



Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

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Law and Bills Digest Section

Contents

Purpose	3
Background	4
The Productivity Commission’s 2004 review of the DD Act	5
Former Government’s response	6
Basis of Policy Commitment	7
Committee consideration	8
Key Issues	8
The ‘dominant reason’ test in the AD Act	8
Extended definition of ‘disability’	8
Reasonable adjustments	9
Application of the DD Act to associates, carers, assistants, assistance animals and disability aids	10
Removal of the ‘proportionality’ requirement	11
Retention of the ‘comparator test’	11

Unjustifiable hardship	12
Financial implications	13
Main provisions.	13
Schedule 1–Amendments to the Age Discrimination Act.	13
Schedule 2–Amendments to the Disability Discrimination Act.	14
Date of commencement.	14
Amendments to Preliminary part of the DDA	14
Discrimination at work	17
Discrimination in other areas	18
Disability standards.	19
Offences.	19
Exemptions	19
Action Plans	20
Schedule 2–Amendments to the Human Rights and Equal Opportunity Commission Act.	20
Schedule 2–Amendments to the Inspector–General of Intelligence and Security Act	20
Schedule 3–Australian Human Rights Commission	21
Schedule 4–Other Amendments	23

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1–3 on the day of Royal Assent; Schedule 1, Part 1 of Schedule 2, Division 1, Part 1 and Part 2 of Schedule 3 and Schedule 4 on the 28th day after Royal Assent; all other items subject to the commencement of other Acts and Regulations.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to amend the [Disability Discrimination Act 1992](#) (DD Act) to implement certain recommendations made by the Productivity Commission in its 2004 review of the DD Act. The Bill also responds to the recent decision of the Full Federal Court in the case of *Forest*¹ by clarifying the operation of Part 1 of the DD Act: namely, that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability.

The Bill also:

- acts on the recommendation made by the House of Representatives Standing Committee on Legal and Constitutional Affairs to remove the ‘dominant purpose’ test from the *Age Discrimination Act 2004* (AD Act)² and
- makes various other technical amendments to human rights legislation.

1. [The State of Queensland \(Queensland Health\) v Che Forest](#) [2008] FCAFC 96 (6 June 2008).

2. House of Representatives Standing Committee on Legal and Constitutional Affairs, [‘Older People and the Law’](#), Canberra, 2007, recommendation 43, p. xxiii.

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Background

The DD Act is part of a package of Commonwealth anti-discrimination laws (including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Human Rights and Equal Opportunity Commission Act 1986* and *Age Discrimination Act 2004*).

The DD Act makes disability discrimination unlawful by aiming to deal with physical and attitudinal barriers that act to directly and indirectly preclude people with disabilities from making optimal use of their knowledge, skills and talents, such that they may effectively and affectively participate in the community. It affords people with disabilities the right to substantive equality of opportunity in areas like employment, education and the provision of goods and services.³

Indeed, the effective operation of Australia's democracy may be argued as being predicated on and imbued with a respect for human rights.

As Justice Kirby has argued:

the modern notion of democracy, at least in a country such as Australia, is far more complex than simple majoritarian rule. It is a sophisticated form of government which involves the general ability of the will of the majority to prevail but in a legal and social context in which the rights of vulnerable minorities are respected and defended [...]⁴

Australia is a signatory to several international agreements that oblige it to address disability discrimination in good faith.⁵ This means, *inter alia*, putting in place relevant laws and regulations and monitoring their effectiveness.

3. Under the Act, individuals may lodge complaints of discrimination and harassment with the Australian Human Rights Commission.

4. The Hon Justice Michael Kirby AC CMG Justice of the High Court of Australia, 'Democracy and Human Rights' (Speech delivered at Melbourne High School, 16 August 2000) Law and Justice Foundation website: <http://www.lawfoundation.net.au/ljf/app/&id=A2D967AED399D622CA2571A3007F84A9>, accessed 22 January 2009.

See further Justice Michael Kirby's remarks in *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 623–4 (Kirby J) on the need for judges to interpret the Constitution to reflect Australia's international human rights obligations.

5. The United Nations (UN) and International Labour Organisation (ILO) have several long-standing conventions and declarations that promote human rights and equality for people with disabilities and help to underpin discrimination legislation in Australia such as the ILO Declaration of Philadelphia (1944), the UN Universal Declaration of Human Rights (1948), the ILO Discrimination (Employment and Occupation) Convention (1958), the UN Declaration on the Rights of Mentally Retarded Persons (1971) and the UN Declaration on

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The Productivity Commission's 2004 review of the DD Act

As part of the former Government's commitment to assessing all existing legislation on the basis of national competition policy principles, on 5 February 2003, the then Parliamentary Secretary to the Treasurer, Ian McFarlane, announced the review of the DD Act by the Productivity Commission. Mr McFarlane explained that the review was designed:

to assess whether any restrictions on competition in the [Disability Discrimination] Act produce benefits that exceed costs and therefore justify the restrictions.⁶

At the time, all legislation that restricted competition or imposed costs on businesses was:

'being evaluated on the basis that it should be retained only if the benefits to the community as a whole outweigh the costs, and if the legislation's objectives cannot be achieved more effectively through other means'.⁷

The terms of reference on which the Productivity Commission was to report were, amongst other things:

- the social impacts in terms of **costs and benefits** that the legislation has had upon the community as a whole and people with disabilities, in particular its effectiveness in eliminating discrimination on the ground of disability, and
- any parts of the legislation which **restrict competition** should be retained only if the benefits to the community as a whole outweigh the costs and if the objectives of the legislation can be achieved only through restricting competition.⁸

In making assessments as to these matters the Productivity Commission was to have regard to 'the analytical requirements for regulation assessment by the Commonwealth, including those set out in the [Competition Principles Agreement](#) and the Government's [guidelines on regulation impact statements](#)'.⁹ In particular the final report was to, amongst other things:

the Rights of Disabled Persons (1975) see: Productivity Commission, 'Review of the Disability Discrimination Act 1992', *Productivity Commission Inquiry Report No. 30*, Commonwealth of Australia, 30 April 2004, p. 42, available at: http://www.pc.gov.au/__data/assets/pdf_file/0010/39655/dda1.pdf accessed on 30 January 2009.

6. Ian McFarlane, '[Productivity Commission to Review Disability Discrimination Act](#)', Media Release, 5 February 2003.

7. *ibid.*

8. Productivity Commission, *op. cit.*, p. iv.

9. *ibid.*, p. v.

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- identify whether, and to what extent, the legislation restricts competition,¹⁰ and
- examine mechanisms for increasing the overall efficiency of the legislation, including minimising the compliance costs and paper burden on small business.¹¹

As can be seen from the above, one of the dominant themes of the review was the impact of Commonwealth disability discrimination regulation on the competitiveness of Australian business, employment and investment growth. It is therefore interesting to consider if, and how, those parameters may temper the operational outcomes of the DDA in times of economic recession.

Former Government's response

On 14 July 2004, the Productivity Commission's final report was tabled in Parliament. In January 2005, the former Government [responded](#) to the recommendations of the Productivity Commission accepting 26 of the 32 recommendations either in full, in part or in principle.¹²

In announcing the Government's response, the then Attorney-General said:

The Government accepts that it is necessary to clarify that the DDA does require organisations to make reasonable adjustments to eliminate discriminatory barriers. However, explicit recognition of this duty is balanced by expanding the operation of the unjustifiable hardship defence.

We must ensure that adjustments will produce net benefits for the community without imposing undue hardship on the organisations required to make them.¹³

Amongst the recommendations which were accepted by the former Government, the following are a feature of this Bill:

- the criteria for determining *unjustifiable hardship* in section 11 of the DDA should be expanded¹⁴

10. *ibid.*, paragraph 3(c), p. v.

11. *ibid.*, paragraph 3(i), p. vi.

12. The Government did not accept recommendations 12.2, 12.3, 12.5, 13.1, 13.4 and 13.5.

13. The Hon. Philip Ruddock MP, Attorney-General, 'Review of the Disability Discrimination Act', *News Release No. 013/2005*, 27 January 2005.

14. Government Response, '*Productivity Commission's Review of the Disability Discrimination Act 1992*', recommendation 8.3 available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~25+Jan+Government+responseDDA.pdf/\\$file/25+Jan+Government+responseDDA.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~25+Jan+Government+responseDDA.pdf/$file/25+Jan+Government+responseDDA.pdf), accessed on 27 January 2009.

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- the defence of *inherent requirements* should be available to employers in all employment situations¹⁵
- the exemption in section 45 of the DDA for *special measures* that are reasonably intended to benefit people with disabilities should be amended to clarify that it:
 - exempts the establishment, eligibility criteria and funding of these measures
 - does not exempt general actions done in their administration.¹⁶
- section 31 of the DDA should be amended to allow *disability standards* to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standards-making power should extend to the clarification of the operation of statutory exemptions.¹⁷

Basis of Policy Commitment

On 18 July 2008, the Government announced that it would introduce amendments to the DD Act to implement recommendations made by the 2004 review of the DD Act.¹⁸

Subsequently, the Government issued a discussion paper for consultation on a National Disability Strategy (NDS) stating:

The Australian Government's commitment to establish a National Disability Strategy (the Strategy) during the 2007 election was made in the belief that after 17 years of economic growth, our nation must do better to fully include people with disability in the social, economic and cultural life of the country. Achieving better outcomes for people with disability and their families and carers is an important part of the government's new social inclusion agenda.¹⁹

The proposed amendments are explained as an extension of the NDS initiative and the ratification of the [UN Convention on the Rights of Persons with a Disability](#).²⁰

15. *ibid.*, recommendation 8.4.

16. *ibid.*, recommendation 12.4.

17. *ibid.*, recommendation 14.3.

18. The Hon. Robert McClelland, Attorney-General and the Hon. Bill Shorten, Parliamentary Secretary for Disabilities, '[Rudd Government to improve Australia's Disability Discrimination System](#)', Media Release, 18 July 2008.

19. Department of Families, Housing, Community Services and Indigenous Affairs, '[Developing a National Disability Strategy for Australia: Access Inclusion Participation](#)', Canberra, October 2008, p. 4.

20. The Hon. Robert McClelland, Attorney-General and the Hon. Bill Shorten, Parliamentary Secretary for Disabilities, *op. cit.*

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Committee consideration

On 4 December 2008, the Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. The reporting date for the inquiry is 24 February 2009. Details of the inquiry can be found at the Committee [website](#).

At the time of writing this Bills Digest 33 submissions had been received. The content of some of the submissions is canvassed in the Key Issues section below.

Key Issues

The 'dominant reason' test in the AD Act

According to existing section 16 of the AD Act, if an act is done for two or more reasons, and one of those reasons is the age of the person, that reason must be the 'dominant' purpose for which the act was done in order for discrimination to be established. The Bill removes the 'dominant reason' test.

The submissions from the Law Council of Australia and the Australian Human Rights Commission both supported the proposed amendment.²¹ In particular, the Law Council of Australia was of the view that 'the 'dominant reason' test is out of step with the tests applied by other pieces of discrimination legislation.'²²

The amendment to section 16 will implement recommendation 43 of the House Standing Committee on Legal and Constitutional Affairs' 2007 report, [Older People and the Law](#).

Extended definition of 'disability'

Items 5 and 6 of the Bill clarify and extend the definition of '*disability*' in two ways.

Firstly the definition is extended to ensure that it includes a disability which may exist in the future 'including because of a genetic predisposition'. Whilst it has been argued that

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21. Law Council of Australia, '[Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008](#)', Canberra, 14 January 2009, p. 6 and Australian Human Rights Commission, '[Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008](#)', Sydney, 14 January 2009, p. 3.
 22. Law Council of Australia, *ibid.*, p. 6.

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the current definition of ‘disability’ is sufficiently broad to include genetic predisposition, the amendment will put this beyond doubt.²³

Secondly the definition is extended to include behaviour that is a symptom or manifestation of the disability. In the case of *Purvis*:²⁴ :

the central issue before the High Court ... was whether treatment of a person based on their behaviour amounts to unlawful disability discrimination, in circumstances where that behaviour is directly connected with an underlying disability. The question before the Court was whether the [DD Act] ... contained an obligation to accommodate the effects or characteristics of a person’s disability — such as disturbed behaviour — in order to avoid a finding of unlawful discrimination.²⁵

The High Court determined that it did. The Bill amends the DD Act to incorporate the High Court’s interpretation, for the avoidance of doubt.

Reasonable adjustments

Proposed subsection 5(2) implements recommendation 8.1 of the 2004 Productivity Commission Report by making explicit the positive duty to make *reasonable adjustments* for a person with disability. This means that a failure to make reasonable adjustments amounts to discrimination.

According to Dr Belinda Smith:

Such a provision acknowledges that to achieve substantive equality, organizations need to do more than simply apply their criteria consistently and treat everyone the same. An obligation to provide reasonable adjustments in effect distributes some of the burden for change across a range of actors in society.²⁶

The Law Council of Australia, whilst welcoming the amendment, noted the Productivity Commission’s observation that ‘No issue caused as much comment during this inquiry as

23. Public Interest Advocacy Centre, [‘Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008’](#), Sydney, 12 January, 2009, p. 5.

24. [Purvis v New South Wales \(Department of Education\)](#) [2003] HCA 62; (2003) CLR 92

25. Samantha Edwards, [‘Purvis in the High Court Behaviour, Disability and the Meaning of Direct Discrimination’](#), Sydney Law Review, Vol. 26, No. 4, December 2004, pp. 639–650 at p. 639.

26. Dr Belinda Smith, [‘Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008’](#), Sydney, 12 January, 2009, p. 5.

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‘reasonable adjustments’ ... reasonable adjustments can mean different things to different people’.²⁷

Application of the DD Act to associates, carers, assistants, assistance animals and disability aids

The Bill clarifies that discrimination against a person on the basis of a disability of any of that person’s associates, or due to a person possessing or being accompanied by an aid or assistant animal (such as a guide dog), interpreter, reader, assistant or carer, is equivalent to discrimination on the basis of that person’s disability.

The amendment is in response to the decision of the Full Federal Court in *Forest*. In that case Mr Forest, who suffers from a mental illness, trained a dog to accompany him in public. Mr Forest was refused entry to the Cairns Base Hospital and on subsequent occasions to the Smithfield Community Centre with his dog. He lodged a discrimination complaint under the DD Act.

The question for the court was whether Mr Forest’s dog was a ‘guide dog, hearing assistance dog or trained animal’ under section 9 of the DD Act. At first instance the Federal Court determined that:

- Mr Forest had a disability within the meaning of section 4 of the DD Act
- the complaint of indirect discrimination under section 6 of the DD Act was made out because it was unreasonable for the Hospital and/or the Community Health Centre to use their own discretion about whether an animal was an assistance animal, in the absence of any objective test²⁸
- discrimination under section 9 of the DD Act was also established as Mr Forest’s dog was not ill behaved and was trained to alleviate the effects of Mr Forest’s disability.²⁹

The State of Queensland appealed against the decision. The Full Court of the Federal Court reversed the decision on the grounds that for discrimination to be established under section 9 of the DD Act it was **insufficient** for the less favourable treatment to be on the grounds that Mr Forest was accompanied by an assistance animal. It was also necessary to establish that the less favourable treatment, the exclusion from the Cairns Base Hospital and Smithfield’s Community Health Centre was on the grounds of his psychiatric disability and this could not be established.

The amendment has been widely welcomed.³⁰

27. Law Council of Australia, op. cit., p. 4.

28. [*Forest v. Queensland Health*](#) [2007] FCA 936 at paragraphs 6585.

29. *ibid.*, paragraphs 89 to 128.

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Removal of the 'proportionality' requirement

Currently, section 6 of the DD Act defines indirect disability discrimination in terms of a person imposing a requirement or condition on a person with disability with which a substantially higher proportion of people without the disability can or would be able to comply (called the 'proportionality test'), but with which the person with disability cannot or would not be able to comply, and which is unreasonable in the circumstances.

Item 17 of the Bill amends section 6 by, amongst other things:

- removing the 'proportionality test' and
- shifting the burden of proving that a requirement or condition is reasonable to the respondent.

The amendment implements recommendation 11.3 of the 2004 Productivity Commission Report.

Retention of the 'comparator test'

Proposed section 5(1) provides that a person 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 the aggrieved person less favourably than they would treat *a person without the disability in circumstances that are not materially different*. Therefore, to establish discrimination, a comparison between the aggrieved person and a person without the disability must be made. This is called the 'comparator test'. It is a feature of the existing DD Act.

While the High Court in *Purvis* confirmed that a person's 'disability' includes the behavioural manifestations of their disability, the majority also held that the appropriate comparator is a person who does not have the disability but who exhibits like behaviour. The appropriate comparator in that case was considered to be a student without a disability who exhibited violent behaviour similar to that exhibited by the complainant as a result of his disorder.³¹

According to the Human Rights Law Resource Centre:

30. Australian Human Rights Commission, op. cit., p. 17; and Office of the Anti-Discrimination Commissioner, [*Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*](#), Hobart, 22 December 2008, p. 5.

31. *Purvis v New South Wales (Department of Education)* [2003] HCA 62 at paragraph 27.

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This interpretation of the comparator test overlooks the inability of a person with a disability to control circumstances that are caused by their disability, such as disruptive behaviour, as in *Purvis*, or infectiousness, as is characteristic of persons with HIV/AIDS. For this reason the comparator test is particularly problematic for people who have intellectual or non-physical disabilities.

The necessity of a comparator also poses particular problems for persons who have been treated less favourably as a result of their disability when compared with other persons with a different form of the same disability, for example when accessing disability services. In such circumstances a comparator may not be found at all because people without the particular disability may not require the service.³²

The issue of the ‘comparator test’ was canvassed by the 2004 Productivity Commission Report.³³ Recommendation 11.3 was that the definition of direct discrimination in the DD Act should be supplemented with examples (either included in the Act or in guidelines) to clarify the ‘circumstances that are the same or not materially different’ for the purposes of making a comparison.³⁴

The ‘comparator test’ is retained in this Bill.

Unjustifiable hardship

The existing DD Act contains a defence to unlawful discrimination where not discriminating would cause the discriminator ‘*unjustifiable hardship.*’ The Bill extends the availability of the defence to all unlawful discrimination on the ground of disability (except harassment and victimisation) in accordance with recommendation 8.2 of the 2004 Productivity Commission Report.

According to the Law Council, whilst it

recognises the arguments supporting the Productivity Commission’s recommendation for extension, it notes that similar defences in all State and Territory discrimination statutes are rarely available to all areas of public life covered by the legislation.³⁵

32. Human Rights Law Resource Centre, ‘[Submission to the Senate Legal and Constitutional Affairs Committee: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008](#)’, Melbourne, 16 January, 2009, p. 9.

33. Productivity Commission, op. cit., p. 305.

34. ibid., p. 312.

35. For example, a defence of unjustifiable hardship, or some related term, is available in the ACT in areas of employment, education, access to premises, provision of goods and services, accommodation, and club membership; in NSW in the areas of employment, membership of registered clubs and industrial organisations, and the provision of goods and services, education, and accommodation; in the Northern Territory only when a person has a ‘special need’ and it is ‘unreasonable to require the... supply of special services or facilities’; in Queensland in the areas of employment, club membership provision of goods

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Extending the unjustifiable hardship defence to all areas of the [DD] Act would create further differences between jurisdictions in an area of discrimination law that already suffers substantially from a lack of uniformity.³⁶

Other amendments in relation to *'unjustifiable hardship'* included the clarification of the matters to be considered when determining unjustifiable hardship, such as the benefit accruing to or the detriment suffered by any person concerned and the community at large and the financial circumstances of, and the estimated amount required to be paid by, the alleged discriminator; and the clarification that the onus of proving unjustifiable hardship falls on the person claiming it.

Financial implications

According to the Explanatory Memorandum, the amendments in the Bill 'will have negligible financial implications'.³⁷

Main provisions

Schedule 1—Amendments to the Age Discrimination Act

The *Age Discrimination Act 2004* (AD Act) makes it unlawful to discriminate on the ground of age. Part 3 of the AD Act provides that discrimination can be 'direct' or 'indirect'.

'Direct' discrimination, under section 14 of the AD Act, is discrimination which takes place when a person is treated less favourably because of age. For example, a decision not to employ someone because of their age would be a case of direct discrimination on the basis of that person's age.

'Indirect' discrimination under section 15 of the AD Act, occurs when a condition or requirement is imposed which is more difficult for people of a certain age to meet. For example, a requirement that employees meet certain rigorous fitness standards may be more difficult for those who are older.

Section 16 provides that if a discriminatory act, whether direct or indirect, takes place and there a number of reasons for the act then, in order for this to constitute age discrimination

and services, education and accommodation; in South Australia only in the provision of goods and services; in Tasmania in the areas of employment, access to public spaces, and the provision of goods and services; in Victoria in the areas of employment and the provision of education and services, and in Western Australia in employment, club membership, and the provision of goods and services, education and accommodation.

36. Law Council of Australia, *op. cit.*, p. 7.

37. Explanatory Memorandum, p. 2.

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as defined by the legislation, the age of the person must be the ‘dominant reason’ for the act.

Item 1 of Schedule 1 of the Bill repeals section 16 and inserts **proposed section 16**. The new section will apply where an act is done to a person for two or more reasons **and** any one of the reasons is:

- the age of the person or
- a characteristic which relates generally to persons of that age or
- a characteristic which is generally imputed to persons of that age: **proposed subsection 16(1)**.

In that case, the act is taken to be done because of the age of the person: **proposed subsection 16(2)**, and this is prima facie unlawful.

Item 2 provides that the proposed amendment will apply only to acts done after the commencement of Schedule 1 of this Bill.

Schedule 2—Amendments to the Disability Discrimination Act

Date of commencement

Schedule 2 of the Bill is in 2 parts. **Items 1–90** which are in Part 1 will commence on the day of Royal Assent. **Items 101–106** have varying dates of commencement dependant upon the commencement of other statutes.

Amendments to Preliminary part of the DDA

Items 1, 3, 4, 7, 9 and 13 insert new definitions into existing subsection 4(1) which contains the interpretative provisions of the *Disability Discrimination Act 1992* (DD Act). In particular:

- **item 4** inserts the definition of ‘*Disabilities Convention*’ being the Convention on the Rights of Persons with Disabilities³⁸, done at New York on 30 March 2007, [ratified](#) by Australia on 18 July 2008, and

38. The Convention complements existing international human rights treaties. It does not recognize any additional human rights of persons with disabilities, but rather clarifies the obligations and legal duties of States to respect and ensure the equal enjoyment of all human rights by all persons with disabilities. The Convention identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have routinely been violated, and where protection of rights must be reinforced. It sets out in detail the additional positive steps that States must take in order to ensure an enabling environment for the enjoyment of the rights of persons with disabilities.

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- **item 13** inserts the definition of '*reasonable adjustment*' so that an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an '*unjustifiable hardship*' on the person.³⁹

Items 2, 8, 12, 14 and 15 repeal the existing definitions for:

- auxiliary aid
- disability discrimination
- institution of tertiary education
- technical and further education institution, and
- this Act.

Item 17 repeals existing sections 5–9 and inserts replacement provisions. These are the provisions that define discrimination. Direct discrimination, under existing subsection 5(1) of the DD Act, is discrimination which takes place when a person is treated less favourably (or it is proposed to treat them less favourably) because of their disability than a person without the disability, in the same circumstances, or circumstances that are not materially different. **Proposed subsection 5(1)** is in similar terms to existing subsection 5(1). However **proposed subsection 5(2)** broadens the current definition of direct discrimination to include the circumstance where:

- a discriminator does not make, or propose to make, *reasonable adjustments* for the person and
- the effect of the failure to make reasonable adjustments is that the aggrieved person is treated less favourably because of their disability than a person without the disability, in the same circumstances, or circumstances that are not materially different.

Proposed subsection 5(3) provides that circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.⁴⁰

Indirect discrimination under existing section 6 of the DD Act, occurs when a condition or requirement is imposed upon a person with a disability which is less difficult for people without that disability to meet. **Proposed subsection 6(1)** reframes the circumstances in which indirect discrimination occurs so that an aggrieved person is discriminated against, on the grounds of disability, if **all** of the following conditions are satisfied:

-
39. See **item 18** for those matters which are to be taken into account in determining whether a hardship imposed on a person is an '*unjustifiable hardship*'.
40. The term '*adjustments*' is not defined in the DD Act although the term '*reasonable adjustments*' is inserted by **item 13** of the Bill.

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- the discriminator requires (or proposes to require) the aggrieved person to comply with a requirement or condition: **proposed paragraph 6(1)(a)**
- the aggrieved person does not comply or would not be able to comply with the requirement or condition because of their disability: **proposed paragraph 6(1)(b)**⁴¹
- the requirement or condition has the effect (or is likely to have the effect) of disadvantaging persons with the disability: **proposed paragraph 6(1)(c)**.⁴²

However **proposed subsection 6(2)** broadens the current definition of indirect discrimination to include the circumstance where:

- a discriminator requires that an aggrieved person comply with a requirement or condition and
- the aggrieved person would be able to comply with the requirement or condition if the discriminator made reasonable adjustments—which the discriminator will not do, and
- the effect of the failure to make reasonable adjustments is to disadvantage persons with the disability.

Proposed subsections 6(1) and (2) do not apply if the requirement or condition is reasonable, having regard to the circumstances of the case: **proposed subsection 6(3)**. In that case the burden of proving that the requirement or condition is reasonable lies with the person who requires it: **proposed subsection 6(4)**.

Proposed section 7 states that the DD Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to the person with the disability. **Items 23, 24, 26, 27, 30, 32, 35, 37–39, 42–44, 47, 50, 52, 53, 55, 56, 58 and 59** amend various sections of the DD Act as a consequence of the changes in **proposed section 7**. It should be read in conjunction with **proposed section 8** which extends the operation of the DD Act to having a carer, assistance animal or disability aid in the same way that it applies to having a disability.

Proposed section 9 contains relevant definitions of the terms:

- *‘carer or assistant’* which includes an interpreter or a reader: **proposed paragraphs 9(1)(c) and (d)**
- *‘assistance animal’* which may be a dog or other animal which has received accredited training or is trained to assist a person with a disability to alleviate the effect of the disability and meet standards of hygiene and behaviour which are appropriate for an animal in a public place: **proposed subsection 9(2)** and

-
41. This is a subjective test looking specifically at the aggrieved person’s capacity to comply with the requirement or condition due to their disability.
 42. This is an objective test looking broadly at ‘persons with that disability’ and whether, broadly speaking, the requirement or condition would disadvantage them.

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- **'disability aid'** which is used by the person to alleviate the effect of the disability: **proposed subsection 9(3)**.

Item 18 repeals existing section 11 and substitutes **proposed section 11** which lists those matters which **must** be taken into account in deciding whether a person would suffer an **'unjustifiable hardship'** namely:

- the nature of the benefit or detriment likely be suffered by any person concerned
- the effect of the disability of any person concerned
- the financial circumstances, and the estimated amount of expenditure required to be made, by the first person
- the availability of financial and other assistance to the first person and
- any relevant action plans given to the Commission⁴³ under section 64.⁴⁴

The burden of proving that something would impose unjustifiable hardship lies on the person claiming it: **proposed subsection 11(2)**.

The external affairs power in section 51(xxix) of *Commonwealth of Australia Constitution Act* (the Constitution) allows the Commonwealth to legislate to implement a treaty if the Commonwealth law is 'reasonably capable of being considered appropriate and adapted to implementing the treaty'.⁴⁵ Some provisions of the DD Act rely on a range of international human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. **Item 20** inserts **proposed paragraph 12(8)(ba)** to include the *Disabilities Convention* as defined in item 4.

Item 22 amends paragraphs 13(4)(a) and (5)(a) so that where a person is entitled to make a complaint under the DD Act and disability standards as well as under a state or territory anti-discrimination law, then the complaint can only be made in one of those jurisdictions. Similarly, a person can only be prosecuted in one of those jurisdictions.

Discrimination at work

Item 41 inserts **proposed sections 21A and 21B** which provides an exception to the rule that it is unlawful to discriminate against a person on the grounds of disability if:

43. Under section 4 of the *Disability Discrimination Act 1992*, '**Commission**' means Human Rights and Equal Opportunity Commission.

44. These are **action plans** prepared by organisations such as a department of the Commonwealth, a department of a state, a public authority of the Commonwealth, an instrumentality of a state or an education institution.

45. *Victoria v Commonwealth* (1996) 138 ALR 129.

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- the discrimination relates to particular work and
- because of the disability, the aggrieved person is not able to carry out the inherent requirements of the particular work, even if the employer made reasonable adjustments.

In deciding whether the aggrieved person is not able to carry out the inherent requirements of the particular work, even with reasonable adjustments, **proposed subsection 21A(2)** requires that the following matters be taken into account:

- the aggrieved person's past training, qualifications and experience relevant to the particular work
- the aggrieved person's work performance, if they already work for the discriminator, and
- any other factor which it is reasonable to take into account.

Proposed subsection 21A(3) lists the circumstances in which the aggrieved person 'works for another person', and includes contractors.

However, under **proposed section 21B** it is **not** unlawful to discriminate on the grounds of disability if avoiding the discrimination would impose *unjustifiable hardship* on the discriminator.

Items 25, 28, 31, 33 and 36 omit various sections of the DD Act as a consequence of the changes in **proposed section 21A**.

Discrimination in other areas

Existing Division 2 of Part 2 of the DDA relates to discrimination in such areas as education, access to premises, goods, services and facilities, accommodation and clubs and incorporated associations. **Item 60** repeals section 30 and inserts **proposed sections 29A and 30**. **Proposed section 29A** provides that it is not unlawful to discriminate against a person in respect of any of the matters contained in Division 2 of Part 2 of the DD Act (apart from section 30) if avoiding the discrimination would impose 'unjustifiable hardship' on the discriminator.

Proposed section 30 provides that it is unlawful to request or require information from a person with a disability that would not be required from a person without a disability, if the information is sought for the purposes of unlawful discrimination. **Proposed subsection 30(3)** provides an exception to the prohibition where the person making the request has evidence that the information was not requested for that purpose.

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Disability standards

Item 61 inserts the new heading of **Division 2A–Disability standards**. **Item 62** repeals existing section 31 and inserts **proposed section 31** which empowers the Minister to formulate ‘*disability standards*’ in relation to any area in which it is unlawful for a person to discriminate against another person, on the ground of disability.⁴⁶ The ‘*disability standards*’ will be legislative instruments.⁴⁷ **Proposed paragraph 31(2)(a)** provides that they may deal with any of the following matters:

- reasonable adjustments
- strategies and programs to prevent harassment or victimisation of persons with a disability
- unjustifiable hardship and
- exemptions from the disability standard.

In addition a disability standard may specify that it is not intended to affect the operation of a law of a State or Territory: **proposed paragraph 31(2)(b)**. **Proposed subsection 31(4)** ‘retains the general stipulation in the current provision that the standards do not take effect until the completion of the period in which they could be disallowed by the Parliament’.⁴⁸

Offences

Items 68 and **88** remove references to monetary penalties and replace them with references to penalty units.⁴⁹

Exemptions

Item 76 inserts **proposed section 54A** which applies so that the following actions in relation to a person with a disability who has an assistance animal are **not unlawful**:

46. Under section 19A of the *Acts Interpretation Act 1901* a reference to ‘the Minister’ is a reference to the Attorney-General.

47. The *Legislative Instruments Act 2003* defines a ‘legislative instrument’ as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament’. A legislative instrument must be tabled in both houses of the Parliament and may be subject to disallowance.

48. Explanatory Memorandum, p. 16.

49. Section 4AA of the *Crimes Act 1914* provides that a penalty unit is \$110. This means that the penalty has been increased to \$1 100.

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- requesting or requiring that the assistance animal remain under the control of the person with the disability or another person: **proposed subsection 54A(2)**
- discriminating against the person with the disability if it is reasonably suspected that the assistance animal has an infectious disease where it is reasonably necessary to protect public health or the health of other animals: **proposed subsection 54A(4)**
- requesting a person with a disability to provide evidence that an animal is an ‘assistance animal’: **proposed paragraph 54A(5)(a)**
- requesting a person with a disability to provide evidence that an animal is trained to meet standards of hygiene and behaviour suitable for a public place: **proposed paragraph 54A(5)(b)**
- discriminating against a person with a disability who is unable to provide evidence as outlined in proposed paragraphs 54A(5)(a) and (b) above: **proposed subsection 54A(6)**.

Action Plans

Item 80 repeals existing section 59 which contains the interpretation of ‘service provider’. In its place is the proposed definition of ‘*action planner*’. According to the Explanatory Memorandum, the rationale for the change is to allow for a wider class of persons who may make action plans.⁵⁰ **Items 81–86** are consequential amendments arising from this change.

Schedule 2—Amendments to the Human Rights and Equal Opportunity Commission Act

Items 91 and 92 amend subsection 11(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) to specify that functions are conferred on the Commission under the DD Act.

Schedule 2—Amendments to the Inspector–General of Intelligence and Security Act

Items 94, 97 and 100 amend section 8 of the *Inspector–General of Intelligence and Security Act 1986* (IGIS Act) so that it is clear that the Inspector–General is empowered to inquire into any matter which relates to an act, or practice, of one of the intelligence agencies that is inconsistent with, or contrary to, any the anti-discrimination provisions contained in the DD Act.

50. Explanatory Memorandum, paragraph 113, p. 18.

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Schedule 3–Australian Human Rights Commission

The Human Rights Legislation Amendment Bill (No. 2) 1998 was introduced into the House of Representatives on 8 April 1998. In the second reading speech the then Attorney-General stated that the name of the Human Rights and Equal Opportunity Commission would be changed to the Human Rights and Responsibilities Commission to reflect

that the new commission's priority will be to educate Australians about human rights and discrimination, and to help them to understand their responsibility, as members of the Australian community, to respect other people's human rights.⁵¹

Parliamentary debate on the Bill was not completed before the 38th Parliament was prorogued. The Bill was reintroduced as the [Human Rights Legislation Amendment Bill \(No.2\) 1999](#) which subsequently lapsed when the Federal Election was called in late 2001.

The Australian Human Rights Commission Legislation Bill 2003 was introduced on 27 March 2003 with the proposal to amend the name of the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission. The relevant [Bills Digest](#) contains useful background information. The Bill lapsed at the end of the 40th Parliament.

Part 1 of Schedule 3 amends the following statutes:

- *Age Discrimination Act 2004*
- *Australian Crime Commission Act 2002*
- *Civil Aviation Act 1988*
- *Commonwealth Electoral Act 1918*
- *Crimes (Torture) Act 1988*
- *Criminal Code Act 1995*
- *Defence Act 1903*
- *Disability Discrimination Act 1992*
- *Evidence Act 1995*
- *Housing Assistance Act 1996*
- *Human Rights and Equal Opportunity Commission Act 1986*
- *Human Rights (Sexual Conduct) Act 1994*

51. The Hon. Daryl Williams, Attorney-General, [‘Second Reading Speech: Human Rights Legislation Amendment Bill \(No. 2\) 1998’](#), *House of Representatives Debates*, 8 April 1998, p. 2829.

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- *Inspector-General of Intelligence and Security Act 1986*
- *Migration Act 1958*
- *Native Title Act 1993*
- *Privacy Act 1988*
- *Privacy Amendment (Office of the Privacy Commissioner) Act 2000*
- *Racial Discrimination Act 1975*
- *Remuneration Tribunal Act 1973*
- *Sex Discrimination Act 1984*
- *Supported Accommodation Assistance Act 1994*
- *Workplace Relations Act 1996* and
- *Fair Work Act 2008*

In each case:

- references to the *Human Rights and Equal Opportunity Commission Act 1986* are omitted and substituted with references to the *Australian Human Rights Commission Act 1986* or
- the existing definition of '**Commission**', being the Human Rights and Equal Opportunity Commission, is omitted and substituted with the proposed definition of '**Commission**' as meaning the Australian Human Rights Commission or
- a reference to HREOC is omitted and substituted with a reference to the Australian Human Rights Commission.

Part 2 of Schedule 3 amends a number of statutes as follows:

- items 117–118: DD Act
- items 119–166: HREOC Act
- items 167–178: *Racial Discrimination Act 1975* (RD Act)
- items 179–180: *Sex Discrimination Act 1984* (SD Act)

Items 117, 119, 149, 175 and 179 amend the DD Act, the HREOC Act, the RD Act and the SD Act respectively so that, before the Governor-General makes an appointment to the Commission, the Minister must be satisfied that the person has the appropriate qualifications. According to the Explanatory Memorandum, this is 'consistent with Office of Parliamentary Council Drafting Direction No 3.4'.⁵²

52. Explanatory Memorandum, p. 25.

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Items 122, 131, 137, 140, 141 and 163 amend the HREOC Act so that monetary figures are omitted from penalty provisions and replaced with penalty units.

Existing section 46P of the HREOC Act provides that complaints alleging unlawful discrimination may be lodged with the Commission by a person who is aggrieved by an act or practice. Subsection 20(1) provides that Commission is to carry out its functions when it has received a complaint in writing alleging that an act or practice is inconsistent with any human right. The sections are inconsistent as the power contained in subsection 20(1) is not dependant upon the complaint being made by an aggrieved person. The effect is that the Commission may receive a complaint about the treatment of a person without that persons knowledge or consent. **Item 125** amends paragraph 20(1)(b) to remove this anomaly.

Existing subsection 32(3) sets out the circumstances in which the Commission can decide not to enquire into an act or practice. **Item 147** inserts **proposed subparagraph 32(3)(c)** which would allow the Commission to decide not to enquire into a matter where it has been settled or resolved. The effect of this amendment is that it will no longer be necessary for a complainant to formally withdraw a complaint which has been resolved by agreement.⁵³

Section 46PO provides that an application may be made to the Federal Court or the Federal Magistrates Court in circumstances where the President of the Commission has terminated a complaint. In particular, subsection 46PO(2) provides that the application must be lodged within 28 days of the notice of termination being issued to the complainant. **Item 154** amends subsection 46PO(2) so that the time limit for lodging the application is increased to 60 days.

The remaining items in schedule 3 of the Bill are primarily technical amendments.

Schedule 4–Other Amendments

Items 1–3, 5, 7–12 and 14 amend the SD Act and the RD Act so that monetary figures are omitted from penalty provisions and replaced with penalty units.

53. Explanatory Memorandum, p. 27.

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