Implementing the Productivity Commission review of the Disability Discrimination Act:

submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Disability Discrimination and Other Human Right Legislation Amendment Bill

12 January 2009

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- Expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on equality and anti-discrimination laws

PIAC has a long history of involvement with the operation of human rights and anti-discrimination law in Australia. This has including conducting test case litigation under both Federal and NSW anti-discrimination statutes, proposing amendments to both substantive and procedural aspects of anti-discrimination law and responding to new and amending anti-discrimination legislation.

In May 2003, PIAC made an extensive submission in response to the Productivity Commission's Issues Paper on the *Disability Discrimination Act 1992* (Cth) (the DDA). That submission focused on the interpretation and application of the phrase 'unjustifiable hardship' and on the complaint process.

The current inquiry

PIAC commends the Federal Government on progressing implementation of the recommendations of the Productivity Commission from its review of the DDA and welcomes the opportunity to provide this submission to the current Senate Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) (the Bill).

General comments

PIAC commends the following aspects of the Bill to the Senate Legal and Constitutional Affairs Committee:

- Making it explicit that a refusal to make a reasonable adjustment for people with disability may also amount to discrimination.
- Clarifying matters to be considered when determining unjustifiable hardship.
- Clarifying that the onus of proving unjustifiable hardship falls on the person claiming it.
- Making clear that the definition of disability includes genetic predisposition to a disability and behaviour that is a symptom or manifestation of disability.
- Shifting the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with disability to the respondent.
- Replacing the proportionality text in the definition of indirect discrimination with the requirement to prove that the condition or requirement imposed has the effect of disadvantaging people with the disability of the aggrieved person.
- Extending the time to take a terminated complaint to the Federal or Federal Magistrates' Court from 28 to 60 days.

PIAC also notes with approval the amendment to the *Age Discrimination Act 2004* (Cth) (the *Age Discrimination Act*) to remove the 'dominant purpose' test.

Comments on Schedule 1 – Age Discrimination

PIAC strongly supports the amendment set out in clause 1 of Schedule 1of the Bill. This amendment brings the *Age Discrimination Act* into line with other Federal anti-discrimination statutes. PIAC notes that the amendment provides a more effective coverage of the range of reasons that may give rise to discrimination and that the principle underpinning this coverage also better reflects the intention of the DDA. As such, PIAC submits that an amendment be proposed to section 10 of the DDA to reflect the same principle:

Section 10 Act done because of disability and for other reason

If:

(a) an act is done for 2 or more reasons; and
(b) one of the reasons (whether or not it is the dominant or a substantial reason for doing the act) **is:**

(i) the disability of a person; or
(ii) a characteristic that appertains generally to persons with the same disability as that person;
(iii) a characteristic that is generally imputed to persons with the same disability as that person;

then, for the purposes of this Act, the act is taken to be done for that reason.

Comments on Schedule 2 – Disability Discrimination

Part 1 – Amendments commencing 28 days after Royal Assent

Assistance animals: amendment to sections 4 and 9

PIAC supports the amendment set out in clause 1 of Schedule 2 and the proposed subsections 9(2) and (4) of the DDA in respect of assistance animals set out in clause 17 of Schedule 2 as these amendments provide greater clarity and certainty in respect of what is required in order for an animal to be an 'assistance animal' for the purposes of the DDA. The lack of clarity has, to date, caused some difficulty both in terms of advising clients with companion animals about whether or not they had experienced discrimination that would be unlawful under the current section 9 of the DDA and in terms of identifying what evidence would be required in any proceedings for unlawful discrimination under section 9.

PIAC also supports the inclusion in proposed section 9 of paragraph 9(2)(c) as this ensures that sufficient flexibility is retained to enable a person to establish that an animal is an 'assistance animal' through a mechanism other than formal accreditation under legislation (primary or subordinate).

Disability aids: amendments to sections 4 and 9

PIAC supports the amendment set out in clause 2 of Schedule 2 and the proposed subsections 9(3) and (4) of the DDA set out in clause 17 of Schedule 2.

Carer or assistant: amendments to sections 4 and 9

PIAC supports the amendment set out in clause 3 of Schedule 2 and the proposed subsections 9(1) and (4) of the DDA set out in clause 17 of Schedule 2.

Burden of proof

PIAC supports the express inclusion in the DDA of provisions clarifying which party bears the burden of proof in relation to the reasonableness of a requirement or condition (new subsection 6(4): clause 17 of Schedule 2) and the defence of unjustifiable hardship (new subsection 11(2): clause 18 of Schedule 2). This clarification is an important amendment as it properly places the burden on the party most able to provide the relevant evidence.

PIAC submits that a similar clarification would be useful in respect of the burden of proof in relation to inherent requirements—the exception set out in new section 21A: clause 41 of Schedule 2—and a person with disability's capacity or otherwise to fulfill the inherent requirements. Further, it is PIAC's view that the respondent to a claim of discrimination ought properly be able to prove that it properly considered what were the inherent requirements and whether or not the complainant could fulfill those requirements at the time of making a challenged decision rather than at some later time. To do otherwise allows discriminatory attitudes to be justified at a later stage.

Take, for example, the situation of an employer deciding not to employ a person because of that person's disability without having any basis for that decision and without considering the question of inherent requirements and the person's capacity to fulfill those requirements. If this decision became the subject of a complaint of unlawful disability discrimination, the employer should not be able to justify its actions after the fact but establishing that the person could not fulfill the inherent requirements of the job. Rather, the conduct should be found to be unlawfully discriminatory with possible remedies including damages for the failure to properly consider the person's application and/ or a requirement that the employer revisit the decision giving

full consideration to the question of inherent requirements and the person's capacity to fulfill such requirements. This approach would discourage employers from continuing to hold discriminatory views and require them to establish proper employment processes that identify up-front the inherent requirements of positions and determine effective mechanisms of testing through the recruitment process whether or not candidates, with and without disabilities, fulfill those inherent requirements.

Discrimination in relation to carers, assistants, assistance animals and disability aids

PIAC supports the amendment to provide a new section 8 as set out in clause 17 of Schedule 2. PIAC notes however that the current drafting does not consistently use the defined terms 'assistance animal' and 'disability aid', referring instead to 'animal' and 'aid' in the proposed paragraphs 8(2)(a) and (b). PIAC submits that these should be amended to ensure the reference is to 'assistance animal' and 'disability aid' wherever these terms appear.

Similarly, section 2 of the table in the proposed new section 9 refers to 'the animal or aid'. Here, PIAC submits that the terms used should be 'an assistance animal or disability aid', rather than 'the' as people with disability may have more than one disability aid or assistance animal and the protection should not be limited to a specific aid or animal but be inclusive of any assistance animal or disability aid that meets with the requirements of the DDA.

While PIAC understands the rationale for new section 54A (clause 76 of Schedule 2) dealing with assistance animals, it is concerned that proposed paragraph 54A(4)(a) may be difficult to implement without clear guidance on what might give rise to a reasonable suspicion that an assistance animal has an infectious disease. PIAC suggests that further consideration should be given to including a mechanism for such guidance to be provided to limit the potential for abuse of this protective provision.

Further, proposed paragraph 54A(6)(b) will, to be effective, require people with disability accompanied by an assistance animal to be able to produce on demand evidence that satisfies the requirements of this paragraph. For many people who currently have assistance animals such evidence may be hard to obtain, either in terms of time or cost. PIAC urges the Committee to give consideration to delaying the commencement of this paragraph to a date to be determined once effective mechanisms have been established to enable people with disability to obtain at little or no cost the required evidence in a form that they are able to carry with them at all times.

Incorporation of the UN *Convention on the Rights of Persons with Disabilities*

PIAC strongly endorses the amendments set out in clauses 4 and 20 of Schedule 2 that ensure recognition of the relevance of the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention) to the DDA, and the role of the DDA as one mechanism for Australia to achieve compliance with obligations as a State Party to that Convention.

While it is PIAC's view that the general and consistent concern clearly expressed within the international community in respect of the equality rights of people with disability has been, since the DDA was enacted, sufficient grounds to empower the Commonwealth Parliament to enact Divisions 1, 2 and 3 of Part 2 of the DDA, these amendments remove any doubt. PIAC notes that the courts have consistently rejected arguments that aspects of the DDA were constitutionally invalid, finding that the provisions relied on reflected matters of

international concern.[1] PIAC also notes that it is not uncommon for respondents to raise potential challenges to the constitutional validity of provisions of the DDA in early stages of complaints; both during the conciliation and pre-hearing stages. This quite understandably causes complainants concern about their prospects of success and may cause unrepresented complainants to decide not to proceed beyond conciliation. The scope of the Convention and the express reference to it in proposed paragraph 12(8)(b)(ba) should significantly reduce the prevalence of this actual or mooted challenge to disability discrimination complaints.

Genetic predisposition to disability

PIAC has consistently argued that the current definition of disability is sufficiently broad to include genetic predisposition. However, because this view is not universal PIAC supports the amendment set out in clause 5 of Schedule 2 to expressly include genetic predisposition in the definition of disability found in section 4 of the DDA.

Symptom or manifestation of disability

PIAC supports the amendment set out in clause 6 of Schedule 2 as this expressly includes on the face of the definition of disability in the legislation the current authoritative interpretation of disability.[2] This also reflects appropriately the principle underpinning the definition of disability in the DDA; that is, that the definition covers both underlying impairment or physiological condition, and the impact of that impairment on a person's capacity. Many people with disabilities are discriminated against because of both of these aspects of disability rather than simply the underlying impairment.

Reasonable adjustment

PIAC supports the inclusion of a definition of reasonable adjustment as proposed by clause 13 of Schedule 2, but submits that in order to be properly understood it is necessary that the definition include the principle underlying reasonable adjustments. This principle is that, in relation to indirect discrimination, a reasonable adjustment is one that minimises to the greatest extent possible, the disadvantageous effects of the requirement or condition; or, in relation to direct discrimination, a reasonable adjustment is one that minimises the less favourable treatment experienced by the person with a disability. An adjustment that fails to minimise the discriminatory impact is not a reasonable adjustment even if it does not impose unjustifiable hardship as such an adjustment does not fulfil the purpose of making adjustments.

As such, PIAC proposes an amendment to the definition proposed by clause 13 of Schedule 2 to include words to the effect that an adjustment is a reasonable adjustment 'if the adjustment minimises to the greatest extent possible the discriminatory impact of an act or omission, requirement or condition'.

Migration

PIAC is disappointed that the amendments proposed in the Bill do not include repeal of section 52 in its entirety. Recent events have highlighted the appalling effect of the blanket exclusion from the scope of the DDA of actions done under the Migration Act 1958 and any legislative instrument made under that Act. PIAC urges the Committee to amend the Bill by replacing clause 75 of Schedule 2 with a new clause 75 in the following form:

> 75 Section 52
> Repeal the section.

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1 *O'Connor v Ross (No 1)* [2002] FMCA 210; *Souliotopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584; *Vance v State Rail Authority* [2004] FMCA 240.

2 *Purvis v New South Wales (Department of Education & Training)* (2003) 217 CLR 92.

Action Plans

PIAC strongly supports to expansion of Part 3 to include the making of action plans more broadly than only the provision of services and facilities: clauses 80-86 of Schedule 2. This has the potential to increase pro-active compliance activities by employers, and others responsible for aspects of activity covered by the DDA.

There are two aspects only of these amendments that PIAC seeks to comment on. Firstly, PIAC submits that it would be useful to include a definition of action plans in the DDA. Second, PIAC submits that it would be useful to require those who have created action plans to, at minimum, notify the Australian Human Rights Commission of the creation of the plan and where such a plan can be obtained from. The benefit of such an approach is to enable the Commission to at least list those entities that have established an action plan with a link to the plan (if it is available electronically) and thereby provide other entities with examples of such plans in the event they are considering developing an action plan themselves.

Other amendments

PIAC supports the other amendments proposed in Schedule 2.

Comments on Schedule 3 – Australian Human Rights Commission

PIAC does not seek to comment on the other amendments other than those that deal with penalties. PIAC endorses the approach of removing reference to absolute dollar figures and replacing them with a specified number of penalty units as this ensures that the penalty amount remains relevant with changes to the value of currency.

However, PIAC is concerned that there are a number of clauses in Schedule 3 that remove the distinction between individuals and corporations in terms of the quantum of penalty: see, for example, clauses 122, 131, 132, and 137 of Schedule 3. A failure by a corporation to comply with a direction from the Commission should carry a more severe penalty than a failure by an individual and this difference should be retained in the penalty provisions of the legislation.