, 999 UNTS 171 (Australia became bound by the obligations contained in the covenant on 13 August 1980). See, specifically, article 26.

Government to “clearly apply to people with disabilities.”⁵ Given the parallels between provisions of the Act and international law,⁶ it is likely that the external affairs power is the principal source of the Act’s constitutional legitimacy: legislation implementing international agreements to which Australia is a party finds its authority in the external affairs power.⁷

4.5 As the proposed amendments are designed to apply to Australian society generally,⁸ the Government ought to be obliged to explain how the external affairs power is capable of supporting the amendments. It is not sufficient that treaty-implementing legislation merely relates to the subject matter of the treaty; it must be a means *appropriate and adapted* to giving effect to the treaty’s obligations.⁹

4.6 The majority view of the High Court in *Victoria v Commonwealth*¹⁰ is that Commonwealth legislation falls within the description of a law implementing an international agreement if the legislation is reasonably capable of being considered appropriate to that end by the Federal Parliament.

4.7 In a similar vein, Justice Dixon of the High Court stated in 1936 in *R v Burgess; Ex parte Henry*:

“... *wide departure from the purpose [of the treaty] is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which [the treaty] relates.*”¹¹

4.8 Likewise, Justice Mason said in the Tasmanian Dams Case:

“*The law must conform to the treaty and carry its provisions into effect.*”¹²

⁵ See Commonwealth Government, *Australia’s Approach to a Draft Convention on the Rights of People with Disabilities* (December 2003) submitted to the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, established by General Assembly Resolution 56/168. We note that no mention of drug-related disabilities was made in this submission.

⁶ See in this regard, the submission of the Public Interest Law Clearing House, which Arnold Bloch Leibler endorses.

⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁸ For example, the legislation is not expressed to apply just to the banking and insurance industries.

⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1, 106 (Gibbs CJ), 130 (Mason J), 232–234 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 295–6; *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁰ (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹¹ (1936) 55 CLR 608, 674–5 (Dixon J).

¹² *Commonwealth v Tasmania* (1983) 158 CLR 1, 131.

- 4.9 The Act as proposed to be amended by the Bill must be “reasonably capable of being considered appropriate to that end by the Parliament”, not be a “wide departure” from the purposes of the treaties which it is implementing and Act conform to the treaty obligations it is carrying into effect. This much is uncontroversial.

Do the amendments fall within the scope of the external affairs power?

- 4.10 The proposed amendments clearly relate to the subject matter of the relevant conventions. However, as has been stated above, this is not sufficient to guarantee the constitutionality of the Bill. The proposed amendments must actually carry Australia’s international obligations into effect. It is reasonably arguable that a statute is unconstitutional if it purports to rely upon the external affairs power to make lawful activity that according to international treaties would be unlawful or undesirable.
- 4.11 A Court adjudicating upon the lawfulness of the proposed amendments would likely take the view that they do not “conform” to Australia’s treaty obligations in relation to equality before the law and the prevention of discrimination on grounds of disability, amongst other treaty obligations. The amendments create a class of persons, defined in the context of one aspect of their behaviour, and *legalise* discrimination against that class of persons. It is difficult to see how such an approach could be said to “conform” with convention obligations that proscribe discrimination on the basis of disability or social status. The *International Covenant on Civil and Political Rights* requires parties to prohibit discrimination “*on any ground*”.¹³ The addition of the proposed sections to the Act tends to the conclusion that the Act, or a severable part of it, will be “substantially inconsistent” with Australia’s treaty obligations and therefore invalid.¹⁴

¹³ Article 26.

¹⁴ *Victoria v Commonwealth* (1996) 187 CLR 416, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

5 Implications of the Bill for employers and employees

5.1 There are two main issues of relevance to the Bill to further highlight in the employment context:

- (a) Existing protections for employers under the Act and occupational health and safety legislation; and
- (b) Difficulties which employers will face in relying on the amendments to justify discriminatory actions.

These will each be dealt with in turn.

Existing protections

5.2 The fact of an employee's drug dependence may not affect his or her performance at work.

5.3 As the law in Australia presently stands, if an employee is unable to perform the 'inherent requirements' of his or her position because of drug dependence, then section 15(4) of the Act provides an exception to the prohibition on dismissing that employee on the grounds of his or her disability, and in relation to refusal to offer employment to a person in the same circumstances.

5.4 The 'inherent requirements of the position' will include an employee's essential duties, and may also include "considerations as to the physical environment in which the particular work is to be performed, and as to health and safety considerations in respect of the employee, fellow employees and others".¹⁵

5.5 Health and safety considerations are part of an employer's common law and statutory obligations to employees. Section 21 of the Victorian *Occupational Health and Safety Act 1985* (the 'OHS Act') provides as follows:

21. Duties of employers

- (1) *An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.*
- (2) *Without in any way limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails -*
 - (a) *to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health;*

¹⁵ *X v The Commonwealth* [1999] HCA 63.

- (b)
- (c) *to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health;*
- (d) *to provide adequate facilities for the welfare of employees at any workplace under the control and management of the employer; or*
- (e) *to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health.*

- 5.6 The duties imposed by section 21 of the OHS Act may require an employer to issue a policy to employees prohibiting the use of drugs (whether legal or illegal) or alcohol in the workplace, and to ensure that all risks to the health of employees are removed or minimised.
- 5.7 If an employee is so affected by his or her drug dependence that he or she constitutes a risk to the health and safety of the workplace, an employer would be required under the OHS Act to take reasonable action to remove that risk, which may include dismissing that employee. Such an action would also accord with the meaning given to the 'inherent requirements of the job', as discussed above.
- 5.8 As the law presently stands, if the dismissal was based on behaviour that resulted from the employee's drug dependence, and not from the fact of that dependence, it would not offend against the Act or constitute an unlawful dismissal, provided the proper consultation and warning processes are followed.
- 5.9 This was confirmed by the recent High Court decision of *Purvis v New South Wales (Department of Education and Training)*.¹⁶ In that case, a school was found not to have discriminated against an intellectually disabled student by expelling him, based on his violent behaviour towards teachers and pupils.
- 5.10 The Court distinguished between his disability, and the behaviour which was a manifestation of that disability, and decided that it was not discriminatory to expel the student on the ground of his behaviour. In arriving at this decision, the Court compared the treatment of the student with the treatment of another, hypothetical, student without a disability, who acted in the same violent fashion, and decided that the hypothetical student would have been treated in the same way.
- 5.11 This reasoning is equally applicable to the employment context. If an employee's drug dependence resulted in behaviours that would constitute grounds for dismissal or other

¹⁶ [2003] HCA 62.

disciplinary action, regardless of the employee's disability, then to take such action will not result in discrimination, or unlawful termination.

- 5.12 There is no evidence to suggest that the Act's current protections constitute a burden for employers, as users of illicit drugs rarely draw upon the Act to initiate anti-discrimination proceedings. *Marsden v Human Rights and Equal Opportunity Commission*¹⁷ is, as far as we are aware, the only case to date brought under the Federal disability discrimination legislation involving drug addiction. Decided in November 2000, this case confirmed that the Act's definition of disability could encompass drug addiction. This case did not involve an employer as a respondent, but rather arose in relation to the expulsion of a methadone user from a community club.
- 5.13 The *Marsden* decision has not resulted in an 'opening of the floodgates'. Three years later, no further cases have been brought by drug users against employers under the federal legislation. Since *Marsden*, there has been only one other similar case (*Carr v Botany Bay Council*¹⁸), which was not brought under the federal legislation, but under the NSW *Anti-Discrimination Act 1977*. In any event, both cases relate to the use of anti-discrimination legislation by methadone users; that is, drug users who would still be protected by the Act if the amendments are passed. Users of illicit drugs are simply not utilising the Act in its current form to bring claims of discrimination.
- 5.14 For these reasons alone, Arnold Bloch Leibler's strong view is that the amendments to the Act are totally unnecessary.

Difficulties in application

- 5.15 Because of the problems of interpretation inherent in the terms 'addiction', 'program' and 'services' (discussed at paragraphs 3.1 - 3.3 of this submission), employers will not, in any case, be able to rely on the amendments to the Act to justify their otherwise discriminatory actions against employees, unless they are willing to face legal action to justify their decisions.
- 5.16 Under these amendments, the dismissal of an employee on the grounds of drug addiction will carry a higher risk of litigation due to the lack of interpretative assistance in the Bill, which will lead to the possibility of damages and other awards for successful employees. Regardless of which party is successful, litigation in the discrimination and unfair dismissal jurisdictions will always result in a high degree of unrecoverable costs for an employer.

¹⁷ [2000] FCA 1619.

¹⁸ [2003] NSWADT 209.

- 5.17 Additionally, few employers will understand the real effect of the amendments. Without legal advice, which many small to medium sized employers cannot afford, the prospects are extremely high that the sections will be unwittingly misapplied by employers to justify the dismissal of an employee.

- 5.18 In other words, the amendments are more likely to cause problems for employers than to address any perceived and ultimately artificial problems.

6 Conclusion

- 6.1 The Bill sets a dangerous precedent by making human rights protection for people with disabilities conditional on having a socially acceptable disability. No other piece of federal anti-discrimination legislation functions, as this Bill does, to exclude a particular class of persons from its operation. It will further entrench existing negative stereotypes and prejudices about drug users, an already profoundly marginalised social group. If enacted, this Bill runs the risk of institutionalising discrimination and ill-treatment for drug users.
- 6.2 We at Arnold Bloch Leibler are of the firm belief that the Bill will prove unworkable in practice. It would introduce new legal uncertainty into the community, as the lawfulness of discrimination will hinge on such vague and undefined concepts as whether a person has an 'addiction' and whether or not they are 'undergoing a program' or 'receiving services'.
- 6.3 We are of the equally firm belief that the Bill is totally and absolutely unnecessary. The Act in its current form provides adequate protection for employers, landlords and service-providers, while still providing a severely disadvantaged group with a protective and reasonable mechanism against discrimination.
- 6.4 The Bill should not be supported. The Bill should be unreservedly withdrawn.

Arnold Bloch Leibler
Lawyers & Advisers
333 Collins Street
Melbourne VIC 3000
Tel: (03) 9229 9999
Fax: (03) 9229 9900

13 February 2004