



Supplementary Information Disability Discrimination and Other Human Rights Legislation Amendment Bill

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council is grateful for the opportunity to provide supplementary information to the Committee in response to questions taken on notice at the Committee hearing on 29 January 2009. The questions related to:

- The extent to which the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (the Bill) reflects the intention to reduce exemptions in relation to decisions under legislation relating to migration
- The merit of the comparator test
- The extent to which recommendations of the Productivity Commission are not addressed by the Bill

In the time available for providing this supplementary information, the Law Council has only been able to address these questions to a limited extent.

Exemptions relating to Migration Legislation

The Law Council's Immigration Lawyers Association has been unable to provide feedback in the time available for providing this supplementary information. However, the Law Council notes its previous observations in relation to implementation of the United Nations Convention on the Rights of Persons with Disabilities that ongoing work is required to fully implement the convention in Australia, despite the existence of the *Disability Discrimination Act 1992* in its current form.¹

The proposed section 52 appears to go only some way towards implementing Australia's obligations to make disability discrimination unlawful in the context of migration decisions. As has been suggested by the Human Rights Law Resource Centre and the Public Interest Advocacy Centre in their submissions on the Bill, it could go much further in order to fully implement Australia's obligations.² The Law Council agrees with these submissions on the basis of its previous advocacy in this area.

The Comparator Test

The comparator test arises in the context of the definition of direct discrimination by requiring examination of how a person with disability is treated less favourably than a person without disability.³ The Bill maintains this element of the definition.⁴

The Law Council notes that a number of other submissions on the Bill have been critical of the comparator test.⁵ The Law Council has also been critical of the comparator test in the context of the *Sex Discrimination Act* and has made submissions that the comparator test should be removed and replaced with a definition of discrimination which does not rely on this test.⁶ The Law Council has

¹ See *Submission to the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=4ADDF5B-1C23-CACD-2233-7025BFFBF0E9&siteName=lca

² See submissions of Human Rights Law Resource Centre and Public Interest Advocacy Centre.

³ s 5 *Disability Discrimination Act 1992*

⁴ Proposed sections 5 to 9.

⁵ See submissions of Human Rights Law Resource Centre; NSW Disability Discrimination Legal Centre; Kate Eastman and Ben Fogarty; Australian Human Rights Commission

⁶ See Submission to Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality at

suggested that the definition of direct discrimination should be based on ACT legislation which defines it in terms of unfavourable rather than less favourable treatment.⁷

The Law Council adopts the same position in relation to the comparator test in the Bill as the removal of the comparator test would simplify the proof of discriminatory conduct and further the objects of the legislation to eliminate disability discrimination as far as possible.⁸

Productivity Commission Recommendations

The Law Council has only been able to address the recommendations outlined in Chapter 8 of the Productivity Commission Report in the time available to provide this supplementary information.

Recommendation 8.1 - The Disability Discrimination Act 1992 should be amended to include a general duty to make reasonable adjustments.

- *Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.*
- *The person or persons on whom the duty would fall should be identified.*
- *Examples of how the duty might apply should be included in each area of the Act.*

Proposed sub-section 5(2) provides that a person is discriminating against another person if they fail to make reasonable adjustments for the person with the disability and the failure to do so has the effect that the person is treated less favourably than a person without the disability in similar circumstances. Proposed sub-section 6(2) similarly incorporates the failure to make reasonable adjustments into the definition of indirect discrimination. These sub-sections aim to implement the Productivity Commission recommendation and have been welcomed in the Law Council's submission. However, other submissions lodged subsequently, have suggested that the Productivity Commission's recommendation could be better implemented by having a stand alone provision in relation to the duty to make reasonable adjustments.⁹ The Law Council supports these suggestions on the basis of its past advocacy in relation to the need to fully implement Australia's international obligations to make disability discrimination unlawful.

The recommendation to define 'reasonable adjustments' to exclude adjustments which cause unjustifiable hardship has been incorporated into the definition of 'reasonable adjustment' in proposed sub-section 4(1).

The recommendation to identify the person on whom the duty should fall is incorporated into proposed sub-sections 5 (2) and 6 (2) but as noted above these sub-sections could be replaced by a stand alone provision incorporating the duty to make reasonable adjustments. If this were done, it should be made clear that it is the person who is potentially treating the person with a disability unfavourably, who should make the reasonable adjustment.

No examples have been inserted into the Bill as recommended by the Productivity Commission.

Recommendation 8.2 - The Disability Discrimination Act 1992 should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

Proposed section 29A introduces a general unjustifiable hardship defence for Division 2, excluding section 30. The exception in respect of section 30 goes to the issue of requests for information.

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=6A23F6BD-1C23-CACD-2250-807AF545B13D&siteName=lca

⁷ See s 8 of the *Discrimination Act 1991* (ACT)

⁸ See s 3 of the *Disability Discrimination Act 1992*

⁹ See submissions of Human Rights Law Resource Centre; NSW Disability Discrimination Legal Centre; Kate Eastman and Ben Fogarty; Australian Human Rights Commission.

The proposed section 30 is very similar to the existing section in that it provides that it is unlawful discrimination 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. The main change is that the proposed section 30 prohibits an employer from requesting or requiring genetic information from a potential or current employee except where it is required for purposes that do not involve unlawful discrimination.

The proposed section 29A largely implements the Productivity Commission recommendation.

Recommendation 8.3 - The criteria for determining unjustifiable hardship in the Disability Discrimination Act 1992 (s.11) should be expanded to;

- *Require consideration of the costs and benefits to all persons and an assessment of the net benefits to the community.*
- *Include as a relevant circumstance, the availability of financial and other assistance.*
- *Clarify that any respondent to a complaint (not just 'service providers') can expect to have their action plan considered.*

In respect of the first point, proposed sub-section 11 requires the nature of the benefit or detriment likely to accrue to, or be suffered by, the community to be considered in determining unjustifiable hardship. This requirement is included as an example for the purposes of proposed sub-section 11(a), rather than specifically in proposed sub-section 11(a). The Explanatory Memorandum to the Bill explains that relevant case law has interpreted 'any persons concerned' as extending beyond the immediate parties to the dispute. The changes are not designed to change the current status of the law. The example therefore incorporates the recommendation, however it may be preferable for the recommendation to be incorporated in the wording of the proposed sub-section itself.

Proposed sub-section 11(d) requires the consideration of the availability of financial and other assistance to the first person. This incorporates the second point raised in the recommendation above.

Existing sub-section 11(d) has largely been incorporated into proposed sub-section 11(e) such that any relevant action plans should be considered. This ensures that it is not just the action plans of service providers that are considered.

Recommendation 8.4 - The defence of inherent requirements should be available to employers in all employment situations.

Proposed section 21A aims to extend the defence of inherent requirements so that it is available to employers in all employment situations. The new section does however provide three areas of employment that are excluded from having the defence:

- Proposed paragraph 21A(4)(a) limits the operation of paragraphs 15(2)(b) or (d) which refer to denying or limiting the employee's access to opportunities for promotion, transfer or training, or any other benefits associated with employment and subjecting the person with the disability to any other detriment.
- Proposed paragraph 21A (4)(a) also limits the operation of paragraphs 16(2)(b) or (d), 17(1)(c) or (d) or 18(3)(c). Those paragraphs deal with discrimination against commission agents, contract workers and partnerships.

Due to these exceptions, the above recommendations of the Productivity Commission have not been fully implemented.

In relation to other recommendations of the Productivity Commission, the law Council notes that both the Explanatory Memorandum and the Bills Digest comment on the implementation of a number

of these recommendations.¹⁰ Unfortunately, in the time available, the Law Council is not able to comment on these other recommendations.

¹⁰ See Bills Digest at http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/6IOS6/upload_binary/6ios60.pdf;fileType=application%2Fpdf#search=%22r4024%22

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.