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The Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

Australian Human Rights Commission Submission to the Senate Committee on Legal and Constitutional Affairs

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Standing Committee on Legal and Constitutional Affairs in its Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (the Bill).

2. The Commission is Australia's national human rights institution and is responsible for, amongst other things, the administration of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) and the *Disability Discrimination Act 1992* (Cth) (DDA).[1]

3. The Commission strongly supports the general aims of the amendments to the DDA and the HREOC Act proposed by the Bill: namely to improve the effectiveness of both laws in promoting and protecting human rights.

4. The Commission particularly welcomes the following proposed changes:

   - removal of the dominant reason test in the *Age Discrimination Act 2004* (Cth) (see sch 1, item 1, proposed s 16);

   - statutory recognition of the United Nations Convention on the Rights of Persons with Disabilities[2](Disabilities Convention) in the DDA (see sch 2, items 4 and 20);

   - clarification that the DDA applies to associates and discrimination in relation to carers, assistants, assistance animals and disability aids in the same way as it applies in relation to having a disability (see sch 2, item 17, proposed ss 7-9);

   - removal of the proportionality requirement in the definition of indirect discrimination (see sch 2, item 17 proposed s 6);

   - shifting onto respondents the burden of proving the reasonableness of a condition or requirement in the context of indirect discrimination claims (see sch 2, item 17, proposed s 6(4));

   - making explicit that respondents must prove avoiding discrimination would impose on them an unjustifiable hardship (see item 18, proposed s 11(2));

   - change of the Commission's legal name to the Australian Human Rights Commission (see sch 3, pt 1); and

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[1] Sections 11 and 31 of the HREOC Act set out the Commission's functions relating to unlawful discrimination and human rights and equal opportunity in employment. The Commission also has functions under the Commonwealth *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

[2] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

- technical changes to provisions concerning the Commission's complaint handling functions (see sch 3, pt 2).

5. However, the Commission has a number of particular concerns about the proposed changes to the DDA. The most significant of these concerns relate to:

    - **The definition of direct discrimination.** The Commission recommends that the definition of direct discrimination be further simplified to remove the explicit requirement for a 'comparator'.

    - **The definition of indirect discrimination.** The Commission recommends that the definition of indirect discrimination be harmonised with the provision in the SDA to focus on disadvantage caused by a requirement or condition to persons with the aggrieved person's disability. An aggrieved person should not be required to show that they cannot comply with a requirement or condition. Alternatively, the proposed section should specify that where an aggrieved person is disadvantaged by a requirement or condition, this will be sufficient to make out an 'inability to comply'.

    - **The duty to provide reasonable adjustments.** While the Commission strongly supports the express provision of the duty to provide reasonable adjustments, the proposed provisions in ss 5(2) and 6(2) are unnecessarily complicated and may be difficult to apply. The Commission proposes an alternative model to ensure that effect is given to the intention of the Bill to create an explicit positive duty to make reasonable adjustments.

6. A number of other concerns with the proposed provisions are also raised below.

7. This Committee's recent inquiry into the operation of the *Sex Discrimination Act 1984* (Cth) (SDA) (the SDA Inquiry) and its *Report on the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating sex discrimination and promoting gender equality* (the 2008 SDA Report), highlighted a range of 'best practice' options for reform of unlawful discrimination laws. The Commission submits that the Committee's recommendations in that report provide a very useful guide to changes that might also be made to the DDA and to the HREOC Act. In addition to the changes proposed in the Bill which, with appropriate amendment, the Commission submits should be introduced as soon as possible, the Commission submits that there would be considerable value in government considering how the changes proposed by the 2008 SDA Report might be implemented for the DDA.

2 Definitions of discrimination in the DDA

2.1 Definition of 'discriminate': sch 2, items 10-11 - s 4(1)

8. The Bill proposes that the definition of 'discriminate' in s 4(1) of the DDA be amended so as to read: '***discriminate*** has the meaning given by sections 5 and 6'. The Commission proposes a technical amendment to this definition to ensure that it operates as intended.

9. Sections 5 and 6 contain the definitions of direct and indirect discrimination.

10. Proposed ss 7 and 8 operate to extend the application of the DDA to associates of people with disability as well as people who have a carer, assistance, assistance animal or disability aid 'in the same way as it applies in relation to having a disability'.

11. The proposed Note to the definition of discriminate in s 4(1) is intended to clarify that the concept of discrimination is extended by ss 7 and 8.

12. In the Commission's view, it would be preferable to make this extension explicit in the definition of s 4(1), rather than leaving it as a matter for the Note.

13. Notes do not form part of the Act itself. Some courts have held that they should 'not be taken into account for interpretation purposes at all;'[3] others have referenced notes only where the meaning of the section is unclear.[4] In *Dugan v Mirror Newspapers Ltd*,[5] Stephen J characterised notes as 'at most only a quite minor aid, "a most unsure guide"'.

14. The Explanatory Memorandum to the Bill states that the object of the amendments to ss 7 and 8 is to address the discrepancy in the law after the Full Federal Court's decision in *Queensland v Che Forest*.[6] That decision had the effect that the DDA does not necessarily apply to people who have a carer, assistance, assistance animal or disability aid in the same way as it applies in relation to having a disability.

15. In the Commission's view, it is preferable to ensure that this intention is carried through into the definition in s 4(1). The Commission therefore recommends that the definition be changed to be of the following effect (with proposed additional words in italics):

> ***discriminate*** has the meaning given by sections 5 and 6 *and as extended by sections 7 (associates) and 8 (carers, assistants, assistance animals and disability aids).*

Recommendation 1: To avoid potential uncertainty, the Commission recommends a reference to ss 7 and 8 be included in the definition of discriminate in s 4(1).

2.2 Direct disability discrimination: sch 2, item 17 – s5

16. The Commission argues for a modification and simplification of the definition of direct discrimination proposed by the Bill.

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[3] *Re Baldwin (1891) 12 LR (NSW) 128; Sanderson v Fotheringham* (1885) 11 VLR 190; *Wacando v Commonwealth* (1981) 37 ALR 317, 237; *Bradley v Commonwealth* (1973) 1 ALR 241, 256 (Barwick CJ and Gibbs J).
[4] *Winkley v Paton (1943) 60 WN (NSW) 162, Joyce v Paton (1941) 58 WN (NSW) 88.* See generally D Pearce and R Geddes 'Statutory Interpretation in Australia' (6th ed, 2006), 161-3.
[5] (1979) 22 ALR 439, 447.
[6] [2008] FCAFC 96.

(a) The Bill's proposed definition

17. The proposed definition of direct discrimination will read as follows:

> **5 Direct disability discrimination**
>
> (1) For the purposes of this Act, a person (***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability **in circumstances that are not materially different.** (emphasis added)
>
> ….
>
> (3) For the purposes of this section, circumstances are not ***materially different*** because of the fact that, because of the disability, the aggrieved person requires adjustments.

18. The Commission's submissions in relation to s 5(2) relating to 'reasonable adjustment' are discussed separately below.

19. It can be seen that the definition of direct discrimination in s 5(1) includes an element of causation (the treatment must be 'because of disability') and a comparative element (a comparison with a person 'in circumstances that are not materially different'). An aggrieved person must prove *both* elements.[7]

(b) Removing the 'comparator'

20. The Commission submits that this Bill presents an opportunity to significantly improve the definition of direct discrimination by removing the explicit comparative element. The central issue in determining whether direct disability discrimination has occurred is whether a person's treatment was *because of* disability. The definition need go no further.

21. The Commission provided detailed submissions on the reasons for taking such a simplified approach to the definition of direct discrimination in its submissions to the SDA Inquiry.

22. In the context of the SDA, the Commission argued that the practical application of the comparator element by the courts has proven problematic, due primarily to the difficult issue of how to construct the 'same or similar circumstances' for carrying out the comparison. The same complications arise in the context of the DDA. Only very rarely is there an 'actual comparator' - a person who was in the same circumstances in all material respects against whom an aggrieved person's treatment can be compared. It is therefore necessary for Courts to consider the position of a 'hypothetical comparator'. This is an exercise fraught with complexity.

23. Lindsay, Rees and Rice note:

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[7] *Purvis v NSW (Dept of Education)* (2003) 217 CLR 92*,* 160-161 [223]-[225] (Gummow, Hayne and Heydon JJ). See further Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 8, 19.

> There are numerous instances in which courts and tribunals have struggled with the overlapping factual issues of identifying a person, either real or hypothetical, who may stand as the '*comparator'* and when determining the *relevant characteristics* for the purposes of contrasting the respondent's treatment of the complainant with the treatment of the comparator... The High Court decision in *Purvis v New South Wales* provides a stark illustration of the difficulties which can arise in some cases when seeking to describe the attributes of the 'comparator' and when determining the relevant circumstances for the purposes of the statutorily mandated comparison of treatment. The various judgments in *Purvis* illustrate that there is considerable scope, in some areas, for quite different approaches to these issues which are, essentially, questions of fact.[8]

(c) A simplified test

24. The Commission submitted to the Committee in the SDA Inquiry that an appropriate 'best practice' model can be found in the *Discrimination Act 1991* (ACT) which provides simply that discrimination occurs when the discriminator 'treats or proposes to treat the other person unfavourably because the other person has [a protected attribute]'. Such an approach does not require an explicit comparative element. This submission was accepted by the Committee in its recommendation 5:

> The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991* (ACT).

25. In the context of disability discrimination, this results in a simple test: a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because of the other person's disability.

26. Under such a simplified test, comparative analysis may still often provide a useful analytical tool in determining whether particular treatment was partly or wholly on the ground of a protected attribute and not some other unrelated reason.[9] If an aggrieved person can show that the only factor distinguishing their treatment from that of another person without a disability but otherwise similarly circumstanced, this might allow an inference to be drawn that the disability was causative. As noted by the Commission in its submission to the SDA Inquiry, courts in the ACT have still chosen in some cases to conduct a comparative-based mode of inquiry.[10]

27. Importantly, however, under the proposed simplified approach, the comparator element is not a rigid threshold requirement which must be met by an applicant in every case. Where good reasons warrant departing from a comparative

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[8] Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 83.
[9] Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 110-1.
[10] See, for example, *Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, [24]-[25].

analysis in assessing the causation element, such as where a particular circumstance is unique to a person with a disability, a court is not bound to still apply the comparator element as a necessary element of the definition.

Recommendation 2: Remove the requirement for a comparator in the test of direct discrimination and replace this with a test of unfavourable treatment because of a person's disability.

2.3 Indirect discrimination: sch 2, item 17 – s6

28. The Commission argues for a simplification of the definition of indirect discrimination to improve its operation and harmonise it with the definition contained in the SDA.

(a) The Bill's proposed definition

29. The proposed definition of indirect discrimination is as follows:

> **6 Indirect Disability Discrimination**
>
> (1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
>
> (c) the requirement or condition has, or is likely to have, **the effect of disadvantaging persons with the disability.** (emphasis added)
>
> ….
>
> (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
>
> (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

30. The Commission's submissions in relation to s 6(2) relating to 'reasonable adjustment' are discussed separately below.

31. The proposed s 6 amends the existing definition of indirect discrimination by, most significantly:

- removing the existing requirement that the relevant requirement or condition be one 'with which a substantially higher proportion of persons without the disability comply or are able to comply' (s 6(a) of the existing definition);
- changing the requirement that an aggrieved person be unable to comply with the requirement or condition to a requirement that such

inability to comply is 'because of the disability' (s 6(1)(b) of the proposed definition);

- inserting the requirement that 'the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability' (s 6(1)(c)); and

- shifting the burden of proving that a requirement or condition is reasonable to the respondent (s 6(4)).

32. While the Commission commends the removal of the proportionality test and shifting the burden of proving 'reasonableness', it is concerned that the definition of indirect discrimination in s 6(1) retains one of the most problematic elements in the disability discrimination context: the requirement that a person with a disability 'does not or would not comply, or is not able or would not be able to comply, with the requirement or condition'.

(b) Simplification and harmonisation

33. The Commission recommends that the Bill be amended to simply remove proposed s 6(1)(b). The effect of this would be a definition of indirect discrimination that is substantially the same as that under the SDA (s 5(3)), simply requiring an aggrieved person to show that

    - the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

    - the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the aggrieved person's disability.

(c) Focus on disadvantage, not 'ability to comply'

34. Whether a person is 'able to comply' with a particular condition or requirement may depend on a range of factors, including:

    - the nature of a person's disability;

    - how the complainant formulates or specifies what the requirement or condition is;

    - how the respondent administers the requirement or condition;

    - whether the particular complainant (considering the resources available to that person in the circumstances) is able to overcome the obstacles presented or 'cope' with the disadvantage caused; and

    - the level of distress, inconvenience or embarrassment a person should reasonably have to endure.

35. These factors should not be the focus of inquiry. Instead, as is the case under the SDA, the definition should focus on disadvantage to the person with a disability caused by the condition or requirement relative to persons without a

disability. Such an approach is consistent with the underlying aim of the DDA: to enable people with disability to live without disadvantage.

36. Such a change would not only be a step towards harmonization of federal unlawful discrimination laws, but would result in greater simplicity and workability of the definition of indirect discrimination in the disability context.

(d) Problems with the focus on 'ability to comply'

37. Examples of the problems caused by a focus on compliance arose in the cases of *Hinchcliffe* v *University of Sydney*[11] (*Hinchcliffe*) and *Hurst v Queensland*[12] (*Hurst*).

38. In *Hinchcliffe*, the court found that a vision impaired student was able to comply with the condition that notes be provided in a standard format (white paper and 10-12 point font) because she was able to reformat the materials most of the time. In order for Ms Hinchcliffe to 'comply' with the condition:[13]

    - Her mother had to visit the University several times to assist finding books in the library. Each visit lasted 4 hours.
    - Ms Hinchcliffe and her mother spent numerous hours photocopying and scanning notes and articles.
    - Her mother spent a significant amount of time reading notes with poor legibility and explaining diagrams and other information presented in video format.
    - Her grandmother and mother converted sets of notes into audio tapes through a process that took 2 full days.
    - Ms Hinchcliffe also spent a considerable amount of time 'chasing up' her university lecturers for appropriately formatted materials.
    - Ms Hinchcliffe and her mother went to the State Library four times to investigate a software program to assist in reformatting the notes. The program was found to be even more time-consuming. One of these visits took three hours.

39. The Court noted that Ms Hinchcliffe was inconvenienced relative to other students when complying with the condition but found that this did not mean she was unable to comply with the condition.[14] The Court found that the disadvantage suffered by Ms Hinchcliffe did not constitute a 'serious disadvantage'.[15]

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[11] (2004) 186 FLR 376.
[12] *Hurst v Queensland* (2006) 151 FCR 562 (Full Federal Court); *Hurst v Queensland* [2005] FCA 405 (first instance).
[13] (2004) 186 FLR 376, 383 [22], 391-2 [56]-[59].
[14] Ibid 476, [114] –[115].
[15] Ibid 476, [115].

40. The reasoning in *Hinchcliffe* effectively means that those who 'persevere' are given less protection by the DDA and allows a respondent to shift the burden of accessibility onto people with disability, their parents, carers, friends and associates.[16]

41. A test of 'serious disadvantage' was also applied by the Federal Court in *Hurst*. At first instance,[17] Lander J found that a student, Tiahna, could comply with the condition that she accept an education and receive instruction in English without the assistance of an Auslan teacher or an Auslan interpreter. This was despite evidence that this was likely to lead to diminished academic performance and have a deleterious effect on her development.[18] There was also evidence that due to the degree of her hearing loss, she would be unlikely to comprehend all of the instructions easily and would require significant amounts of pre and post teaching to reach her educational potential.[19] Lander J found that Tiahna was able to 'comply' with the condition because she was not 'falling behind' her non-hearing peers and 'could be expected to "cope" in a regular classroom environment'.[20] His Honour accepted that Tiahna's ability to cope may have been the result of the 'attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan.'[21]

42. The decision of Lander J was overturned on appeal.[22] While still applying a test of 'serious disadvantage',[23] the Court held that it was not enough that Tiahna could 'cope'. The fact that she would be likely not to reach her full educational potential meant that she would be seriously disadvantaged.

43. The Commission appeared as an intervener before the Full Court in *Hurst* and argued for a test of 'non-trivial disadvantage' to be applied to determining a person's ability to comply with a requirement or condition. This submission was rejected by the Court.[24]

44. Despite the ultimate result in *Hurst*, the case again demonstrates the difficulties of the test of 'serious disadvantage'. Where the line of 'seriousness' is to be drawn in each case is uncertain and places an additional hurdle in the way of people with disability seeking substantive equality.

45. The Commission therefore submits that it is necessary to remove the requirement that a complainant be unable to comply with the requirement and replace this with a simple test of disadvantage.

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[16] See generally B Fogarty, The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78.
[17] [2005] FCA 405.
[18] *Hurst v Queensland* (2006) 151 FCR 562, 581,[109] – [113].
[19] Ibid [111].
[20] [2005] FCA 405, [396], [804]-[822],
[21] Ibid [820].
[22] (2006) 151 FCR 562, 584, [125], 585 [134].
[23] Ibid [106], [134]. See also *Clarke v Catholic Education Office* (2003) 202 ALR 340, 352-353 [49], upheld on appeal *CEO v Clarke* (2004) 138 FCR 121.
[24] (2006) 151 FCR 562, 583 [120].

46. In cases of arguably 'trivial' disadvantage, it will be open to a respondent to show that the requirement or condition is 'reasonable' in all of the circumstances. This will ensure that in cases of arguably 'trivial' disadvantage, an appropriate balance can be struck. In any event, it will always be open to respondents to plead the defence of unjustifiable hardship in relevant cases.

> **Recommendation 3:** The Commission recommends the definition of indirect discrimination mirror that under the SDA, to require an aggrieved person to show that the discriminator imposes, or proposes to impose, a requirement or condition that has, or is likely to have, the effect of disadvantaging persons with the aggrieved person's disability.

(e) Alternative submission: defining 'ability to comply'

47. While the alignment of the definition of indirect discrimination with that under the SDA is the Commission's strongly preferred option, an alternative would be to clarify that a person cannot comply with a requirement or condition if to do so would impose upon them a disadvantage.

48. This could be achieved by inserting a subsection which provides that 'for the purposes of subsection (1)(b), a person cannot comply with a requirement or condition if to do so would have the effect of disadvantaging them.[25]

49. As noted above, if such disadvantage is minor, it will be open to a respondent to argue that the requirement or condition is reasonable. It should nevertheless be the starting point that people with disability are entitled to live without disadvantage.

> **Recommendation 4:** As an alternative to the strongly preferred recommendation 3, the Commission recommends that the proposed s 6 provide that, for the purposes of s 6(1)(b), a person cannot comply with a requirement or condition if to do so would have the effect of disadvantaging them.

3 Reasonable adjustments

50. The Commission strongly supports the Bill's aim of making explicit the positive duty to make reasonable adjustments for people with disability. However, the Commission is very concerned about the way in which the Bill seeks to do so. The Commission recommends that an alternative model be adopted to give effect to the intention of the Bill.

51. In particular, the Commission is concerned that the drafting of ss 5(2) and 6(2), which links the concept of reasonable adjustments with the definitions of direct and indirect discrimination, creates significant complexity and uncertainty.

[25] It may also be necessary for the operation of s 6(2)(b), relating to reasonable adjustments, to be altered in the same way. However, for the reasons set out below, the Commission submits that the provisions relating to reasonable adjustments should be substantially altered in a way that would make ability to comply irrelevant.

52. The Commission also recommends the use of examples of reasonable adjustments in a Note in the DDA to assist readers with the interpretation and application of those provisions.

53. In the alternative, the Commission suggests some technical changes to the Bill to improve the operation of the proposed provisions.

3.1 Complexity and uncertain operation of the proposed model of reasonable adjustments

54. The proposed duty to make reasonable adjustments is contained in the following provisions:

> 5(2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
>
> 6(2) For the purposes of this Act, a person (the ***discriminato***r) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
>
> (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

55. These are not easy sections to understand and apply. By superimposing the obligation to make reasonable adjustments onto the definitions of direct and indirect discrimination, the complexities associated with those definitions (such as the need to identify a 'comparator' for direct discrimination and the need to prove an inability to comply with a requirement or condition, discussed above) are retained. Indeed, by adding to these definitions the additional element of reasonable adjustment, the complexities may be deepened. Such complexity creates significant uncertainty in the operation of those provisions.

56. The complexity of the sections and the consequent uncertainty in their operation also denies the opportunity for the DDA to contain a clear positive statement as to the duty to make reasonable adjustments.

3.2 The Commission's proposed model for reasonable adjustments

57. The Commission recommends introducing a clear duty to make reasonable adjustment that is not tied to the definitions of direct and indirect discrimination as is proposed in ss5(2) and 6(2).

58. In place of the proposed ss 5(2) and 6(2), the Commission recommends that a provision to the following effect be inserted after the definitions of direct and indirect discrimination in ss 5 and 6:

> **Duty to make reasonable adjustment**
>
> For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if the discriminator refuses or fails to make a reasonable adjustment.

59. 'Reasonable adjustment' should be defined as a modification or adjustment that:

- alleviates a disadvantage related to an aggrieved person's disability; or
- assists an aggrieved person to have opportunities which are, as far as possible, equal to persons without the aggrieved person's disability.

60. Similar to the model proposed by the Bill, such a duty to make reasonable adjustments operates through the meaning of the term 'discriminate'. It therefore only applies in those areas of public life set out in Division 1 and 2 of Part 2 of the DDA which make discrimination unlawful (employment, education etc). The Commission regards this as an appropriate, clear and consistent way of defining the scope of the duty to make reasonable adjustments.

61. The Commission submits that this approach is far simpler and more workable than the more complicated provisions proposed by the Bill, while achieving the same result as intended by the Bill.

(a) The Commission's model gives effect to the intention of the Bill

62. The intention of the Bill is to introduce into the DDA 'an explicit positive duty to make reasonable adjustments for a person with disability'.[26] The Explanatory Memorandum notes that until relatively recently, it was thought that such an obligation was implicit in the DDA. By making the duty explicit, effect is given to the original intention of the DDA.

63. The Explanatory Memorandum also states that the intention of the Bill is for the duty to be consistent with the definition of 'reasonable accommodation' in Article 2 of the Disabilities Convention. In the Disabilities Convention, 'reasonable accommodation' means:

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[26]Explanatory Memorandum, Disability Discrimination and other Human Rights Legislation Amendment Bill 2008, p7.

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

64. The Commission's proposed definition of 'reasonable adjustment' ensures the purpose of such measures are to ensure equal enjoyment of rights by persons with disabilities by linking the meaning to alleviating disadvantage and providing equal opportunity.

65. It is not necessary for the definition of 'reasonable adjustments' to include reference to 'unjustifiable hardship' (in the Convention described as 'disproportionate or undue burden'), because the defence of 'unjustifiable hardship' already proposed by the Bill (s 21B) is one of general application. It will therefore always be open to a respondent to argue unjustifiable hardship as a defence against a claim that they have refused or failed to make a 'reasonable adjustment'.

Recommendation 5: The Commission recommends removing ss 5(2) and 6(2) and inserting a new provision that defines discrimination as occurring when the discriminator refuses or fails to make a reasonable adjustment. The definition of 'reasonable adjustment' should also be changed to an adjustment that alleviates disadvantage and provides equal opportunity.

3.3 Provide examples of reasonable adjustments

66. The Commission considers that providing examples of reasonable adjustments would be very helpful. These could be inserted into the DDA as Notes or in a revised Explanatory Memorandum. This is consistent with Productivity Commission Recommendation 8.1 which recommends providing examples.

67. Examples could include:

- Adjustments to work arrangements, including in relation to hours of work and use of leave entitlements.
- Provision of interpreters, readers, attendants, counselling or other work related assistance or support.
- Providing accessible facilities and producing information in accessible formats.
- Permitting or facilitating a person to use equipment or assistance provided by the person with a disability or by another person or organisation.

Recommendation 6: The Commission recommends including examples of reasonable adjustments as Notes or in a revised Explanatory Memorandum.

3.4 Alternative submission: technical changes

68. In the event that the current model for reasonable adjustments is retained, there are some technical changes that may improve its operation.

(a) Definition of reasonable adjustments

69. Item 3 of sch 2 of the Bill proposes the following definition:

> ***Reasonable adjustment***: an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

70. The Commission is concerned that this definition may be read as requiring complainants to bear the onus of proving that a reasonable adjustment is *not* an unjustifiable hardship.

71. The thrust of the present reforms is to require respondents to prove unjustifiable hardship exists, as respondents possess the relevant information to prove this. It is exceedingly difficult for complainants, without the relevant information, to prove something would *not* cause an unjustifiable hardship. Further, it is a heavy onus for any party to prove a negative in court proceedings. Accordingly, in proposed s 11(2), the person claiming unjustifiable hardship bears the onus of proving something would impose an unjustifiable hardship.

72. A court may find, however, that at the stage of determining whether discrimination has taken place, it is not necessary for a respondent to claim unjustifiable hardship. The aggrieved person bears the onus of proving discrimination. Section 11(2) may therefore not operate as intended and an aggrieved person may bear the burden of proving that a reasonable adjustment is *not* unjustifiable hardship.

73. A simple way to avoid this potential problem within the proposed framework for reasonable adjustments would be to amend the definition of 'reasonable adjustment' to read (with the proposed additional words being in italics):

> ***Reasonable adjustment***: an adjustment to be made by a person is a ***reasonable adjustment*** unless *the person proves that* making the adjustment would impose an unjustifiable hardship on them.

74. However, as set out above, the Commission submits that it would be preferable to adopt a different framework for the concept of reasonable adjustment and accordingly an alternative definition linked to alleviating disadvantage and providing equal opportunity.

Recommendation 7: The Commission recommends that, should the proposed framework for reasonable adjustments be retained, the proposed s 4(1) definition of reasonable adjustment make it clear that the respondent bears the onus of proving that an adjustment would impose an unjustifiable hardship.

(b) Wording of s 6(2)(b)

75. Should the proposed s 6(2) be retained, its wording could be altered to improve its operation. The proposed s 6(2)(b) requires that an aggrieved person demonstrate that 'because of the disability', they would comply with a requirement or condition '**only if** the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so'.

76. The Commission has noted above that requiring an aggrieved person to prove their inability to comply with a requirement or condition undermines the intention of the DDA to promote substantive equality for people with disability. This proposed amendment creates similar problems by using the expression 'only if', which suggests that an adjustment sought by a person with disability must be more than simply reasonable – it must be essential.

77. As outlined above, in *Hinchliffe v University of Sydney*, the court found that to the extent that others were able to assist the complainant reformat her university notes, she was able to comply with the condition. This was notwithstanding that reformatting the material herself was 'time consuming and left her with less time to study' relative to other students without a disability.[27]

78. The Commission is concerned that proposed s 6(2) will render discrimination not unlawful where a complainant can comply with a condition if they or others, and not *only* the discriminator, make reasonable adjustments. The Commission considers this is contrary to the policy objectives and beneficial purpose of the DDA. As noted above, such an approach also effectively acts as a disincentive to carers who may assist persons with a disability by providing reasonable adjustments to their detriment.

79. While the Commission strongly recommends a separate duty to provide reasonable adjustments, and has concerns about the complexity and workability of the proposed definition in s 6(2), removing the word 'only' may improve its operation.

> **Recommendation 8:** As an alternative to recommendation 5, the Commission recommends removing the word 'only' from proposed s 6(2)(b).

4 Discrimination in relation to associates: sch 2, item 17 – s 7

80. The Commission supports the amendment proposed in s 7. However, it suggests that it may assist readers if the wording in brackets in the phrase 'subsection 54(2) or (3) (assistance animals)' is changed to '(exemptions in relation to assistance animals), consistent with s 8(3).

[27] (2004) 186 FLR 376 [115]-[116].

5 Discrimination in relation to carers, assistants, assistance animals and disability aids: sch 2, item 17 – ss 8 & 9

5.1 Include guide dogs

81. The Commission welcomes the changes proposed by the Bill to the provisions relating to assistance animals. The Commission believes that these changes strike an appropriate balance between the rights and responsibilities of people with disabilities, service providers and other members of the public.

82. However, the proposed definition of assistance animal in s 9 of the Bill makes no specific reference to guide dogs, unlike the current s 9 of the DDA. The Commission submits that it is appropriate to continue to recognise the special status of guide dogs in the DDA.

> **Recommendation 9:** The Commission recommends including a guide dog as a specific further example of 'assistance animal' in s9(2).

6 Employment agencies: sch 2, item 40 – s 21(2)

83. The proposed s 21(2) and (3) reads:

> **21 Employment Agencies**
>
> (1) ….
>
> (2) This part does not require an employment agency to ensure that an employer complies with this Act.
>
> (3) Subsection (2) does not affect the operation of section 122 (which applies if an employment agency causes, instructs, induces, aids or permits an employer to do an unlawful act).

84. The Commission submits that proposed ss 21(2) and (3) are not necessary.

85. The Commission is not aware of any cases under the DDA where employment agencies have been held responsible for ensuring an employer complies with the DDA.

86. There is indeed no basis for reading into the DDA an obligation on an employment agency to ensure that an employer complies with the DDA. The relevant obligation that exists under the DDA is that contained in s 122 which provides for ancillary liability (ie for causing, instruction, inducing, aiding or permitting unlawful acts).

87. The Commission also notes that proposed 21(2) causes disharmony with other federal unlawful discrimination laws which do not have a provision to this effect. Further, the 2008 SDA Report did not find it necessary to make similar recommendations for reform to the SDA.

> **Recommendation 10:** The Commission recommends removing proposed ss 21(2) and (3).

7 Contract workers: sch 2, item 40 – s 4

88. The Commission submits that the definition of 'contract worker' in s 4 should be defined to include 'independent contractors'.

89. Alternatively proposed s 21A(3)(c) be amended to refer to 'contract worker or independent contractor'.

90. This is consistent with recommendation 10 of the 2008 SDA Report which states:

> Recommendation 10 recommended that 'the Act be amended to provide specific coverage to volunteers and independent contractors; and to apply to partnerships regardless of their size'.

Recommendation 11: The Commission recommends amending the s 4(1) definition of 'contract worker' to include 'independent contractors'.

8 Requests for information: sch 2, item 60 – s 30

91. The Commission welcomes the operation of proposed s 30(2), which covers requests for information made only from people with disability or relating to a person's disability.

92. The Commission submits, however, that the proposed exemption in s 30(3) should be amended to impose a clear burden on respondents to prove that they did not request information unreasonably or for the purpose of discriminating against them.

93. The proposed s 30(3) provides as follows:

> (3) Subsection (2) does not apply if:
>
> (a) evidence is produced to the effect that the first person did not request or require the information for the purpose of unlawfully discriminating against the other person on the ground of the disability; and
>
> (b) the evidence is not rebutted.
>
> Example: An employer may not require a prospective employee to provide genetic information if the employer intends to use that information to unlawfully discriminate against the employee on the ground of a disability of the employee.
> However, the employer may require such information in order to determine if the prospective employee would be able to carry out the inherent requirements of the employment or to determine what reasonable adjustments to make for the employee.

94. The proposed section places only a very low evidential burden on a respondent: it would appear that any evidence, however probative, 'to the effect that' the person lacked a discriminatory purpose will be sufficient. It is then for an applicant to rebut that evidence.

95. It is not clear why a respondent is not required to bear the ordinary burden of proving the defence, as required for other defences in the DDA.

96. The Commission submits that it does not pose an unduly or unfairly heavy burden on respondents to prove that they had a lawful reason for requesting the information. It will often be the case that only the respondent will know why information was requested. This may make an applicant's task of rebutting evidence, which may only be slight, impossible.

97. The Commission also suggests that s 30 should provide protection against unreasonable requests for information from people with disability. Unreasonable requests for information from people with disability may have the effect of discouraging or limiting their equal participation in the areas of public life covered by the DDA. The defence in s 30(3) may make unreasonable or intrusive requests for information lawful, provided that a respondent can provide evidence that the request for information is not made for a discriminatory purpose.

98. The Commission therefore recommends that s 30(3) should require a respondent to demonstrate that the request for information was reasonable and required for a lawful purpose.

Recommendation 12: The Commission recommends replacing s 30(3) with a provision to the effect that subsection (2) does not apply if the information was reasonably requested or required for a lawful purpose. The provision should make it clear that the respondent bears the onus of proof.

9 'Best practice' options for reform of unlawful discrimination laws identified by the 2008 SDA Report

99. The Committee's 2008 SDA Report identifies a range of best-practice options in the context of the SDA that are relevant to reforming other unlawful discrimination laws to improve their effectiveness. While many of these are specific to the SDA, some may provide useful options for the development of the DDA.

100. The Commission submits that the changes proposed in this Bill should, with appropriate amendments, pass as soon as possible. However, there would be considerable value in government considering how the changes proposed by the 2008 SDA Report might be implemented for the DDA. Such consideration would necessarily require consultation with the community and particularly people with disability.

101. The Commission also notes that the 2008 SDA Report recommended several options to broaden the Commission's functions to achieve best practice protection and promotion of human rights and equality generally. The Commission recommends that government also consider how these changes might be implemented.

Recommendation 13: That the Committee recommends that government consider how the changes proposed by the 2008 SDA Report might be implemented for the DDA and to the HREOC Act.

10 New legal name for the Australian Human Rights Commission

102. The Commission welcomes the change of its legal name to the Australian Human Rights Commission.

103. The Commission has been known as the Australian Human Rights Commission since 4 September 2008 when its operating name was changed as a part of an updating of its corporate identity. The Commission's new name is intended to ensure that audiences know the Commission is a national human rights institution with the responsibility to protect and promote human rights throughout all of Australia.

Appendix - List of recommendations

1. A reference to s7-8 be included in the s 4(1) definition of 'discriminate'.

2. Remove the requirement for a comparator in the test of direct discrimination and replace this with a test of unfavourable treatment because of a person's disability.

3. The definition of indirect discrimination mirror that under the SDA, to require an aggrieved person to show that the discriminator imposes, or proposes to impose, a requirement or condition that has, or is likely to have, the effect of disadvantaging persons with the aggrieved person's disability.

4. As an alternative to the strongly preferred recommendation 3, proposed s 6 should provide that, for the purposes of s 6(1)(b) and s6(2)(b), a person cannot comply with a requirement or condition if to do so would have the effect of disadvantaging them.

5. Remove proposed ss 5(2) and 6(2) and create a stand-alone provision that defines the failure to make a reasonable adjustment as discrimination and amend 'reasonable adjustments' in proposed s4(1) so that it is linked to alleviating disadvantage related to a person's disability and providing equal opportunity.

6. Include examples of reasonable adjustments as Notes or in a revised Explanatory Memorandum.

7. Should the proposed framework for reasonable adjustments be retained, amend the proposed s 4(1) definition of 'reasonable adjustments' to clarify that the respondent bears the onus of proving that an adjustment would impose an unjustifiable hardship.

8. Should the proposed framework for reasonable adjustments be retained, remove the word 'only' from proposed s 6(2)(b).

9. Include 'guide dogs' as a specific example of 'assistance animal' in proposed s 9(2).

10. Remove proposed new s 21(2) and (3) liability of employment agencies.

11. Amend the s 4(1) definition of 'contract worker' to include 'independent contractors'.

12. Replace proposed s 30(3) with a provision to the effect that subsection (2) does not apply if the information was reasonably requested or required for a lawful purpose. The provision should make it clear that the respondent bears the onus of proof.

13. The Committee recommends that government consider how the changes proposed by the 2008 SDA Report might be implemented for the DDA and to the HREOC Act.