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Bills Digest
No. 84 2003–04

Disability Discrimination Amendment Bill 2003

ISSN 1328-8091

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Published by the Information and Research Services, Parliamentary Library,
Department of Parliamentary Services, 2004

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No. 84 2003–04

Disability Discrimination Amendment Bill 2003

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11 February 2004

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Disability Discrimination Amendment Bill 2003

Date Introduced: 3 December 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1-3 of the Bill commence on Royal Assent. However, the operative provisions of the Bill (found in Schedule 1) commence on the 28th day after the Bill receives Royal Assent

Purpose

This Bill makes a number of amendments to the *Disability Discrimination Act 1992* ('the Disability Discrimination Act'). The amendments provide that it is not unlawful (with certain exceptions) to discriminate against a person who is addicted to a prohibited drug on the basis of that addiction.

Background

Origin of Bill

Introduction of this Bill follows the decision of the Federal Court in Marsden v. Human Rights and Equal Opportunity Commission and Coffs Harbour and District Ex-Servicemen's and Women's Memorial Club Limited¹ (Marsden's case) on 15 November 2000.

Mr Marsden was expelled from the Coffs Harbour and District Ex-Servicemen's and Women's Memorial Club Limited (the Club) in November 1996, after a number of incidents (commencing in 1994) including Mr Marsden appearing to be intoxicated on club premises and becoming involved in a loud altercation with a staff member. In August 1996 Mr Marsden had disclosed to the Judiciary Committee of the Club that he was on a methadone programme related to a former heroin addiction.

Mr Marsden complained to the Disability Discrimination Commissioner and an Inquiry was held. The Inquiry Commissioner concluded that the Club did not unlawfully discriminate against Mr Marsden. He found that the actions of the Club were not taken

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because of Mr Marsden's opioid dependence or use of methadone but because of Mr Marsden's inappropriate behaviour. However, he rejected evidence as to how the Club had dealt with other members whose alleged conduct was similar to Mr Marsden's conduct.²

Mr Marsden sought review under the *Administrative Decisions (Judicial Review) Act 1977* of the decision of the Inquiry Commissioner. The Federal Court held that the Inquiry Commissioner's decision should be set aside and remitted the matter for reconsideration.³

The Court found that in determining that the Club had not discriminated against Mr Marsden the Commissioner had not applied the definition of 'discriminate' in s.5 of the Disability Discrimination Act. That section provides as follows:

"For the purposes of this Act, a person ('**discriminator**') discriminates against another person ('**aggrieved person**') on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability."

The Court found that the Commissioner did not seek to determine whether Mr Marsden was treated less favourably by the Club than in the same or similar circumstances it would have treated another person who did not have an opioid dependency.⁴ In particular, the Inquiry Commissioner had rejected evidence tending to show how the Club had dealt with other members whose alleged conduct was similar to the conduct of the applicant.⁵

The Federal Court was reported as having decided that opioid dependence constitutes a disability under the Disability Discrimination Act and that it is unlawful under the Disability Discrimination Act to discriminate against a person solely because the person has an addiction to a prohibited drug.⁶ However, the Court made no finding on the issue whether either heroin addiction or opioid dependency is a disability for the purposes of the Disability Discrimination Act. Nevertheless, it is fair to say that the reasons of the Federal Court open the way for a finding that opioid dependence constitutes a disability under the Disability Discrimination Act and are consistent with such a finding.

Basis of policy commitment

In a radio broadcast on 3 November 2003 the Prime Minister stated that the decision in Marsden's case 'left open the possibility that a court could find that addiction to a prohibited drug was a disability for the purposes of anti-discrimination law'. He also said that '[i]n effect, drug addicts could enjoy similar legal rights under the Disability Discrimination Act as people who are in wheelchairs or are visually impaired. This is unfair. That is why the Government has proposed changing the law to make it absolutely clear that drug addiction is not a disability under the Disability Discrimination Act'.⁷

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Position of significant interest groups/press commentary

Employer groups support the proposal to amend the Disability Discrimination Act to provide that addiction to a prohibited drug is not a disability for the purposes of that Act. The Australian Chamber of Commerce and Industry issued a media release on 3 November 2003 welcoming the Prime Minister's statement that the Government would move to amend the Disability Discrimination Act in this way.⁸ Business groups have been concerned that litigation may result from a refusal to employ a person who is addicted to a prohibited drug, or a dismissal from employment upon learning that a person is addicted to a prohibited drug. Previously the Chamber had expressed concern about the decision in Marsden's case and had sought either an appeal against the decision of the Federal Court in that case or an amendment of the definition of disability in the Disability Discrimination Act.⁹

Groups concerned with the protection of human rights have raised concerns in relation to the proposal given effect in the Bill. Australian Lawyers for Human Rights Inc (ALHR) raised concerns in relation to legislation passed in New South Wales to amend the Anti-Discrimination Act 1977 (NSW) to provide that it is not unlawful to discriminate against a person on the ground of disability in employment when the disability 'relates to'¹⁰ dependence on a prohibited drug. ALHR expressed concern that such an amendment would be inconsistent with Australia's commitments under the *Declaration on the Rights of Disabled Persons*¹¹ and Article 26 of the *International Covenant on Human Rights*,¹² that it failed to recognise that anti-discrimination law already provided measures to balance interests, including those of employers, and that it removed protection from prejudice from a drug dependent person.¹³

The Human Rights and Equal Opportunity Commission ('HREOC') also opposes legalisation of discrimination on the ground of addiction to a prohibited drug. In its submission to the Productivity Commission review of the Disability Discrimination Act in 2003 it stated as follows:

'HREOC does not favour [an amendment similar to that made to the Anti-Discrimination Act 1977 of NSW] to the DDA, and considers that a better approach remains that taken by the DDA in focusing on what is discrimination (including issues of reasonableness and unjustifiable hardship) rather than an exclusionary approach defining what are "acceptable" disabilities. If there is a need for clearer statement of the rights of employers or other parties to deal with issues of intoxication or substance use, the NSW amendment dealing only with addiction to prohibited substances does not appear an effective approach since these issues may arise whether or not a person is an addict and whether or not the substance concerned is illegal.'¹⁴

Many of those concerned with policy on drugs have expressed opposition to the proposed amendment. Ms Cheryl Williams of the Alcohol and Other Drugs Council of Australia¹⁵ stated that the amendment may perpetuate the problems of young people who use prohibited drugs.¹⁶

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Media commentary has primarily been directed at the decision in Marsden's case, rather than at the proposal to be given effect by this Bill. Such commentary is relevant because the proposal is largely directed at overturning the suggestion arising from Marsden's case that addiction to a prohibited drug could constitute a disability for the purposes of the Disability Discrimination Act.

Views on the desirability of the proposal have varied. Most media commentators have taken the view that a person who chooses to use a prohibited drug should not receive any protection under anti-discrimination law.¹⁷ However, others have taken the view that the proposed change is unnecessary and undesirable, because it is based on a view that people addicted to a prohibited drug should not receive protection because the addiction is their own fault¹⁸ and because it disregards the evidence that many substance dependencies are forms of disease.¹⁹

ALP/Australian Democrat/Greens policy position/commitments

The Australian Labor Party has not stated its position on the Bill. However, the Labor Government of New South Wales in 2002 passed legislation which provided that it is not unlawful under the Anti-Discrimination Act 1977 (NSW) to discriminate against a person in relation to employment on the basis of the person's addiction to a prohibited drug.

The Australian Democrats oppose the Bill, on the basis that it "simply panders to misinformation and stereotypes about drug users and will have widespread consequences".²⁰ Senator Greig stated that "[e]xisting laws are already in place to enable employers to lawfully dismiss employees for disruptive or dishonest behaviour or an inability to perform duties. Therefore this Bill, which allows the sacking of a competent worker who happens to have an addiction, is unwarranted".²¹

It should be noted that the proposed amendment does not apply only to employment situations. It would also apply in situations such as club membership or the rental housing market (where the laws referred to by Senator Greig do not operate). However, for the reasons discussed in the following section the proposed amendment is arguably unnecessary even in circumstances where there is no specific legislative provision relating to matters such as disruptive behaviour.

The Australian Greens also oppose the Bill, on the basis that people with a drug addiction need help rather than discrimination.²² Senator Nettle stated that drug addiction is an illness rather than a choice and that these amendments could discourage people from seeking help because this may result in others becoming aware of their addiction whilst they may not receive assistance because of limited services.²³

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Is this Bill necessary?

Those supporting the proposal apparently believe that if drug addiction is a disability for the purposes of the Disability Discrimination Act then the Act requires that drug addicts be given special consideration in circumstances such as club membership or employment. In actuality the Disability Discrimination Act simply requires that a disabled person not be treated less favourably because of his or her disability. So if, for example, a person addicted to a prohibited drug cannot perform the requirements of a job because of his or her disability the Disability Discrimination Act does not require an employer to employ that person. The effect of the Disability Discrimination Act is that where the disability does not affect the person's ability to perform the requirements of the job the employer is not permitted to refuse to employ him or her merely because of the existence of the disability. The effect of the proposed amendment will be that it will become permissible to discriminate against a person who is addicted to a prohibited drug merely because of that addiction, regardless of whether his or her behaviour is affected in any relevant way. This is why those who are addicted to prohibited drugs will become even less likely to acknowledge their addiction than is currently the case.

This view of the operation of the Disability Discrimination Act was confirmed by the High Court in Purvis v New South Wales (Department of Education and Training).²⁴ This case was concerned with whether the exclusion from school of a student whose violent behaviour was a consequence of brain damage contravened the Disability Discrimination Act. The High Court, by a majority of 5 to 2, found that there was no contravention of the Disability Discrimination Act. The basis of the decision was that the student's treatment by the State had to be compared with the treatment that would be given to a student who was violent otherwise than because of a disability. This means that in determining whether treatment of a person who is addicted to a prohibited drug contravenes the Disability Discrimination Act (without the proposed amendments) it is necessary to consider how a person who is not addicted to a prohibited drug but who behaves similarly to the addicted person would be treated. Therefore where the behaviour of a person who is addicted to a prohibited drug is inappropriate action may be taken without contravening the Disability Discrimination Act as it currently stands.

Main provisions

The effect of **item 1 of Schedule 1** of the Bill is to insert a new **section 54A** into the Disability Discrimination Act. New **subsection 54A(1)** will provide that it is not unlawful to discriminate against a person on the basis of the person's disability if the disability consists of addiction to a prohibited drug, and the person is currently addicted to the drug. It will remain unlawful to discriminate against a person on the basis that it is believed that they are addicted to a prohibited drug, on the basis of a previous addiction, or on the basis of a medical condition (such as HIV infection) that may be related to drug addiction. 'Addiction' is not defined.

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New **subsection 54A (2)** provides that **subsection 54A(1)** will not apply where a person's use of a prohibited drug is authorised by a Commonwealth, State or Territory law, or where a person is undergoing a program or receiving services to treat the addiction to the drug.

New **subsection 54A(3)** provides a definition of 'prohibited drug', by reference to the *Customs (Prohibited Imports) Regulations 1956*.

Section 170CK of the *Workplace Relations Act 1996* provides that an employer must not terminate an employee's employment for various reasons, including physical or mental disability. **Item 3 of Schedule 1** provides an exemption from this provision where the disability is covered by new **section 54A** of the Disability Discrimination Act.

Concluding comments

The proposal underlying this Bill supports the message that the usage of prohibited drugs is unacceptable. It may therefore assist in achieving the objective of reducing the number of people experimenting with such drugs.

However, there are issues with the Bill on legal, social and technical bases.

Legal issues

The proposal to be given effect to by this Bill is not necessary unless it is considered desirable to allow discrimination against a person who is addicted to a prohibited drug merely because of that addiction and regardless of whether the addiction affects his or her behaviour in a relevant way.

The law at present does not require positive discrimination in favour of disabled persons, including those whose disability consists of addiction to a prohibited drug. The test for whether there has been unlawful discrimination is whether the person has been treated differently to how a person without the disability would have been treated in the same situation.

The broad definition of disability in the Disability Discrimination Act has reduced the potential for arguments as to who is or is not a person with a disability. The proposed amendment would introduce an element of anti-discrimination policy based on exceptions to that broad definition whereas it would be preferable to continue to focus on what actually constitutes discriminatory treatment.

Furthermore, Australian anti-discrimination law has not distinguished between situations where a disability may be considered to be the fault of the person suffering the disability and those where it would not be so perceived. Such a distinction is undesirable both

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because it introduces additional scope for litigation and because it could result in people suffering identical conditions receiving different treatment.²⁵ Removing drug addiction from the scope of disability protection may be seen as a step towards such a distinction.

There may be instances where it is difficult to determine whether in fact a person has been treated in a particularly way because he or she is addicted to a prohibited drug or because of other factors, such as his or her behaviour. However, such difficulties also arise in relation to other disabilities and the mechanisms in place to determine these questions would also operate in relation to those whose disability consists of addiction to a prohibited drug.

It is not clear whether or not the proposed amendments would be inconsistent with Australia's international obligations (as suggested by Australian Lawyers for Human Rights Inc). The definition of 'disabled person' in the Declaration on the Rights of Disabled Persons²⁶ does not necessarily encompass people who are addicted to prohibited drugs, and the proposed amendment may be found not to constitute unjustifiable discrimination so as to breach Article 26 of the International Covenant on Civil and Political Rights.²⁷

Social issues

Passage of this legislation may have the effect that people who are addicted to prohibited drugs will be less inclined to admit their addiction and seek treatment. Although proposed **section 54A(2)(b)** provides that where a person who is addicted to a prohibited drug has acknowledged their addiction and is undergoing treatment for the addiction discrimination on the grounds of the disability will remain unlawful it may be that in some situations there is no treatment program that is available to the addicted person. Furthermore, passage of the legislation may be perceived as unnecessarily penalising people who are in need of support and assistance rather than further stigmatisation.

Passage of the legislation could be perceived to demonstrate a commitment to stronger enforcement of laws relating to prohibited drugs. Conversely, opposition to the legislation could be perceived as going soft on prohibited drugs. Both these perceptions are based on the misconception that applying disability discrimination law to those addicted to prohibited drugs gives them special benefits.

Technical issues

Where a person who is addicted to a prohibited drug has acknowledged their addiction and is undergoing treatment for the addiction, discrimination on the grounds of the disability will remain unlawful (proposed **section 54A(2)(b)**). This protection has a very broad scope, which may well be productive of litigation.

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The term ‘addiction’ is also not defined in the Bill. This may also be productive of litigation, with the issue being a need to distinguish between a person who uses a prohibited drug but is not addicted and a person who is addicted.²⁸

Endnotes

- 1 [2000] FCA 1619 (15 November 2000).
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/2000/1619.html
- 2 Taken from the reasons for judgement of the Federal Court, *ibid.* at para.45.
- 3 The case was subsequently settled between the parties.
- 4 *ibid.*, para.41; see also Purvis v New South Wales (Department of Education and Training); discussed below p. 5.
- 5 *ibid.*, para.45.
- 6 For example Katharine Murphy, ‘Drug addiction not disability, says ACCI’, *Financial Review*, 6 December 2000, Peter Switzer ‘Workers’ rights keep shooting up’, *The Australian*, 29 January 2001, Malcolm Farr ‘Editorial: Judgment penalises community’, *Daily Telegraph*, 24 November 2000.
- 7 Prime Minister’s Weekly Radio (2NSB) Broadcast (3 November 2003).
<http://www.pm.gov.au/news/speeches/broadcast.html>
- 8 ‘Employers Welcome Planned Drug Disability Change’ *ACCI Press Release*, 3 November 2003. <http://www.acci.asn.au/MediaReleasesMain.htm>
- 9 Katharine Murphy, ‘Drug addiction not disability, says ACCI’, *Financial Review*, 6 December 2000.
- 10 The New South Wales amendment operates upon a disability that ‘relates to’ a person’s addiction to a prohibited drug; the proposed amendment of the Disability Discrimination Act operates upon a disability that ‘is’ an addiction to a prohibited drug. This may explain the need in the New South Wales legislation to specifically provide that s.49PA of the Anti-Discrimination Act 1977 (NSW) does not make it lawful to discriminate against a person on the basis of a medical condition that may be related to drug addiction (see s.49PA(3) of the Anti-Discrimination Act 1977 (NSW)).
- 11 Article 2 of the *Declaration on the Rights of Disabled Persons* provides:
“Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination”.

However, the definition of ‘disabled person’ in Article 1 of the Declaration does not appear to encompass people who are addicted to prohibited drugs.

<http://www1.umn.edu/humanrts/instree/t3drdp.htm>

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12 Article 26 of the *International Covenant on Civil and Political Rights* states:

“all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

At international law a violation of the prohibition of discrimination arises:

“if there is (a) differential treatment of (b) equal cases, (c) without there being an objective and reasonable justification, or if (d) proportionality between the aim sought and the means employed is lacking”. P. van Dijk and G.J.H van Hoof *Theory and Practice of the European Convention on Human Rights* The Hague, 1998 p.719.

There would be an ‘objective and reasonable justification’ for the prohibition of the use of certain drugs. It could also be argued that there would be such a justification for allowing discriminatory treatment of people who are addicted to such drugs, and that the proportionality test would be met, but the position is not clear.

13 Australian Lawyers for Human Rights (Inc), Letter to the Hon. Bob Debus, MP Attorney General of New South Wales, 5 February 2001.

http://www.alhr.asn.au/html/documents/debus_disability_letter.html

14 Human Rights and Equal Opportunity Commission, Initial Submission to the Productivity Commission Review of the Disability Discrimination Act, 6 June 2003.

http://www.hreoc.gov.au/disability_rights/inquiries/pc/sub1.htm

15 ADCA is the peak, national, non-government organisation representing the interests of the Australian alcohol and other drugs sector. It aims to provide a national voice for people working to reduce the harm caused by alcohol and other drugs: <http://www.adca.org.au/>

16 Quoted in David Wroe and Annabel Crabb, ‘Drug addict rights set off rebellion’, *The Age*, 3 December 2003.

17 For example, Malcolm Farr, Editorial, *Daily Telegraph*, 24 November 2000, Matthew Pinkney ‘Amend the law properly’, *Herald Sun (Melbourne)*, 8 December 2003.

18 Australian anti-discrimination law has not distinguished between disabilities which may be perceived to be the fault of the person suffering the disability and those which may not be so perceived.

19 Stephen Long, ‘Addicts must get the same protection’, *Financial Review*, 29 November 2000.

20 Media Release by Senator Brian Greig, Australian Democrats Spokesperson for Attorney-General and Justice, 3 December 2003.

21 *ibid.*

22 Media Release by Senator Kerry Nettle, Senator for New South Wales, 3 December 2003.

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- 23 *ibid.*
- 24 [2002] HCA 62 (11 November 2003).
http://www.austlii.edu.au/au/cases/cth/high_ct/2003/62.html
- 25 For example, a person whose confinement to a wheelchair resulted from an accident caused by their own dangerous driving could be treated differently to a person similarly injured as a result of somebody else's dangerous driving.
- 26 Declaration on the Rights of Disabled Persons, *op. cit.* n.11.
- 27 International Covenant on Civil and Political Rights, *op. cit.* n.12.
- 28 The term appears not to have been judicially defined. The Macquarie Dictionary defines as an 'addict' as 'one who is addicted to a practice or habit' and 'addicted' as 'devoted or given up (to a practice, habit or substance)', Macquarie Dictionary, Federation Edition, 2001.

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