



Blind Citizens Australia

**Submission to the Inquiry into the Disability
Discrimination and Other Human Rights
Amendment Bill 2008**

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About Blind Citizens Australia

Blind Citizens Australia (BCA) is the peak national advocacy organisation of and for people who are blind or vision impaired. Our mission is to achieve equity and equality by our empowerment, by promoting positive community attitudes, and by striving for high quality and accessible services which meet our needs. As the national advocacy peak body we have over 3000 individual members, branches nationwide and 13 affiliate organisations that represent the interests of blind or vision impaired Australians.

About the Disability Discrimination and Other Human Rights Amendment Bill 2008

Overall, Blind Citizens Australia (BCA) strongly supports the efforts of the government to change the *Disability Discrimination Act 1992 (Cth)* (DDA) and the *Human Rights and Equal Opportunity Act 1986 (Cth)* (HREOC Act). In particular, we are keen to see suggested changes which would:

1. Give legal recognition to the UN Convention on the Rights of Persons with Disabilities (UN CRPD) within Australia. The UN CRPD articulates a broad range of basic human rights for people with disabilities with specific references to the accommodations required for those rights to be met. It is critical, and commendable, that the Australian government has ratified the UN CRPD and now seeks to enshrine it in our local laws.

2. Provide clarity regarding genetic predisposition to disability as a qualifier for disability discrimination complaints. Many people who are blind or vision impaired have genetic conditions such as retinitis pigmentosa (unpredictably deteriorating vision which can have onset at any age) and their family members may be likely to either develop the condition or pass it on to future generations. It is vital that these family members have the same protection from discrimination in everyday life as their relatives who already have a vision impairment.
3. Provide clarification regarding the manifestation of behaviour relating to a disability, so that it is clear that discrimination based on disability related behaviour and disability aids is grounds for discrimination. For people who are blind or vision impaired, this will make it clear that the behaviour of, for example, not looking a person in the eye, or use of a disability aid such as wearing sunglasses inside does not mean that the person is able to be discriminated against.
4. Provide clarification regarding discrimination against carers and assistants. People who are blind or vision impaired are occasionally in a position where they require the help of a sighted guide or assistance with tasks such as shopping. Conversely, some people who are blind or vision impaired act as carers for their family members, and may be exposed to discrimination in that role.
5. Provide clarification regarding the use and definition of assistance animals. Promoting harmony between the State, Territory and Federal laws is critical to reducing ambiguity and confusion.

In particular, the decision to allow a person to ask for evidence of an animal's qualifications and training as an assistance animal will provide some certainty for both people who are blind or vision impaired and service providers without being too prescriptive about the type of evidence required. We would encourage the government to ensure that it is clear that this should not diminish the role of harnesses and identification jackets currently used on animals such as dog guides as an initial means of identification. Harnesses and jackets are often clearly branded to state that the dog guide is a trained assistance animal from a registered dog guide school.

BCA also encourages the government to make it clear that under the revised law no organisation is allowed to require only one type of proof that an animal has been trained or is a working assistance animal, as the options offered from animal to animal and state to state may vary. For example, one dog guide school may choose to provide students with an identity card, while another will decide that a harness and the contact details for the school will do. Differences in the services offered to people who are blind or vision impaired should not mean indirect discrimination is allowed to flourish.

To encourage further clarity and awareness, BCA recommends that dog guides are listed as an example of assistance animals in the notes to the DDA.

ISSUES

While BCA applauds the fact that the government is making efforts to provide clearer, simpler definitions of reasonable adjustment and discrimination (direct and indirect), we believe that there is some room for confusion in the current draft definitions. BCA is especially concerned that the laws be as clear and simple as possible so that they might be more easily accessed by people with disabilities.

Firstly, we believe that it should be clear that the definition of discrimination extends to carers, associates, assistance animals and disability aids. Although we believe that the proposed changes intend to do this, we are concerned that without an explicit statement in the law to this effect, this will be left to the interpretation of individual lawyers once cases move into the court system.

Direct Discrimination

Additionally, the definition of direct discrimination includes the clause that the person experiencing discrimination should be able to prove that someone without a disability would not suffer the same consequences if they were placed in the same situation i.e. in circumstances which are not materially different. In a disability discrimination complaint this can be incredibly difficult to establish. While it is a simple matter to determine that someone who requests a Braille phone bill is discriminated against if their request is refused because we all receive phone bills in print or electronic format by our choosing, other situations are not so simple. For instance, a person who is blind or vision impaired might not get a particular job, but unless there is a sighted applicant with exactly the same resume and presentation at an interview, we cannot know for a certainty that discrimination has occurred in circumstances which are not materially different.

Asking for proof that the circumstances are not materially under these conditions only complicates an already murky and complicated situation. In the case of a conciliation (as opposed to a formal court proceeding), a person with a disability acting on their own behalf may have more difficulty reconstructing such a scenario and offering proof that this would have been the case. The need to do so potentially discourages self advocacy and the number of disability discrimination complaints overall because it imposes an additional hurdle.

It is BCA's belief that providing a comparison may prove useful in some cases, but it should not be a requirement for a successful disability discrimination claim. Different treatment on the basis of disability should be the only required burden of proof. Comparisons between the treatment of an able and disabled person should be a valuable tool, but not a compulsory element of the process.

Indirect Discrimination

The Bill also suggests changes to the definition of indirect discrimination. These are:

- That there is no longer a need to prove that people without a disability can, or would, meet a requirement which is considered discriminatory;
- Clearly stating that discrimination occurs if a person is unable to meet a requirement because of their disability, not if they are simply unable to meet the requirement;
- Adding that there needs to be proof that the requirement does, or might disadvantage people with a particular disability; and

- Making it the responsibility of the person responding to a disability discrimination complaint to prove that a requirement is reasonable.

While most of these changes are positive, the law still states that an instance of indirect discrimination is defined by whether a person with a disability “does not or would not comply, or is not or would not be able to comply, with the condition.” It is BCA’s belief that this makes the law more complicated and difficult to apply. For people who are blind or vision impaired, there are many instances where complying with requirements which might constitute indirect discrimination could happen, but only with the help of another person, a situation which does not promote independence or freedom.

For example, a person who is blind or vision impaired may be able to ‘comply’ with the requirement to leave a building in a safe and timely fashion in case of an emergency if they have assistance from another person, even though there are no resources – such as a tactile map, or tactile ground surface indicators (TGSIs) in emergency areas – which would allow them to get out independently. The person may be able to comply with these requirements, but they are still disadvantaged by them.

Furthermore, one individual’s ability to comply may be better than others with a similar disability. To use the example above, someone who has light perception may be able to make out emergency lights in a dark room, aiding their ability to evacuate safely and independently. A person who is totally blind with no light perception will not have the same ability to comply. Both people would be disadvantaged by the lack of additional resources, but in this instance it is hard to say who would be worse off: the person who has no vision

and would be reliant on a sighted person for full assistance, or the person with very limited vision who may be expected to struggle along on their own.

BCA believes that the best remedy is to remove this clause from the definition, so that the definition for indirect discrimination encompasses compliance with a requirement or condition which would disadvantage people of a certain disability group. This requirement or condition should not be judged on whether or not compliance can be met by one person or group of people.

Alternatively, the government could specify that compliance with a condition is not met if the person is disadvantaged by meeting the requirements.

Reasonable Adjustments

As the proposed legislation stands, reasonable adjustments are tied to the definitions of direct and indirect discrimination. This has the potential to be too complex to understand and apply. It is also arguable that it makes the DDA unable to make a clear positive statement in relation to providing reasonable adjustments, rather than simply calling the absence of reasonable adjustments a form of discrimination.

Again, the use of comparisons with a potentially hypothetical person without a disability may cause difficulty in deciding what is, or is not, a reasonable adjustment. BCA believes that the definition of reasonable adjustment should focus on providing equal opportunities and/or alleviating disadvantage, rather than sticking to a more functional understanding of the specific situation. This would bring it into line with the definition provided by the UN CRPD. To

provide clarity about what a reasonable adjustment might be, examples should be provided as part of the Notes.

Refusing or failing to make a reasonable adjustment should be considered discrimination under both definitions of discrimination. Additionally, people with disabilities should not be required to prove that making a reasonable adjustment does not impose an unjustifiable hardship. The default should explicitly be that reasonable adjustments must be provided unless the respondent can prove they would experience unjustifiable hardship by doing so.

Role of the Commission

BCA believes that this change to legislation offers a chance to consider broadening the role of the Australian Human Rights Commission to, for example, allow it to initiate systemic complaints when it is in the public interest. Although the DDA has provided many opportunities for people with disabilities to articulate their rights and to improve equality in Australian society, they still face significant systemic disadvantage. According to the Vision Australia Employment Report (2007) 63% of people who are blind or vision impaired and looking for work are unemployed. Only an estimated 3% of printed materials are put into alternative, accessible formats.

BCA strongly believes that the Commission should be able to initiate complaints when systemic issues cannot be solved through individual complaints. In the longer term this would assist with alleviating systemic issues by, for instance, requiring publishers to provide books in electronic format upon request from a person who is blind or vision impaired.

Systemic discrimination is also alleviated through positive measures such as Disability Action Plans. While the Commission is already able to register and collect action plans on a voluntary basis, BCA encourages the government to consider a clear definition of what constitutes an Action Plan within the DDA. In addition, BCA encourages the government to investigate allowing the Commission to require that any Action Plan developed in Australia be registered with the Commission to assist in educating the community about best practice in Action Plans as well as providing better public accountability for organisations utilising them.

Other Concerns

BCA is concerned that the current changes to the DDA do not respond to the inconsistency between the DDA and the UN CRPD with regards to migration. In particular, we encourage the government to expedite its review of the DDA and the *Migration Act* so that the exemption for the *Migration Act* can be dealt with as quickly as possible.