The Senate

Standing Committee on Legal and Constitutional Affairs

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 [Provisions]

February 2009

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RECOMMENDATIONS

Recommendation 1

3.86 That the Government undertake additional consultation with stakeholders and give further consideration to refining the test for direct discrimination in the DDA, and in particular:

- **The removal of the 'comparator' component contained at subsections 5(1) and 5(2) of the Act, and at new sections 5(1) and 5(2)(b) of the Bill; and**
- **Whether the definition of discrimination contained in the *Discrimination Act 1991 (ACT)* should be adopted in the DDA.**

Recommendation 2

3.87 That the Government consider the inclusion in either the DDA or related guidelines of examples to better illustrate the intended operation of the 'comparator' test in subsection 5(1) of the Bill.

Recommendation 3

3.88 That paragraph 30(3)(a) be amended to the effect that:

- **(a) Evidence is produced that the first person requested or required the information other than for a purpose of unlawfully discriminating against the other person on the ground of the disability.**

Recommendation 4

3.89 That the Government consider implementing recommendation 13.5 of the Productivity Commission's Review of the *Disability Discrimination Act 1992*.

Recommendation 5

3.90 That the Australian Electoral Commission expedite the implementation of more accessible voting procedures for voters with a disability.

Recommendation 6

3.91 That subject to recommendation 3, the Bill be passed.

CHAPTER 1

INTRODUCTION

1.1 On 4 December 2008, the Senate referred the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 24 February 2009.

1.2 The Bill was introduced in the House of Representatives on 3 December 2008 by the Attorney-General, the Hon. Robert McClelland, and seeks to amend the *Disability Discrimination Act 1992* ('the DDA', *Age Discrimination Act 2004* ('the ADA'), *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act') and other legislation.

1.3 Foremost among the Bill's objectives is the implementation of the recommendations of the Productivity Commission in its 2004 review of the DDA.[1] The Bill also implements the House of Representatives Standing Committee on Legal and Constitutional Affairs' recommendation[2] to remove the 'dominant purpose' test from the ADA and makes various other amendments to the human rights legislation going to the general operation of human rights law in Australia.

Summary of key amendments

1.4 In summary, the Bill:

- makes explicit that refusal to make reasonable adjustments for people with disability may also amount to discrimination;
- makes the defence of unjustifiable hardship available in relation to all unlawful discrimination on the ground of disability, except harassment and victimization;
- clarifies matters to be considered when determining unjustifiable hardship;
- clarifies that the onus of proving unjustifiable hardship falls on the person claiming it;
- makes clear that the definition of disability includes genetic predisposition to a disability and behaviour that is a symptom or manifestation of a disability;

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1 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004.

2 Older People and the Law, 2007.

- replaces the 'proportionality test' in the definition of indirect discrimination with the requirement to prove that the condition or requirement imposed has the effect of disadvantaging people with the disability of the aggrieved person;

- shifts the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with disability to the respondent, and

- extends the power to make standards under the DDA.

- seeks to assist people with assistance animals and service providers by recognising animals accredited either under a State and Territory law or by a relevant organisation.

- consolidates provisions relating to carers, assistants and aids, and addresses the issues raised by the Full Federal Court in Forest [2008] by clarifying 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.

- implements the Government's decision to change the name of the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission.

- extends the period within which a person may take a terminated complaint to the Federal or Federal Magistrates Court from 28 days to 60 days; and

- aims to improve the efficiency of the complaints handling process under the HREOC Act, such as allowing the President of the Commission to finalise a complaint where the complainant expresses no intention to pursue the matter.

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper on 17 December 2008, and invited submissions by 12 January 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 50 organisations and individuals inviting submissions.

1.6 The committee received 38 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.7 The committee held public hearings in Sydney on 21 January 2009, Melbourne on 29 January 2009, and Canberra on 6 February 2009. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.8 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

OVERVIEW

2.1 This chapter briefly examines the main provisions of the Bill.

Schedule 1 - Age Discrimination

2.2 The bill proposes to amend the *Age Discrimination Act 2004* (ADA) to remove the 'dominant reason' test.[1] Currently, 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.

2.3 Under the amendment, where a person's age[2] is one of the reasons for taking discriminatory action that disadvantages the person then it is a sufficient basis for discrimination, even if it was the only reason for the discrimination. In other words, it will no longer be necessary for a person to prove that age was the dominant reason.

2.4 This is consistent with the recommendation of the House Standing Committee on Legal and Constitutional Affairs in its 2007 report 'Older people and the law'.[3] It will also harmonise the act with other federal and state and territory anti-discrimination laws.

Schedule 2 - Disability Discrimination

The definition of disability

2.5 The amendments include reference to a genetic predisposition to disability at the end of paragraph (j) of the definition of disability in the *Disability Discrimination Act 1992* (DDA). This item makes it explicit that 'disability' does include a genetic predisposition to a disability.[4] This not only implements recommendations made by the Productivity Commission[5], but also recommendations by the Australian Law

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1 Item 1, section 16.

2 Or because of characteristics that appertain or are generally imputed to persons of the age of a person.

3 *Older People and the Law*, House of Representatives Standing Committee on Legal and Constitutional Affairs, 2007, Recommendation 43, paragraph 6.36,

4 Item 5: Subsection 4(1) (paragraph (j) of the definition of disability)

5 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004.

Reform Commission (ALRC) and the National Health and Medical Research Council (NHMRC) in their joint report.[6]

2.6 The definition of disability is also amended to include behaviour that is a symptom or manifestation of the disability[7] and explicitly include within the definition the possibility of disabilities which may exist in the future.

2.7 Item 17 of Schedule 2 repeals and replaces sections 5 to 9 of the DDA, which are the provisions that define discrimination under the DDA. The changes primarily implement recommendations of the Productivity Commission and address discrepancies raised in the decision of the Full Federal Court in *The State of Queensland (Queensland Health) v Che Forest [2008] FCAFC 96* [Forest].

Direct Discrimination

2.8 Section 5 deals with direct disability discrimination. The original intention of the DDA was to recognise that positive action may be required to avoid disability discrimination. The general view, including in the case law, was that that the DDA impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination. However, comments made by the High Court in the 2003 decision of *Purvis*[8] cast doubt on this.[9] New subsection 5(2) introduces an explicit and positive duty to make reasonable adjustments for people with disability.

2.9 New subsection 5(2) provides that a person is discriminating against another person if he or she fails to make, or proposes not to make, reasonable adjustments for the person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability in circumstances that are not materially different. Reasonable adjustments are defined as adjustments that do not impose an unjustifiable hardship on the person making the adjustments.[10] Hence, reasonable adjustments are defined in the negative.

2.10 The duty is imposed with the proviso that a person does not discriminate if the person makes all reasonable adjustments to eliminate that disadvantage or minimise it to the greatest extent possible. As the term *'reasonable adjustments'* is defined to

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6 *Essentially Yours: The Protection of Human Genetic Information in Australia,* Joint Report of the Australian Law Reform Commission and the National Health and Medical Research Council, 2003.

7 Item 6: Subsection 4(1) (at the end of the definition of disability).

8 *Purvis v The State of New South Wales (Department of Education and Training) [2003] HCA 62*

9 Hon. Robert McClelland, Second Reading Speech, House Hansard, 3 December 2008, p. 12292.

10 subsection 4(1) (Item 13). The definition is consistent with the definition of 'reasonable accommodation' in Article 2 of the Disabilities Convention.

exclude adjustments that cause *'unjustifiable hardship'*, the question of whether the person has complied with the duty takes into account the circumstances of the parties involved, including what is or is not possible for the person making the adjustments. On the other hand, the question of what adjustments can be made to 'minimise as much as possible the disadvantageous effect of the requirement or condition' requires a consideration to be made of what adjustments are possible to be made generally and not what is possible for that particular person. What is meant by 'unjustifiable hardship' is discussed in more detail later in this chapter.

Indirect Discrimination

2.11 Section 6 deals with indirect disability discrimination and is different from the existing section in several ways. In the first instance, it replaces the 'proportionality test' with the test of whether a requirement or condition disadvantages the person with disability concerned. Currently, the DDA 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 ('proportionality test'), but the person with disability cannot or would not be able to comply, and which is unreasonable in the circumstances. The Productivity Commission opined that this test appeared to be of little benefit and imposed an undue burden of proof on complainants[11].

2.12 In its place, new subsection 6(1) proposes a 'disadvantage' test, which requires that the condition or requirement imposed by the discriminator has, or is likely to have, the effect of disadvantaging people with the disability of the aggrieved person. The disadvantage test aligns the DDA with the SDA (subsections 5(2), 6(2) and 7(2)) and the ADA (section 15(1)).

2.13 Unlike section 5 (direct discrimination), existing section 6 of the DDA does not currently include *proposed* acts of indirect discrimination. It requires that a condition or requirement is actually imposed before a complaint of unlawful discrimination can be made. New subsection 6(1) extends the definition of indirect discrimination to cover incidences of proposed discrimination by specifically making reference to requirements or conditions that the discriminator 'proposes to require' of a person with disability. This is consistent with the approach taken in the SDA, the ADA and in the existing definition of direct discrimination in section 5 of the DDA.

2.14 As with subsection 5(2), subsection 6(2) imposes a duty to make reasonable adjustments to avoid an instance of indirect discrimination.

2.15 The new subsection 6(4) places the burden of proving that a requirement or condition is reasonable on the person who imposes, or proposes to impose, the requirement or condition. This amendment is consistent with the findings of the

11 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Finding 11.4, page 315.

Productivity Commission[12] to amend section 6 to require the respondent to a discrimination complaint to prove that a requirement or condition is reasonable. The rationale is that it is reasonable to expect that the person imposing the requirement or condition would have better access to information required to explain or justify the reason for it. This is also consistent with the approach taken in the Sex Discrimination Act and the Age Discrimination Act.

Assistance animals, and carers

2.16 Sections 7 and 8 of Item 17 of Schedule 2 of the Bill propose to rectify discrepancies in the operation of the DDA highlighted by the Federal Court in the case of *The State of Queensland (Queensland Health) v Che Forest*.[13]

2.17 The amendments provide that discrimination on the grounds of a person having a carer, assistant, assistant animal or disability aid is equivalent to discrimination on the ground of disability.[14] While the definition of 'carer or assistant' remains unchanged, subsection 9(2) introduces a new definition of 'assistance animal', and provides that an assistance animal is an animal that satisfies any one of three specific requirements. Firstly, it is accredited under a State or Territory law relating to the accreditation of such animals. Secondly, it is accredited by a training organisation to be prescribed in the regulations. Thirdly, it is otherwise trained to alleviate the effect of the person's disability and meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

2.18 The purpose of this amendment is to provide greater certainty for both service providers and people with assistance animals. The third limb of the definition is designed to ensure that people with disability who may not live in a State or Territory that has a relevant accreditation scheme, or who may not have access to a recognised assistance animal trainer, continue to be protected under the DDA (provided they are able to demonstrate the requirements of the relevant sections).[15]

2.19 Item 76 of Schedule 2 of the Bill inserts new section 54A into the DDA, which would exempt from unlawful discrimination requests for information to confirm the accreditation of an assistance animal or for evidence of its training to a suitable standard or related requests that the animal be under the control of the person with the disability or of an associate.

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12 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Recommendation 11.3.

13 *[2008] FCAFC 96* [Forest]. The Full Federal Court stated in *Forest* that the provisions in Part 2 of the Act, which render certain discrimination unlawful, refer only to discrimination on the grounds of the disability of a person or a person's associate, not the types of discrimination defined in sections 7–9.

14 Item 11: Subsection 4(1) (at the end of the definition of discriminate), referring to ss 7 and 8.

15 Paragraph 9(2)(c).

2.20 It also exempts discrimination consequential to the failure of the person with the assistance animal to provide appropriate evidence that the animal has the appropriate accreditation or training.

Unjustifiable Hardship

2.21 As it stands, the defence of *'unjustifiable hardship'* is not available to a respondent in matters concerning education after enrolment, employment between hiring and dismissal, or administration of Commonwealth laws and programs, sports, and land. The Bill would extend the availability of the defence to all otherwise unlawful discrimination on the ground of disability, with the exception of victimisation and harassment.

2.22 Currently, in determining whether the defence of *'unjustifiable hardship'* is made out, all the relevant circumstances of the particular case must be taken into account, including 'the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned'. Relevant case law has interpreted 'any persons concerned' as extending beyond the immediate parties to the dispute (for example, *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915) at paragraphs 16–17.[16]

2.23 Item 18 inserts an example at the end of the section to clarify that the nature of the benefit or detriment likely to accrue or be suffered by the community is one of the factors to be taken into account in making the determination. [17] The availability of financial and other assistance to the person claiming unjustifiable hardship has also been added to the criteria to be taken into account under section 11.[18] This is designed to allow for a more balanced assessment of the costs of making adjustments.

2.24 New subsection 11(2) imposes the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

Employment agencies

2.25 The new subsections 21(2) and 21(3) clarify that is it not the responsibility of an employment agency to ensure that an employer complies with the DDA. This is intended to clarify that an employment agency either acting on behalf of an employer or otherwise acting between the employer and potential employee is not to be held responsible for carrying out the employer's obligations under the DDA, including the obligation to make reasonable adjustments. However, this does not affect the operation of section 122 of the Act, which provides that a person who causes, instructs, induces, aids or permits another person to do an unlawful act is taken also to

16 See existing section 11.

17 New subsection 11(1).

18 New paragraph 11(1)(d).

have done that act. New subsection 21(3) has been introduced to avoid any doubt on that view.

Inherent requirements

2.26 As it stands, the DDA provides a defence to an employer to a discrimination complaint, if it is reasonable to take into account that the person would not be able to carry out the inherent requirements of the work sought, even were reasonable adjustments made. The defence is only available to an employer responding to a claim of disability discrimination with respect to the offer of employment or dismissal. The amendments would see this extended so that it is available to employers in all employment situations.[19] This item substantially implements a recommendation made by the Productivity Commission.[20]

2.27 This extension is only implemented to the extent that it is appropriate for the defence to apply. It will not apply when denying a person with disability access to opportunities for promotion, transfer or training; denying a person with disability access to any other benefits associated with employment, and subjecting the person with disability to any other detriment.[21]

2.28 The purpose of the first exclusion is to ensure people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others. Thus an employer could not, by denying access to the opportunity for promotion or transfer, deny an employee with disability the opportunity to demonstrate that he or she can in fact carry out the inherent requirements of the job sought.

2.29 The second and third areas exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, as the employee is already carrying out the inherent requirements of the job, the defence of inherent requirements would bear no meaning. That is, if the employee is carrying out the inherent requirements of the job, but is then denied access to a benefit or is subjected to a detriment by his or her employer (other than dismissal or a change in terms or conditions), it cannot be a defence to claim that the reason for the discrimination was that the employee was unable to carry out the inherent requirements of the job.

2.30 However, if an existing employee became unable to meet the inherent requirements of the job, the defence of inherent requirements would remain available to the employer, should he or she decide to dismiss the employee or to change the terms and conditions of the employment on that basis.

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19 Item 41: Section 21A.

20 Australian Government Productivity Commission, Review of the Disability Discrimination Act 1992, 2004, Recommendation 8.4.

21 Proposed Section 21A.

2.31 An employer who denies an employee access to any other employment benefit or subjects an employee to any other detriment would continue to have available the defence that avoidance of the discrimination would cause unjustifiable hardship.

Information

2.32 New section 30 implements a recommendation of the ALRC that the DDA be amended to prohibit an employer from requesting or requiring genetic information from a job applicant or employee, except where the information is reasonably required for purposes that do not involve unlawful discrimination, such as ensuring that a person is able to perform the inherent requirements of the job.[22] The new section will apply to all requests for information to all areas of discrimination covered by the DDA.

2.33 According to the Attorney-General, new subsection 30(3) lays the onus on the person seeking the information to establish that the purpose for which the information is sought was not for unlawful discrimination. This is a reversal of the usual onus on a complainant to first establish all the elements of the unlawful conduct. While there may be difficulties associated with requiring a person to prove a negative, the provision does not impose an unduly onerous burden requiring that the defendant totally eliminate the possibility that they may have had a purpose of unlawful discrimination.[23]

Standards

2.34 New section 31 extends the scope to make standards to cover all areas of unlawful discrimination, simplify requirements for demonstrating indirect discrimination and place the burden of proving the reasonableness of a requirement or condition on the person who has imposed it. The existing provision is limited to employment, education, accommodation, public transport, the administration of Commonwealth laws and programs in respect of people with disability and access to or use of premises that are publicly accessible. This amendment also implements a recommendation of the Productivity Commission.[24]

2.35 New section 31 clarifies the existing situation, whereby Disability Standards prevail over relevant state and territory legislation. It requires that the Attorney-

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22 *Essentially Yours: The Protection of Human Genetic Information in Australia*, Joint Report of the Australian Law Reform Commission and the National Health and Medical Research Council, 2003, Recommendation 31-3.

23 Explanatory Memorandum, p. 15.

24 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Recommendation 14.3.

General take into account comments made by state and territory counterparts in making the Standards.[25]

2.36 The form of the new section 31 is different from the provision it replaces. The new provision provides explicitly that the disability standards are legislative instruments and provides a more comprehensive power for the standards to make provision in relation to reasonable adjustments, strategies and programs to prevent harassment and victimization of persons with disabilities, unjustifiable hardship and exemptions and the power of the Australian Human Rights Commission (AHRC) to grant such exemptions.

Penalties

2.37 The amendments substitute a system of penalty units for monetary figures. This is in accordance with modern drafting practice.[26]

Migration

2.38 Section 52 of the DDA currently contains an exemption from Part 1 and Part 2 of the Act for provisions in the *Migration Act 1958* (the Migration Act) and regulations made under it and for the administration of that Act and regulations. The Productivity Commission recommended that this be reviewed to ensure that the exemption extends only to those provisions that deal with issuing entry and migration visas to Australia and does not extend to administrative processes.[27] According the Explanatory memorandum, new section 52 clarifies that incidental administrative processes are not exempted from relevant parts of the Act. How far the exemption stretches is elaborated on in chapter 3.

Action plans

2.39 Presently the class of persons who can prepare action plans is restricted to include government departments, educational institutions, and providers of goods, services or facilities.[28] The amendments in new sections 59 to 64 loosen these restrictions.

2.40 Item 85 repeals existing sections 63, 64 and 65. Under new section 64 the AHRC will no longer be required to sell action plans. Instead, an action plan submitted to the Commission must be made available to the public (for example, by

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25 Existing standards are saved, notwithstanding any new duty to consult with state and territory ministers, by Item 63.

26 Items 68 and 88. See also Items 122, 131, 137 140, 141 and 163 perform a similar function in relation to the HREOC Act, while Items 1-3, 5, 7-12 and 14 of Schedule 4 have a similar effect in relation to the RDA and the SDA.

27 Australian Government Productivity Commission, Review of the Disability Discrimination Act 1992, 2004, Recommendation 12.4.

28 Section 59. See section 61 of the DDA for what action plans do.

providing a copy on the Internet). Item 86 is a savings and transitional provision to preserve existing action plans and providing for them to operate in accordance with relevant amendments following their commencement.

Schedule 3 - Human Rights and Equal Opportunity Commission Act 1986 and other acts

Human Rights and Equal Opportunity Commission Act 1986

2.41 The bill proposes amendments to the HREOC Act, and consequential amendments to other acts, to formally change the name of the Human Rights and Equal Opportunity Commission (HREOC) to the Australian Human Rights Commission (AHRC).[29]

2.42 Earlier this year, the commission changed its corporate identity to assist in promoting the AHRC as an independent national institution with the responsibility to protect and promote human rights in Australia.[30]

2.43 A key amendment to the HREOC Act is to extend from 28 to 60 days the period in which a person can take a complaint to the Federal or Federal Magistrates Court after it is terminated by the commission.[31] This gives effect to another recommendation from the Productivity Commission's report.[32]

2.44 A number of amendments are also proposed to improve the efficiency and effectiveness of the commission's complaints-handling process, including allowing the president of the commission to finalise settled complaints and complaints for which the complainant expresses no intention to pursue the matter.

2.45 These include the repeal of a provision calling for the establishment of advisory committees to assist the Commission in its functions.[33] The provision is not strictly necessary as the Commission retains the power under section 15 of the Act to consult appropriate persons, governmental organisations and non-governmental organisations in performing its functions. Other amendments include:

- a new requirement that complaints alleging a breach of human rights be made by or on behalf of one or more persons aggrieved, so as to avoid complaints being made without the knowledge of the allegedly aggrieved party.[34] The

29 Schedule 3, Part 1.

30 'HREOC will now be known as the Australian Human Rights Commission', Media Release, 4 September 2008.

31 Item 154.

32 Recommendation 13.2.

33 Item 123: Section 17, repeals section 17.

34 Item 125.

new requirement is mirrored by Item 143 in relation to discrimination in employment.

- A new power enabling the President of the Commission to decide not to inquire, or not to continue to inquire into a complaint alleging a breach of human rights if he or she is satisfied that the complaint has been settled or resolved. This will allow the Commission to close complaints that have been resolved and avoid the need for the complainant to withdraw a complaint after it has been resolved by agreement.[35]
- A new power allowing the President to decide not to inquire or not to continue to inquire into the complaint if he or she is satisfied that the complainant does not want the President to inquire or continue to inquire into the complaint, or is satisfied the complaint has been settled or resolved. This will enable the Commission to discontinue complaints where the complainant has ceased to respond to the Commission's requests for information and thereby assist the Commission to function effectively and efficiently perform its complaint-handling function.[36]
- Amendment of existing subsection 47(1) of the HREOC Act to allow for the Minister to declare an international instrument to be an international instrument relating to human rights and freedoms for the purposes of the HREOC Act without the need for gazettal, to have status as an international instrument under the Legislative Instruments Act, and to be exempt from 'sunsetting' provisions that might otherwise apply.[37]

2.46 Other amendments deal with appointments to the Commission[38], protection for the Commission from civil actions[39], agents acting for and on behalf of the Commission[40], penalties under the Act being prescribed in unitary form[41]

Racial Discrimination Act 1975 (RDA)

2.47 The effect of the first set of amendments in relation to the RDA is to remove the Community Relations Council. No members have ever been appointed to the Community Relations Council, although some of its functions were in the past

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35 Items 129 and 147

36 Item 152.

37 Items 156 and 157.

38 Items 117, 119, 149, 175 and 179

39 Item 118: Subsection 126(1), Item 159. See also Items 178 and 180, which perform a similar function in relation to the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984, respectively.

40 Items 121, 133, 135, 136, 139, 160, 161 and 164-166

41 Items 122, 131, 137 140, 141 and 163

performed by voluntary committees established on an *ad hoc* basis by the Commissioner. The new Commission will retain the power, currently in section 15 of the Human Rights and Equal Opportunity Act, to work with and consult appropriate persons, governmental organisations and non-governmental organisations.[42]

42 Items 167-172, 173-174, 176.

Chapter 3

ISSUES

Introduction

3.1 The Bill attracted widespread support, and the majority of submitters and witnesses commended the amendments on the basis that they would improve the operation of laws relating to disability discrimination and other human rights in Australia.[1] An exception to this was the Australian Chamber of Commerce and Industry (ACCI), which did not support a number of key amendments contained in the Bill.

3.2 At the outset, it is important to acknowledge the very different nature of the Disability Discrimination Act (the DDA) to other anti-discrimination legislation. Most notably, it is much more likely that a potential respondent under the DDA would incur considerable costs in complying with their obligations under the DDA than under legislation which addresses itself to discrimination in the areas of sex or race. This sets the DDA apart, and adds special focus to the fair yet practical application of obligations, and the circumstances in which they might be set aside, under the Act.

3.3 Particular support was expressed by a number of submitters for the adoption by the Government of the United Nations Convention on the Rights of Persons with a Disability[2], and for the Bill's explicit recognition that a failure to make reasonable adjustments to accommodate people with disabilities can constitute discrimination.[3]

3.4 However, most submitters also expressed concerns about the effectiveness of some provisions in achieving their objectives, and about whether the Bill went far enough in reforming the current law.[4]

3.5 This chapter addresses itself to the observations of these submitters. In general, provisions are dealt with in the order in which they appear in the Bill.

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1 See, for example, Disability Council of New South Wales, *Submission* 14, p.1; the Australian Employers' Network on Disability, *Submission* 10, p. 1; University of Sydney Students' Representative Council, *Submission* 11, p. 2; Kate Eastman and Ben Fogarty, *Submission* 23, p. 1; Dr Belinda Smith, *Submission* 15, p. 1.

2 See, for example, Spinal Cord Injuries Australia, *Submission* 6, p. 1; Public Interest Advocacy Centre, *Submission* 7, p. 4.

3 See, for example, the Australian Tertiary Education Network on Disability (ATEND), *Submission* 9, p. 1; Disability Council of New South Wales, *Submission* 14, p.2; Dr Belinda Smith, *Submission* 15, p. 5; Public Interest Advocacy Centre, *Submission* 7, p. 5.

4 See, for example, Australian Deafblind Council, *Submission 25*, p. 1; Law Council of Australia, *Submission* 17, p. 4; Dr Belinda Smith, *Submission* 15, p. 1; Carers Australia, *Submission* 8, p. 1.

Amendments to the Age Discrimination Act

3.6 Amendments to the ADA received broad support, with most submitters focussing on changes to the DDA. The exception was the ACCI, which addressed the ADA amendments extensively and recommended that the 'dominant purpose' test in the ADA be retained.[5]

Amendments to the Disability Discrimination Act

3.7 Perhaps the most common concern across the range of submissions related to the definition of discrimination in sections 5 and 6 of the DDA, as well as to prospective amendments to the definition contained in the Bill.

Direct discrimination

The 'comparator' element

3.8 The Bill does not substantially alter the direct discrimination provisions, except to add the requirement to make reasonable adjustments. However, submitters took the opportunity to question the continued use of the 'comparator' test which is retained in the legislation. A number of submitters were evidently disappointed that the redrafting of these provisions did not include any substantial change to the 'comparator' test.

3.9 The Bill proposes to define direct discrimination by reference to less favourable treatment of a person, because of their disability, than would be enjoyed by a person without the disability, in circumstances that are not materially different.[6] Thus, the definition 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.

3.10 A significant number of submitters argued for the removal of the comparative element to the definition, on the grounds that the central issue in determining whether direct disability discrimination has occurred is whether a person's treatment was because of disability, and that the definition need go no further.[7] Submitters 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. Only very rarely is there an 'actual comparator'; that is, a person who was in the same circumstances in all material respects against whom an aggrieved person's treatment can be compared. It is

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5 ACCI, *Submission* 37, p. 2.

6 New section 5.

7 See, for example, AHRC, *Submission* 16, p. 6; Kate Eastman and Ben Fogarty, *Submission* 23, p. 4; NSW Disability Discrimination Legal Centre, *Submission* 27, p. 4.

therefore necessary for Courts to consider the position of a 'hypothetical comparator'. This, according to the Australian Human Rights Commission (AHRC), 'is an exercise fraught with complexity'.[8]

3.11 The NSW Disability Discrimination Legal Centre submitted that:

> A large proportion of NSW DDLC's cases involve incidents of direct discrimination because of a manifestation of a disability, for example where children are suspended or expelled from school because of behavioural disabilities, where employees are dismissed after being absent from work for a period of time because of an illness or where a person is evicted from an apartment because of anti-social behaviour. Our advice to these clients is that, unless they can construe what happened as indirect discrimination, which is extremely difficult to do, as discussed below, they are not protected under the DDA. Another employee, student or tenant, who behaved the same way in the same circumstances, but without the disability, would have been treated the same way. Unfortunately, our clients are left without recourse in these situations.[9]

3.12 In a similar vein, the Human Rights Law Resource Centre submitted that:

> …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 … 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.
>
> …
>
> … a complaint of disability discrimination should not fail simply because a comparator cannot be found, or because the comparator displays the very characteristics of the person's disability that resulted in the discriminatory treatment. Such an approach fails to ensure substantive equality for persons with a disability and instead promotes identical treatment irrespective of difference and irrespective also of any discriminatory consequences.[10]

3.13 A number of submitters proposed the adoption of the definition contained 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 prescribed attribute.[11] Critically, such an approach does not require an explicit comparative element. However, an officer from the Attorney-General's Department submitted that:

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8 AHRC, *Submission* 16, p. 6.

9 NSW Disability Discrimination Legal Centre, *Submission* 27, p. 4.

10 Human Rights Law Resource Centre, *Submission* 20, pp 10, 11.

11 See, for example, the AHRC, *Submission* 16, p. 7; NSW Disability Discrimination Legal Centre, *Submission* 27, p. 4.

> The comparison element is almost always there anyway, I would think. Under the ACT model, you are asking, 'Was this person treated unfavourably? Were they disadvantaged?' I do not think it is too far of a step then to say, 'What would have happened had they not had that characteristic or feature?' It is quite express here and that is then seen as an element that you need to demonstrate. In the other ones, it is probably not seen as a required element, but it is clearly something that does occur in the background.[12]

3.14 Proponents of the model seem not to argue with this observation. It was argued that, 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. The distinguishing factor is that the comparator element, while potentially useful, does not form a threshold which must be cleared by the complainant in order to make their case. [13]

3.15 The AHRC, one of the proponents of the ACT model, pointed out that the committee had seen fit to recommend the model's adoption in the context of its recent review of the Sex Discrimination Act[14], and explained the outcome of the removal of the comparator test would:

> …result 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. This gets to the heart of what nondiscrimination is about and avoids the artificial and sometimes tortuous search for a hypothetical comparator.[15]

3.16 Representatives of the Attorney-General's Department were circumspect about the prospect of removing the comparator test. As well as reminding the committee that its removal would bring about another point of difference between the DDA and other anti-discrimination legislation, officers pointed out that the Productivity Commission had considered the test appropriate when it conducted its 2004 inquiry. The Productivity Commission's finding in relation to the comparator test is in contrast to its recommendation regarding the proportionality test, which the Bill removes.[16] An officer went on to elaborate on the purpose behind the comparator test:

> It does focus the test on what would have happened in a situation without a disability or what would have happened in a situation where a person of the

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12 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, pp 16–17.

13 AHRC, *Submission* 16, p. 7.

14 AHRC, *Submission* 16, p. 7. See also, for example, Dr Belinda Smith, *Submission* 15, p.

15 Mr Graeme Innes, Australian Human Rights Commissioner, *Committee Hansard*, 21 January 2009, p. 2.

16 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 15.

> opposite sex would have been considered, so it does require the court or a decision maker to focus on that element there. Some people would say that is an unnecessary element and that if you are treated unfavourably that should be sufficient to demonstrate that there is discrimination. Other people say, 'No, that's a process in which that test allows you to flesh out a few more of the issues.'[17]

3.17 The committee notes that the Productivity Commission was not in favour of the test's removal, and considered it appropriate.[18] After considering the ACT model and others, the Commission concluded that it was:

> …not convinced that these alternative approaches are significantly different in practice from the comparator approach in the DDA. Any notion of 'unfavourable', 'less favourable' or 'detrimental' treatment almost inevitably requires a notional or theoretical comparison of the treatment of the person with a disability, and the treatment that person would have received if they did not have the disability.[19]

3.18 However, the Productivity Commission did find that the DDA is unclear about what constitutes 'circumstances that are the same or not materially different', and that the DDA should be the making of a comparison under the 'comparator' test would be aided by examples in the Act or in guidelines to clarify when those circumstances apply. The Commission recommended, at 11.2, that such examples be inserted.[20]

3.19 The committee acknowledges the arguments for and against the comparator being retained in the DDA, but considers that the implementation of the Productivity Commissions recommendation to insert examples to better illustrate when circumstances are the same or not materially different would go some long way to addressing concerns. Therefore, the committee recommends that the Government consider the development and insertion of such examples into the DDA.

General limitations provision and the breadth of anti-discrimination law

3.20 A number of submitters calling for the removal of the comparator element suggested the introduction of a general limitations provision in its stead.[21] It was argued that, were the comparator test removed from the definition of direct

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17 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 16.

18 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. 307.

19 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. 307.

20 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. 312.

21 See, for example, Human Rights Law Resource Centre, *Submission* 20, pp 11, 12.

discrimination, such a provision would need to be introduced into the DDA to ensure that the right to protection against discrimination could be limited in certain circumstances, such as where it is unreasonable to require a person to accommodate the disability because of unavoidable occupational health and safety or public safety risks. Such a provision would incorporate guidance on permissible limitations on the right to non-discrimination.

3.21 On a similar point, ACCI argued that the definitions of discrimination are too broad. Although arguing for the exclusion of mental disorders which manifest themselves in addiction from the definition of discrimination in the Bill, the point made by the Chamber had parallels with the discussion of a general limitations clause, insofar as both aim to address the possibility of absurd outcomes under the Act. ACCI submitted that:

> The definition of disability is extremely wide, and can conceivably cover nearly every known (and yet to be discovered) medical disease/illness. This can also include psychiatric conditions. The problem for employers is that some conditions are:
>
> - Objectively not readily observable (genetic conditions, conditions that are not obvious by external manifestations);
> - Manifest in behaviour which is anti-social or dangerous to other persons which could be attributed to someone without underlying conditions;
> - Manifest in behaviour that is not known to result from or be predominantly caused by an underlying condition (ie. illicit or legal drug use).

3.22 The committee notes that the Bill does not contain any proposal in relation to a limitations clause. While understanding the argument for such a clause, it considers the extension of the unjustifiable hardship defence will go some way to alleviating concerns that the definition of discrimination goes too far. The committee would anticipate the opportunity to further examine the concept, and make appropriate recommendations, were the government to proceed with removal of the 'comparator' element from the test for discrimination in the DDA.

Indirect discrimination

3.23 Many submitters supported the removal of the 'proportionality' test for those seeking to prove indirect discrimination.[22] In addition, the new subsection 6(3) which shifts the onus of proving reasonableness of a condition or requirement to the respondent, also attracted widespread support.[23]

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22 See, for example, Kate Eastman and Ben Fogarty, *Submission* 23, p. 5; Dr Belinda Smith, *Submission* 15, p. 5;

23 See, for example, Dr Belinda Smith, *Submission* 15, p. 5; Law Council of Australia, *Submission* 17, p. 6; Public Interest Advocacy Centre, *Submission* 7, p. 3.

3.24 As with the definition of direct discrimination, however, a number of concerns were raised about aspects of the proposed definition of indirect discrimination.

3.25 Prominent among these was the requirement under new paragraph 6(1)(b) for the applicant to show that they do not, would not, could not or are not able to comply with the condition or requirement because of their disability.[24] A number of submitters expounded on problems associated with the need to show an inability to comply with a condition or requirement, and a number made reference to the *Hinchcliffe* case.[25] This case involved a vision impaired student who was found to be 'able to comply' with a condition in spite of considerable disadvantage in doing so. The Federal Magistrates Court noted that the applicant 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.[26]

3.26 The AHRC recommended the removal of paragraph 6(1)(b) to bring the DDA into line with the equivalent provision in the SDA, which requires the applicant to show that the respondent requires, or proposes to require the applicant to comply with a requirement or condition that has or is likely to have the effect of disadvantaging the applicant.[27] The AHRC argued that interpretation of the definition is thus simplified, and the focus of the inquiry is on the disadvantage rather than on the applicant's ability to comply with a requirement.

3.27 New paragraph 6(2)(b) attracted comments in a similar vein. It proposes to require the applicant to show that, because of their disability, they would be able to comply with the requirement or condition only if the respondent made reasonable adjustments, and proposed to not make those adjustments.

3.28 The effect of the provision is that applicants must prove that they cannot comply with a requirement or condition *only* because the respondent declines to make the adjustment. This means that a person who is able to cope with a requirement or condition, in spite of suffering disadvantage, is denied a remedy.[28] At the committee's hearing in Sydney, the Commissioner Graeme Innes put the argument this way:

> We argue that the focus should be on the disadvantage caused by the condition or requirement, as is the case under the [Sex Discrimination Act] definition of 'indirect discrimination'. A test of compliance focuses a court's inquiry on the resources and perseverance of a person with disability. It results in the court asking, in effect, what level of distress, inconvenience

24 See, for example, Blind Citizens Australia, *Submission* 24, p. 6; Vision Australia, *Submission* 32, pp 6–7; Anti-Discrimination Commissioner for Tasmania, *Submission* 1, p. 5.

25 *Hinchcliffe v University of Sydney* (2004) 186 FLR 376.

26 *Hinchcliffe v University of Sydney* (2004) 186 FLR 376, paragraph 115.

27 AHRC, *Submission* 16, p. 9. See also Dr Belinda Smith, *Submission* 15, p. 5.

28 See, for example, Human Rights Law Resource Centre, *Submission* 20, p. 14.

> and embarrassment a person with a disability should have to endure before they can be said to be unable to comply with a requirement or condition. That is a long way from equality for people with disability. The starting point should be that people with disability are entitled to live without disadvantage, not that they are expected to put up with it.[29]

3.29 The Human Rights Law Resource Centre submitted that requiring the applicant to show an inability to comply was:

> … inconsistent with the objects of the DDA, which include 'to eliminate, as far as possible, discrimination against persons on the ground of disability' in prescribed areas of activity and 'to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community'. As *Hinchliffe* illustrates, a person with a disability cannot enjoy their right to an education on an equal basis with others if they are disadvantaged by teaching methods that fail to accommodate their different circumstances.[30]

3.30 Representatives of the Attorney-General's Department submitted that, while consideration was given to the 'ability to comply' provision appearing at section 6(1)(b), its removal was not put forward because the matter was not the subject of a recommendation in the Productivity Commission's review.[31]

3.31 While the compliance test is clearly unpopular with some submitters, the committee does not consider that it received sufficient evidence from a wide variety of stakeholders of the likely effect of its removal on the way discrimination cases are heard and decided. The matter requires deeper consideration, and as a result the committee makes no recommendation on the removal of the compliance test at this stage.

Reasonable adjustment

3.32 Very strong support was received for the explicit recognition in the Bill that a failure to make *'reasonable adjustment'* can amount to discrimination.[32] The requirement to make such adjustments is introduced in paragraphs 5(2)(b) and 6(2)(b) of the Bill. Dr Belinda Smith expressed a common view:

> I strongly support the proposal to provide that failure to make reasonable adjustments amounts to discrimination. Such a provision acknowledges that

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29 Mr Graeme Innes, Australian Human Rights Commissioner, *Committee Hansard*, 21 January 2009, p. 3.

30 Human Rights Law Resource Centre, *Submission* 20, p. 15.

31 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 16.

32 See, for example, the Australian Tertiary Education Network on Disability (ATEND), *Submission* 9, p. 1; Disability Council of New South Wales, *Submission* 14, p.2; Dr Belinda Smith, *Submission* 15, p. 5.

> to achieve substantive equality, organizations need to do more than simply apply their criteria consistently and treat everyone the same.[33]

3.33 However, submitters saw a number of problems with the Bill's treatment of reasonable adjustment. One concern put by a number of submitters was the possibility that the wording of the definition of reasonable adjustment contains an assumption that the adjustments are reasonable unless they impose an unjustifiable hardship[34] Such an assumption being made is important, as the effect could otherwise be to place on the applicant the burden of proving that reasonable adjustments did not cause unjustifiable hardship on the respondent.[35] The committee accepts the argument that it would be very difficult for an applicant, without the necessary information, to prove a negative in a court setting.

3.34 Another concern centred on the definition of reasonable adjustment being tied to whether or not the adjustment imposed unjustifiable hardship. The Public Interest Advocacy Centre (PIAC) put the argument this way:

> PIAC supports the inclusion of a definition of reasonable adjustment … but submits that in order to be properly understood it is necessary that the definition include the principle underlying reasonable adjustments. This principle is that, in relation to indirect discrimination, a reasonable adjustment is one that minimises to the greatest extent possible, the disadvantageous effects of the requirement or condition; or, in relation to direct discrimination, a reasonable adjustment is one that minimises the less favourable treatment experienced by the person with a disability. An adjustment that fails to minimise the discriminatory impact is not a reasonable adjustment even if it does not impose unjustifiable hardship as such an adjustment does not fulfil the purpose of making adjustments.[36]

3.35 The corollary to this is the observation that the concept of *'unjustifiable hardship'* is intended to be a defence, and should not form part of the definition of reasonable adjustment.[37] This inter-relationship between concepts was one of the most common concerns put to the committee, in particular the conflation of the concept of reasonable adjustment with the definitions of direct and indirect discrimination, as well as the concept of unjustifiable hardship. It was argued that the definitions of discrimination are complex, and that the inclusion of reasonable adjustment with those

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33 Dr Belinda Smith, *Submission* 15, p. 5.

34 See, for example, Human Rights Law Resource Centre, *Submission* 20, p. 21. Unjustifiable hardship is discussed elsewhere in this chapter.

35 Human Rights Law Resource Centre, *Submission* 20, p. 21

36 Public Interest Advocacy Centre, *Submission* 7, p. 5. See also, for example, the Law Council of Australia, *Submission* 17, pp 4–5.

37 See, for example, NSW Disability Discrimination Legal Centre, *Submission* 27, p. 3.

definitions adds to the confusion.[38] The opportunity for the DDA to make a clear positive statement as to the duty to make reasonable adjustments is also foregone.

3.36 The Australian Human Rights Commission proposed an alternative model, whereby the need to make reasonable adjustments appears as a positive requirement after the definitions of discrimination. In place of proposed subsections 5(2) and 6(2) the Commission recommended:

> …that a provision to the following effect be inserted after the definitions of direct and indirect discrimination in [subsections] 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.
>
> '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.[39]

3.37 The Commission argues that such a stand-alone provision would bring effect to the intention of the Bill, and would be an 'appropriate, clear and consistent way of defining the scope of the duty to make reasonable adjustments'.[40] Commissioner Innes expounded on the benefits of the model at the Sydney hearing:

> The model works by providing a more detailed definition of 'reasonable adjustment' that requires a person to show that the adjustment will alleviate their disadvantage or promote equality of opportunity. The commission's model then defines a failure to make reasonable adjustments as discrimination but does not replicate the more complicated language of direct and indirect discrimination, as the bill does in proposed sections 5(2) and 6(2). The duty then applies in the areas of public life in which discrimination is unlawful. A respondent has available the defence of unjustifiable hardship. This is consistent with the bill's proposed section 4(1) definition of 'reasonable adjustment', which defines a reasonable adjustment as any adjustment that does not impose an unjustifiable hardship.[41]

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38 See, for example, Ms Robin Banks, Public Interest Advocacy Centre, *Committee Hansard*, 21 January 2009, p. 13.

39 AHRC, *Submission* 16, p. 14.

40 AHRC, *Submission* 16, p. 14.

41 Mr Graeme Innes, Australian Human Rights Commissioner, *Committee Hansard*, 21 January 2009, p. 3.

3.38 At the committee's hearing in Canberra, officers from the Attorney-General's Department submitted that 'reasonable adjustments' had always been linked to the concept of discrimination, so that:

> For example, in the concept of indirect discrimination, it is unlawful to impose an unreasonable requirement on someone that has those impacts on them as a result of their disability, so if something is unreasonable there is an obligation in there to make a reasonable adjustment to avoid having an unreasonable one. It is very much something that is focused to those concepts of discrimination.[42]

3.39 The committee was told that this rationale underpinned the decision to proceed with an explicit recognition of 'reasonable adjustments' within the scope of direct and indirect discrimination. Officers went on to explain that:

> There are a number of advantages to this model that the government has proposed. It reinforces the original intention of the Act and the fact that it was the original intention of the Act. It provides more clarity and certainty for those who need to work out what their obligations under the Act are, because it does not derogate too far from the current definitions of what discrimination is under the Act. It also provides direction for the courts by allowing them to draw on the jurisprudence that has already been established with respect to both reasonable adjustments and unjustifiable hardship, particularly the jurisprudence that was developed before *Purvis*.[43]

3.40 The committee agrees that the arrangements put forward in the Bill are complex, and considers that new sections 5 and 6 could benefit from simplification. However, the committee takes the view that proposals for simplification require in-depth analysis and consideration, a task that falls outside the scope of this inquiry. Putting aside issues of complexity, the explicit inclusion of 'reasonable adjustments' is a positive step, and consequently the committee supports the Bill's provisions in this regard.

Consistency

3.41 In the context of making comparisons between various definitions, a number of submitters made note of the fact that the definition of discrimination differs between various commonwealth acts. In respect of the definition of indirect discrimination, Dr Belinda Smith observed that:

> …it is unclear why the wording does not more closely replicate the indirect discrimination provisions of the SDA or the [ADA]. Enacting this provision would mean that, despite legislative reform, we would still have four different definitions of indirect discrimination at the federal level. If the

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42 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 17.

43 Ms Rachel Antone, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 18.

> Government is committed to harmonization of state and federal anti-discrimination laws, then it should start by ensuring consistency between the federal legislation.[44]

3.42 However, the sentiment underlying Dr Smith's submission was echoed by other submitters, and in respect of definitions for both direct and indirect discrimination.[45]

3.43 Officers from the Attorney-General's Department advised the committee that the Standing Committee of Attorneys-General (SCAG) is currently trying to harmonise in three stages the state and territory anti-discrimination laws with the Commonwealth anti-discrimination laws.[46]

3.44 The committee will follow the progress of the SCAG process, but is mindful of the very different nature of the DDA from other anti-discrimination legislation. This necessarily limits the extent to which harmonisation of scope, definition, operation and remedy can occur. Nonetheless, the committee takes this opportunity to restate its preference for maximising consistency of definitions (where it is possible and practical to do so) for similar or identical concepts across different Acts, both within and between jurisdictions.[47]

Extension to cover associates, carers, animals and aids.

3.45 The measure in new section 8 of the Bill of the operation of the DDA to associates, carers, assistance animals (usually dogs) and assistance aids garnered solid support from submitters.[48]

3.46 Specifically, concerns arose as to the requirements contained in section 9, and at new section 54A, and their potential practicality for people with assistance animals. Among other things, these provisions clarify that it is not unlawful to ask a person with an assistance animal for evidence of the animal's training, or to discriminate against the person if the evidence is not forthcoming, or if the animal is dirty or poses a threat to safety. The NSW Disability Discrimination Legal Centre submitted that:

> Where an animal is trained to alleviate the effects of the person's disability, but not accredited, there is little guidance for applicants or respondents to assess whether it will meet the requirements of section 9(2)(c)(ii).[49]

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44 Dr Belinda Smith, *Submission* 15, p. 5.

45 See, for example, the foregoing discussion of the definitions of discrimination as they appear in the DDA as compared with the SDA.

46 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 5.

47 See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *Report on the provisions of the Evidence Amendment Bill 2008*, p. 35.

48 See, for example, Carers Australia, *Submission* 8, p. 2; Law Council of Australia, *Submission* 17, p. 5; Disability Council of NSW, *Submission* 14, p. 4; AHRC, *Submission* 16, p. 18; Anti-Discrimination Commissioner for Tasmania, *Submission* 1, p. 5.

3.47 Conversely, for other submitters, the Bill's recognition of an assistance animal in spite of it not being accredited was a matter of concern. The Guide Dogs Association of South Australia and the Northern Territory submitted that:

> The training of an assistance animal is one area of concern; however the temperamental and breed suitability is another. Guide dog schools in particular ensure their staff is suitably qualified to ensure clients receive the specialist service they require. They also develop breeding programs and puppy raising programs to ensure the quality and temperament of the dogs is of the highest standard. Our concern is that assistance animals not accredited under a law of a State or Territory or animal training organisation are not of the same standard and are potentially temperamentally unsuitable to be entering public places. There is also a duty of care to ensure people are not selecting dogs that are considered prescribed breeds as assistance animals. There are many breeds that are perceived as unsafe and our concern is that these breeds will cause fear or avoidance from the public towards all assistance animals.[50]

3.48 While most submitters supported the measure in principle, some were keen to point out some potential practical problems. The Deafblind Council submitted that:

> Although [the Council] encourages the right to request that an owner produces evidence of training and qualification for an assistance animal, we stress that any request which is made should be done through appropriate and accessible communication. Many people who are deafblind use highly specialised sign language, or communicate via speech and hearing with great difficulty. Under these circumstances, merely requesting the relevant information and asking follow up questions may pose an insurmountable barrier if done incorrectly.[51]

3.49 Similarly, the Guide Dogs Association of South Australia and the Northern Territory submitted that:

> Section 54A (2) of the proposed amendment suggests that it is not unlawful for a person to request or require that the assistance animal remain under the control of another person on behalf of the person with a disability. This amendment is open to abuse and is somewhat ambiguous. Our concern is that a person can request that an assistance animal remain with a 'friend' outside while the person with a disability is permitted inside a public place. This is simple discrimination against the person with the assistance dog. Guide Dogs SA.NT would question the relevance of including this amendment. If the purpose of this is to ensure that assistance dogs are always under the control of the person with a disability or their carer, it would be prudent to include this section, but not with the stipulation that it

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49 NSW Disability Discrimination Legal Centre, *Submission* 27, p. 7. See also, for example, *Submission* 38 (name withheld), p. 1.

50 Guide Dogs SA and NT, *Submission* 26, p. 2.

51 Australian Deafblind Council, *Submission* 25, p. 3.

> is lawful for another person to request or require the assistance animal be under the control of another person.[52]

3.50 Representatives of the Attorney-General's Department submitted that the provision was designed with the aim of better defining 'assistance animal' so as to alleviate problems with the existing arrangements:

> Under the Disability Discrimination Act at the moment, the provision that relates to assistance animals is quite general…[I]t does not refer at all to state or territory laws that might actually accredit animals, and some states and territories are developing those sorts of systems. It also at the moment does not allow, for example, a shop owner or a restaurant owner to ask a person who is being accompanied by an assistance animal whether it is an assistance animal, because, in a sense, asking for that information could trigger off a complaint of unlawful discrimination [so that] on the one hand, we have this call for greater recognition of what is an assistance animal and the need to make sure that the Disability Discrimination Act is updated to reflect that. On the other hand, we also have this request for information: is it unlawful to ask someone, 'Is that an assistance animal? Is it appropriately trained?'[53]

3.51 Mr Arnaudo went on to conclude that:

> [The Bill] is trying to balance those different interests and also recognising that at the moment the Disability Discrimination Act is quite general about assistance animals. What we are trying to do is provide a bit more certainty. It is not trying to remove all the uncertainty that the current act already has.[54]

3.52 The committee acknowledges the difficulty is striking the right balance between protecting the rights of those with assistance animals, and a potential respondent's need to establish the bona fides of a person seeking access to premises and claiming to have an assistance animal, especially when that animal appears dirty or displays otherwise antisocial behaviour. There is no apparent solution, and on balance the committee considers that the provisions relating to assistance animals represent an improvement to those currently in place.

Requests for information

3.53 Proposed new section 30 is intended to implement recommendations made by the ALRC to 'prohibit an employer from requesting or requiring genetic information from a job applicant or employee, except where the information is reasonably required

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52 Guide Dogs SA and NT, *Submission* 26, p. 3.

53 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 8.

54 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 11.

for purposes that do not involve unlawful discrimination, such as ensuring that a person is able to perform the inherent requirements of the job.'[55]

3.54 The ALRC addressed its submission largely to discrimination on the basis of genetic information. The Commission expressed very strong support for proposed new section 30, and submitted that it was consistent with the findings in the *Essentially Yours* report.[56]

3.55 However, the Human Rights Law Resource Centre expressed concern that the prohibition on seeking information would not apply if evidence were produced by the employer to the effect that they did not request the information for the purpose of unlawfully discriminating against the other person on the ground of the disability. The Centre went on to observe that:

> Whilst not strictly an exemption, subsection 30(3) may in some cases have the effect of allowing discriminatory acts under the DDA if evidence is produced in favour of the respondent and not rebutted. This means that an employer need not actually prove that they did not have an unlawful purpose (in accordance with the usual civil standard of proof), but merely needs to produce evidence to the effect that the purpose is not unlawful discrimination. There is no justification for releasing the employer from the burden of proving the absence of unlawful purpose to the normal standard of proof in this circumstance and effectively creating an assumption in favour of the purpose being lawful. This is not part of the recommendations of the ALRC in *Essentially Yours*.[57]

3.56 The Australian Human Rights Commission echoed these concerns, submitting 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. … 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. 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. 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

55 *Essentially Yours: The Protection of Human Genetic Information in Australia,* Australian Law Reform Commission, 2003, Recommendation 31-3.

56 ALRC, *Submission* 19, p. 6.

57 Human Rights Law Resource Centre, *Submission* 20, p. 23.

> make an applicant's task of rebutting evidence, which may only be slight, impossible.[58]

3.57 Officers from the Attorney-General's Department explained the rationale behind the provision, and responded to the concerns expressed by submitters:

> What we are trying to do is clarify what the requirements are. [n]ew section 30 subsection (3) puts the onus on the person requesting the information that the purpose is not for unlawful discrimination…what we are saying is, 'If you're seeking that information, you have to establish that the purpose for which you are seeking it is not for unlawful discrimination, because you are not going to discriminate against them.' That reverses [the onus], but what that also does is create some difficulties for the person asking for the information, because they have to basically prove a negative. They have to prove that the information was being sought not for unlawful discrimination. In order to minimise that burden, we say that they are required to provide evidence that it is within their knowledge. If they can produce evidence that it is not for the purpose of unlawful discrimination, as long as that evidence is not rebutted by someone else, it stands basically. It is to try to rebalance it, in a sense, rather than to change it dramatically, but recognising that it is very difficult to prove a negative.[59]

3.58 ACCI opposed the amendment, arguing that:

> Employers continue to be concerned that they be able to manage their continuing legal obligations in a manner that allows them to determine and assess risk to all employees (and the public). This includes employers assessing employees against the inherent requirements of jobs and assessing OHS risk. The difficulty with assessing or knowing an employee's disability (and genetic predisposition), is that there is no positive obligations on an employee to disclose to the employer such conditions.[60]

3.59 The committee has reservations about the relatively low burden of proof placed on the person requesting information, in spite of the fact that they have the difficult task of demonstrating a negative. On the other hand, the imposition of a civil standard of proof seems excessive, in which case requiring a respondent to prove on the balance of probabilities that their information they requested was not for the purposes of discriminating (or was for solely for a purpose or purposes other than discriminating) could be too onerous.

3.60 The committee is also concerned by the wording used in new paragraph 30(3)(a), which provides that the person seeking information must adduce evidence that the information was not sought for 'the' purpose of unlawfully discriminating. The committee considers that the use of the word 'the' could bring about the failure of the

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58 AHRC, *Submission* 16, pp 19–20.

59 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 20.

60 ACCI, *Submission* 37, p. 13.

test in a case where unlawful discrimination is only one of a number of purposes for which the information was sought.

3.61 The views put in submissions concerning the Section 30 amendments illustrate the considerable difficulty in striking the correct balance between the right to privacy and the need by others for information. No perfect solution is evident, and the committee takes the view that, subject to a recommendation amending paragraph 30(3)(a), the Bill proposes a fair and reasonable way to achieve the aims of the Act.

Amendments to other Acts

3.62 The ALRC pointed out to the committee that neither the *Human Rights and Equal Opportunity Act 1996* (HREOC Act) nor the HREOC Regulations[61], specifically deal with possible future disabilities. The *Essentially Yours* report had recommended the amendment of the HREOC Act and Regulations, as well as a similar change to the *Workplace Relations Act 1996*, to specifically identify the issue of genetic status.[62] In its submission to the committee, the ALRC called for the committee to consider whether the enactment of the amendments should be followed up.[63] The Attorney-General's Department informed the committee that the Government currently considering the ALRC's recommendations.[64]

3.63 While the argument put forward by the ALRC appears to be sound, with the exception of a general endorsement of the inclusion in the Bill of genetic predisposition, the committee took insufficient other evidence on the treatment of genetic information to make any recommendation as to the amendments called for by the ALRC.

Extension of Unjustifiable hardship

3.64 The Bill proposes to extend the availability of the defence of unjustifiable hardship so that it would encompass cases involving discrimination in education after enrolment, employment between hiring and dismissal, and administration of Commonwealth laws and programs, sports, and land. The Bill also clarifies that the onus of proof for the person claiming unjustifiable hardship lies with the person claiming it.

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61 *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth).

62 *Essentially Yours: The Protection of Human Genetic Information in Australia*, Joint Report of the Australian Law Reform Commission and the National Health and Medical Research Council, 2003, Recommendation 9–3.

63 ALRC, *Submission* 19, p. 4.

64 Attorney-General's Department, answers to questions on notice, received 11 February 2009.

3.65 Support was garnered from a wide variety of submitters for the extension.[65] Others expressed qualified support for an extension, such as Vision Australia who considered an extension warranted except insofar as it would extend to the administration of Commonwealth laws and programs. Vision Australia's submission observed that:

> The exclusion of the unjustifiable hardship defence from S29 was not an oversight, and examination of the parliamentary discussion that took place around the passage of the DDA in 1992 makes it clear that there was a strong view that the Commonwealth bears an increased burden of responsibility, both to demonstrate leadership to the community by removing disability discrimination in its sphere of operations, and also to ensure that people with disability are not disadvantaged by the administration of its laws and programs. Hence, it was decided that the Commonwealth would not be able to claim unjustifiable hardship as a defence to these complaints.
>
> …
>
> In our view, the Commonwealth has moved much too slowly in removing discriminatory practices in the way it administers laws and programs. We fear that providing an extra defence will only lead to even slower progress.[66]

3.66 Others saw the matter as one of worsening inconsistency between jurisdictions. While recognising the arguments underlying the extension, the Law Council of Australia declined to endorse it, submitting that:

> …similar defences in all State and Territory discrimination statutes are rarely available to all areas of public life covered by the legislation. Extending the unjustifiable hardship defence to all areas of the Disability Discrimination Act would create further differences between jurisdictions in an area of discrimination law that already suffers substantially from a lack of uniformity and the Law Council suggests that this aspect relating to extension should be considered carefully by the Committee, as should the need for extension to all areas.[67]

3.67 New subsection 11(2), which aims to clarify that the onus of proof for proving unjustifiable hardship lies with the person claiming it, attracted solid support.[68] However, the NSW Disability Discrimination Legal Centre was concerned that section 4, when read together with the new subsection, may be interpreted as meaning

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65 See, for example, Kate Eastman and Ben Fogarty, *Submission* 23, p. 6; Australian Tertiary Education Network on Disability, *Submission* 9, p. 1; Dr Belinda Smith, *Submission* 15, p. 6; ACCI, *Submission* 37, p. 11.

66 Vision Australia, *Submission* 32, pp 8, 9.

67 Law Council of Australia, *Submission* 17, p. 7.

68 See, for example, the Law Council of Australia, *Submission* 17, p. 7; Kate Eastman and Ben Fogarty, *Submission* 23, p. 6; AHRC, *Submission* 19, p. 3.

that a person with disability has to, in effect, prove the adjustment that they are requesting is not an unjustifiable hardship, in order to establish a *prima facie* act of discrimination.[69] However, representatives from the Attorney-General's Department considered that the Bill made clear that adjustments were presumed to be reasonable, and that in demonstrating otherwise, the onus fell clearly on the person claiming unjustifiable hardship.[70]

Migration

3.68 At present, a broad exemption exists in the DDA for anything done by a person in relation to the administration of the *Migration Act 1958* and its regulations.[71] The Bill would see the exemption narrowed to include only those acts permitted or required to be decided under the Act or regulations. While the Explanatory Memorandum contends that the exemption is intended to cover only incidental administrative processes, a number of submitters argued that the exemption is still far broader than was intended by the Productivity Commission when it framed the recommendation which apparently underpins the amendment.[72]

3.69 While arguing, along with a number of other submitters[73], for the repeal of section 52 in its entirety, the Human Rights Law Resource Centre observed that the provisions:

> …may mean that disability discrimination is lawful in the exercise of detention and deportation powers under the Act, and in matters such as the registration of Migration Agents. There is no sound public policy rationale for exemptions in these circumstances.[74]

3.70 Furthermore, the Multicultural Disability Advocacy Association of NSW submitted that Australia was in breach of its human rights obligations by persisting with the exemption. It submitted that:

> Despite its official commitment to the United Nations Convention on the Rights of Persons with Disability (UNCRPD) through its ratification in July of 2008, Australia maintains discriminatory policies and practices by continuing to exempt decisions made under the Migration Act from the coverage of the DDA. It thereby contravenes Article 4(A), which requires State parties 'to adopt all appropriate legislative, administrative and other

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69 NSW Disability Discrimination Legal Centre, *Submission* 27, p. 2.

70 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 18, by reference to new section 11(2) of the Bill.

71 Explanatory Memorandum, paragraph 106.

72 See, for example, Human Rights Law Resource Centre, *Submission* 20, p. 25.

73 See, for example, People with Disabilities Australia, *Submission* 21, p. 6; Multicultural Disability Advocacy Association of NSW, *Submission* 31, p. 2; Public Interest Advocacy Centre, *Submission* 7, p. 5.

74 Human Rights Law Resource Centre, *Submission* 20, p. 25.

> measures for the implementation of the rights recognized in the … Convention'.
>
> …
>
> Discriminatory and inconsistent application of the health assessment requirements in determining eligibility under the Migration Act focuses on unwarranted assumptions about the potential economic costs of supporting a migrant or refugee with disability in the Australian community.[75]

3.71 At the committee's hearing in Sydney, Ms Robin Banks added that:

> The difficulty with any blanket exemption is that it does not have any nuance to it; it does not allow for circumstances where, in the case of migration, a person may in fact be able to establish quite easily that they would be a very solidly contributing member of the community, that they are going to be able to contribute to a family situation by being part of a family that comes to Australia and that the overall cost is not one that Australia as a country should be concerned about. The way the act operates now is to effectively say, 'We don't have to consider that; we can just say that a person with a disability can be excluded from entering this country as a migrant'.[76]

3.72 When asked whether the provision would have the outcome envisaged in the Explanatory Memorandum, an officer of the Attorney-General's Department replied that he considered the provisions:

> …achieved that outcome, which is very much to have an exemption in place for legislative instruments under the Migration Act that may be discriminatory and ensuring that the Disability Discrimination Act does not apply there. That is the current approach to it. I know that in recent months the issue of people with disability and their interaction with the migration system has been an issue of general public debate, and I understand the Minister for Immigration and Citizenship announced late last year that there will be another parliamentary inquiry into the broader issue as well, so there might be something that will come out of that process.[77]

3.73 The committee understands that terms of reference for an inquiry into the operation of health and disability with the Migration Act will be referred to the Joint Standing Committee on Migration in the near future. The committee is satisfied that the amendments in new section 52 are an improvement on the provisions currently in place. As to the narrowing of the exemption to the DDA to cover aspects of the administration of the Migration Act, the committee awaits with interest the parliamentary inquiry foreshadowed in evidence.

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75 Multicultural Disability Advocacy Association of NSW, *Submission* 31, p. 2.

76 Ms Robin Banks, Public Interest Advocacy Centre, *Committee Hansard*, 21 January 2009, p. 14.

77 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 2.

Inherent requirements

3.74 The Bill implements a recommendation of the Productivity Commission to extend the defence of 'inherent requirements' so that it is available to employers in all employment situations.[78] The defence of 'inherent requirements' is a defence that provides that it is not unlawful to discriminate against a person with disability if he or she would be unable to perform the inherent requirements of the employment, even if reasonable adjustments were made. At present, the defence is only available to an employer responding to a claim of disability discrimination with respect to the offer of employment or dismissal.

3.75 However, it is important to note that the Bill would not make the defence available in cases of discrimination relating to opportunities for promotion, training or transfer. According to the Attorney-General's Department, this ensures that people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others.[79]

3.76 PIAC called for the clarification of the burden of proof in relation to the ability to fulfil inherent requirements, and for a duty to be placed on employers to properly consider the job's inherent requirements and the applicant's ability to fulfil them, and that in the event they fail to do so, damages or revisitation of the decision be considered as remedies. The Centre took the view that the respondent to a claim of discrimination ought to be capable of proving that it properly considered the inherent requirements and whether or not the complainant could fulfil those requirements at the time of making a challenged decision rather than at some later time.

3.77 To do otherwise, argues PIAC, would allow discriminatory attitudes to be justified at a later stage:

> Take, for example, the situation of an employer deciding not to employ a person because of that person's disability without having any basis for that decision and without considering the question of inherent requirements and the person's capacity to fulfil those requirements. If this decision became the subject of a complaint of unlawful disability discrimination, the employer should not be able to justify its actions after the fact [by] establishing that the person could not fulfil the inherent requirements of the job. Rather, the conduct should be found to be unlawfully discriminatory with possible remedies including damages for the failure to properly consider the person's application and/or a requirement that the employer revisit the decision giving full consideration to the question of inherent requirements and the person's capacity to fulfil such requirements. This approach would discourage employers from continuing to hold discriminatory views and require them to establish proper employment processes that identify up-front the inherent requirements of positions and

78 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Recommendation 8.4.

79 Attorney-General's Department, answers to questions on notice, received 11 February 2009.

> determine effective mechanisms of testing through the recruitment process whether or not candidates, with and without disabilities, fulfil those inherent requirements.[80]

3.78 The committee can see the potential for a respondent to take advantage of the provision as it is currently drafted, although any requirement to demonstrate that inherent requirements were considered prior to the decision being made would be difficult to make out.

3.79 The committee takes the view that the extension of 'unjustifiable hardship' will promote the fair, just and reasonable operation of discrimination law, and consequently supports its inclusion in the Bill.

Standing before a court or commission

3.80 Various submitters, including the NSW Disability Discrimination Legal Centre and People with Disabilities, raised as a concern the restrictions placed on legal standing before judicial and quasi-judicial bodies in respect of initiating actions for discrimination. Currently, representative bodies do not have standing in their own right. A person who alleges unlawful discrimination must take the complaint forward.[81]

3.81 The committee heard that this situation derives from a conflict between the representative complaints provisions in the HREOC Act and those in the *Federal Court of Australia Act 1976.*[82] The result of the conflict, according to the NSW DDLC, is that:

> …systemic issues cannot be dealt with through representative organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can prove that it itself is affected by the conduct, which, given the barriers noted above, happens very rarely. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory…Amending the Federal Court of Australia Act to make the standing provisions consistent with those in the HREOC Act would address this issue.[83]

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80 Public Interest Advocacy Centre, *Submission* 7, pp 3–4. See also the Law Council of Australia, *Submission* 17, pp 7–8.

81 People with Disabilities, *Submission* 21, p. 8; NSW Disability Discrimination legal Centre, *Submission* 27, p. 9. See also, for example, Ms Robin Banks, Public Interest Advocacy Centre, *Committee Hansard*, 21 January 2009, p. 15.

82 NSW Disability Discrimination Legal Centre, *Submission* 27, p. 9.

83 NSW Disability Discrimination Legal Centre, *Submission* 27, p. 9.

3.82 The committee notes that the Productivity Commission, in its 2004 review of the DDA, recommended that:

> The Human Rights and Equal Opportunity Commission Act 1986 should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required.[84]

3.83 Representatives of the Attorney-General's Department submitted that this issue was beyond the scope of the Bill before the committee, and had implications for other areas of litigation.[85] In a subsequent written response to the committee's question, the Department reported that the Government is currently considering the Productivity Commission's recommendation.[86]

Access to electoral process

3.84 The committee took evidence from a number of submitters that went to the appropriateness of procedures for sight-impaired people to cast a secret ballot at an election. The committee heard that the Electoral Act allows only for electronic voting, one measure which can facilitate secret voting by the sight-impaired, to be conducted on a trial basis. While the committee was led to understand that electronic voting machines were used at 29 pre-polling centres during the 2007 election, only about 850 sight-impaired voters were able to use the facility. [87]

3.85 The committee was pleased to hear that the trial was successful, and that plans are underway to make electronic voting available on a wider basis.[88] Such an expansion of electronic voting, or other methods of assisting those for whom normal voting procedures are difficult, is consistent with a recommendation of the Productivity Commission, which found that:

> The Commonwealth Electoral Act 1918 should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.[89]

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84 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Finding 13.5.

85 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 19.

86 Attorney-General's Department, answers to questions on notice, received 11 February 2009.

87 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 13.

88 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 13.

89 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, Recommendation 9.2.

Recommendation 1

3.86 That the Government undertake additional consultation with stakeholders and give further consideration to refining the test for direct discrimination in the DDA, and in particular:

- **The removal of the 'comparator' component contained at subsections 5(1) and 5(2) of the Act, and at new sections 5(1) and 5(2)(b) of the Bill; and**
- **Whether the definition of discrimination contained in the *Discrimination Act 1991 (ACT)* should be adopted in the DDA.**

Recommendation 2

3.87 That the Government consider the inclusion in either the DDA or related guidelines of examples to better illustrate the intended operation of the 'comparator' test in subsection 5(1) of the Bill.

Recommendation 3

3.88 That paragraph 30(3)(a) be amended to the effect that:

- **(a) Evidence is produced that the first person requested or required the information other than for a purpose of unlawfully discriminating against the other person on the ground of the disability.**

Recommendation 4

3.89 That the Government consider implementing recommendation 13.5 of the Productivity Commission's Review of the *Disability Discrimination Act 1992*.

Recommendation 5

3.90 That the Australian Electoral Commission expedite the implementation of more accessible voting procedures for voters with a disability.

Recommendation 6

3.91 That subject to recommendation 3, the Bill be passed.

Senator Trish Crossin

Chair

Additional Comments by Senator Guy Barnett, Deputy Chair

1.1 I support the underlying principles of the *Disability Discrimination Act 1992* (DDA) and can see merit in the amendments proposed in the current Bill and in most of the recommendations made in the Chair's draft. However, the proposal in the Chair's draft to investigate the abolition of the 'comparator' test is problematic. These Additional Comments discuss these issues in turn.

1.2 I believe there are a number of points to be made at the outset. One of the underlying concerns with various measures in the Bill is the impact they will have on costs to business. First, employers do not seek to conduct business operations or employment practices on a discriminatory basis, yet the regulation of employment and other business practices by discrimination law raises multiple issues of public policy that have the potential to unduly and inappropriately impede legitimate business decisions. This does no service to those sought to be protected by such laws.

1.3 Second, multiple regulatory jurisdictions create multiple regulatory obligations. Employers are subject to both federal and state anti-discrimination laws. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the *Workplace Relations Act 1996*. This proliferation of obligations can be confusing and challenging to employers. Again, this does nothing to aid in discouraging discrimination.

1.4 In my opinion, anti-discrimination law should have a clearly delineated scope of operation, and provide specifically identifiable obligations and avenues for redress. General anti-discrimination goals and objects should only be included in legislation where supported by detailed operational provisions that properly support compliance. They should not be repetitious or overlapping.

Definitions too broad

1.5 The Australian Chamber of Commerce and Industry (ACCI) argued that the definitions of discrimination contained in the Act, and replicated in the Bill, are too broad. The Chamber raised with the committee a case in which the Victorian Civil and Administrative Tribunal ruled that a gambling addiction could give rise to a claim of discrimination.[1] The Tribunal found that, *inter alia*:

> Notwithstanding the lack of certainty about the conclusions that might be drawn by the Tribunal and notwithstanding the present lack of temporal evidence, it is my view that there is a real possibility that the applicant could, with amplification of the evidence from suitably qualified medical practitioners, bring herself within the impairment definition. That is a

1 McDougall v Kimberley-Clark Australia Pty Ltd (Anti Discrimination) [2006] VCAT 1563

matter for future evidence, the existing evidence being insufficient for the purpose.[2]

1.6 While the Tribunal did not find in the applicant's favour due to lack of medical evidence presented, ACCI took the view that the decision stands for the proposition that an 'addiction' in the form of a compulsive gambling behaviour can be a disability under anti-discrimination legislation.[3]

1.7 ACCI also expressed concern about the classification of illicit drug addiction, and 'new' addictions such as a compulsion to use the internet, as disabilities for the purposes of the DDA. The Chamber cited a Federal Court decision in 2000 which ruled that a heroin addiction was a 'disorder, illness or disease' that would give rise to liabilities under the Act caused concern in the employer and wider community.[4]

1.8 Following that decision the Howard Government moved legislative amendments to overcome its effect. The New South Wales Government did likewise. While the NSW legislation was enacted; Commonwealth legislation was opposed at the time. ACCI expressed its support for the former government's Bill[5] to be reintroduced into the Parliament to clarify the situation for employers, and recommended that the DDA be amended to specifically exclude illicit drug addiction/dependence or gambling from the definition of 'disability' under the DDA.[6]

1.9 I agree that the definition of disability is extremely wide, and could conceivably cover nearly every known (and yet to be discovered) medical disease or illness. To this end, I agree with ACCI that addictions should be excluded from the operation of the Act, and recommend that the Government introduce such an amendment as soon as possible.

Recommendation

That the Government introduce an amendment to the Disability Discrimination Act to specifically exclude addictions to illicit drugs, gambling and the internet as grounds for a claim of discrimination under the Act.

Assistance animals

1.10 I note the general support received for the Bill from those who use assistance animals.7 Blind Citizens Australia, for example, considered that the Bill provided

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2 McDougall v Kimberley-Clark Australia Pty Ltd (Anti Discrimination) [2006] VCAT 1563, paragraph 16.

3 ACCI, *Submission* 37, p. 19.

4 Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd

5 Disability Discrimination Act Amendment Bill 2003

6 ACCI, *Submission* 37, p. 20.

7 See, for example, Physical Disability Australia, *Submission* 5, pp 7–8.

clarification regarding the use and definition of assistance animals, and promoted harmony between the State, Territory and Federal laws, which was critical to reducing ambiguity and confusion.[8]

1.11 The Sydney Opera House also indicated its support for the Bill's move to exempt from unlawful discrimination requests to produce evidence that an assistance animal has been trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place. According to the Opera House, this will provide more certainty for businesses and service providers around the operation of section 9 of the DDA.[9]

1.12 I strongly support the provisions in the Bill in respect of assistance animals, and also endorse the recommendation of the Chair's draft in respect of the assistance animals regime.

Retention of 'comparator'

1.13 A number of submitters called for the removal of that part of the discrimination test which requires the complainant to show that, because of the disability, the respondent treated the complainant less favourably than they would treat a person without the disability in circumstances that are not materially different.[10]

1.14 However, I take the view that the comparator test compels the decision maker to consider a broader range of issues in considering the case made by the applicant. I therefore support the Bill's retention of the comparator test.

1.15 To this end, I do not support the recommendation in the Chair's draft to investigate the removal of the comparator test. However, I do support the Chair's later recommendation to provide examples to guide users of the legislation in determining their compliance with its requirements.

Reasonable Adjustments

1.16 The Bill proposes to explicitly recognise a duty to make reasonable adjustments for people with a disability. ACCI does not agree with that proposal, on the basis that it would create a new obligation where none currently exists. ACCI also does not agree with the suggestion that such an obligation was Parliament’s original intention.[11]

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8 Blind Citizens Australia, *Submission* 24, p. 2.

9 Sydney Opera House, *Submission* 22, p. 1.

10 Proposed section 5(1).

11 ACCI, *Submission* 37, p. 12.

1.17 I note ACCI's concerns, but am mindful of the fact that the concept of reasonable adjustment is not a new one, and that the need to make such adjustments has been part of the disability discrimination law for some time.12 This derives from Australia's responsibilities under the Unites Nations Convention on the Rights of Persons with Disability.

Co-regulation of Disability Standards

1.18 In its review of the DDA, the Productivity Commission made the following recommendation:

> A co-regulatory approach should be introduced to encourage the private sector to take a greater role in tackling discrimination. Industries could develop codes of conduct, and those that meet minimum criteria could be registered with HREOC. Organisations applying a code could be given some degree of protection from complaints under the DDA, for example by requiring that relevant complaints are first addressed under the code before permitting them to be heard by HREOC.[13]

1.19 At the committee's hearing in Canberra, a representative of the Attorney-General acknowledged that, while the Productivity Commission report made some recommendations about co-regulatory approaches, the Bill before the committee did not address itself to that subject. Mr Arnaudo went on to say that:

> We are looking at that issue in a more general sense to see what scope there is. There are a range of ways in which you could bring a co-regulatory approach into the Disability Discrimination Act. It is tricky in some areas—for example, do you have a role for the commission to certify things or not? At the moment the bill does not enter that area, but it is something that we are looking at. It also might be something that comes up in the review of the transport standards…[t]here are a range of issues involved in the roles of the different stakeholders in terms of developing those co-regulatory approaches and how binding they could be. But it is an issue that is on our agenda to look at. It might be an issue that comes out of that transport standards review as well.[14]

1.20 I acknowledge the likely complexity in devising and implementing a co-regulatory scheme, as well as the need to ensure that it offers sufficient protection to people with disability. However, it is important to ensure effective engagement of

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12 The Productivity Commission noted that it was an original intention of the Act that a refusal to make reasonable adjustments could amount to discrimination. See Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, pp 189, 190 and 194.

13 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. xlvi

14 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 12.

major industry sectors in achieving the aims of the DDA, and taking a co-regulatory approach is an excellent way to achieve that outcome.

1.21 In its submission to the inquiry, the Australian Railway Association (ARA) proposed that the DDA be amended to implement the Productivity Commission's recommendation that 'The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to who the Act applies.'[15] The Association pointed out that the rail industry already operates in a co-regulatory framework in respect of rail safety, and has a strong tradition of regulating its own affairs with effective co-regulatory oversight. The Association contended that this demonstrated ability to work together with regulators provides an excellent basis upon which to progress governance of Disability Standards.[16]

1.22 I call on the Government to consider the ARA's request and the merits of implementing a co-regulatory scheme.

Australian Human Rights Commission

1.23 The committee took evidence that the then Human Rights and Equal Opportunity Commission took an operational decision in September 2008 to change its name to the Australian Human Rights Commission. The committee heard that the Commission did not request permission or even consult the Minister prior to making the change, but merely advised him that the decision had been made. The Commission's status as a statutory authority was cited as justification for the unilateral nature of the decision [17]

1.24 I take issue with the Commission's course of action. The fact that the Commission is a statutory authority does not, in my view, excuse the need to seek permission from the Executive, or at the very least consult the Executive, prior to taking significant decisions such as a change in name. The fact that the decision has necessitated an amendment to legislation only serves to throw into relief the perverse consequences of the Commission's decision. It seems to me a clear proposition that an authority established by statute does not have the inherent authority to take a decision which necessitates amendments to its parent legislation. Colloquially speaking, that is to put the cart before the horse. This highlights concerns in some quarters that the Commission has become a law unto itself.

15 PC – rec 14.5.

16 ARA, *Submission* 28, p. 3.

17 Mr Graeme Innes, AHRC, *Committee Hansard*, 21 January 2009, p. 10.

Comprehensive review

1.25 I note the support received by a number of submitters for a review of overlapping anti-discrimination laws across Federal, State/Territories and within non-discrimination legislation. ACCI was one such supporter, and made the point that:

> Employers must ensure that they comply with each different jurisdiction, with various rules, procedure and jurisprudence – this is clearly regulatory confusion and deserves close examination in the future.[18]

1.26 I support the objective of achieving better consistency between jurisdictions in relation to anti-discrimination laws. This would ease the process of accessing justice for applicants, but also minimise compliance costs for business.

Electoral access

1.27 I endorse the findings of the majority report in respect of furthering access for people with disability to a secret ballot, and await progress by the Australian Electoral Commission in this regard with interest.

Age Discrimination amendments

1.28 I note the concerns expressed by ACCI in respect of the Bill's removal of the dominant purpose test for age discrimination. Nonetheless, I support the amendments proposed by the Bill.

Senator Guy Barnett

Deputy Chair

18 ACCI, p. 1.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Office of the Anti-Discrimination Commissioner
2	National Disability Services
3	David Bath
4	Adam Johnston
5	Physical Disability Australia Ltd
6	Spinal Cord Injuries Australia
7	Public Interest Advocacy Centre
8	Carers Australia
9	Australian Tertiary Education Network on Disability
10	Australian Employers' Network on Disability
11	Students' Representative Council, University of Sydney
12	Mr David Heckendorf
13	Ms Belinda Jane
14	Disability Council of NSW
15	Dr Belinda Smith
16	Australian Human Rights Commission
17	Law Council of Australia
18	Association of Australian Assistance Dogs (N.Q) Inc.
19	Australian Law Reform Commission
20	Human Rights Law Resource Centre
21	People With Disability Australia Incorporated

22	Sydney Opera House
23	Kate Eastman and Ben Fogarty
24	Blind Citizens Australia
25	Australian Deafblind Council
26	Guide Dogs SA.NT
27	NSW Disability Discrimination Legal Centre Inc
28	Australasian Railway Association Inc
29	Mr Geoff Bridger
30	Mental Health Council of Australia
31	Multicultural Disability Advocacy Association of NSW
32	Vision Australia
33	Department of Transport, Energy and Infrastructure (South Australia)
34	Arts Access Australia
35	The Hon Dr Bob Such MP JP
36	Assistance Dogs Australia Limited
37	Australian Chamber of Commerce and Industry
38	Name Withheld

ADDITIONAL INFORMATION

1	"Removing The Obstacles" Joint Draft Report sent in by Accessible Arts received 30 January 2009
2	Answers to Questions on Notice from the Australian Human Rights Commission, received 3 February 2009
3	Human Rights Law Resource Centre – Answers to Questions on Notice, received 4 February 2009
4	NSW Disability Discrimination Legal Centre – Answers to Questions on Notice, received 6 February 2009

5	Law Council of Australia – Answers to Questions on Notice, received 9 February 2009
6	Attorney-General's Department – Answers to Questions on Notice, received 11 February 2009
7	Attorney-General's Department – Answers to Questions on Notice, received 16 February 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Wednesday 21 January 2009

BANKS, Ms Robin, Chief Executive Officer
Public Interest Advocacy Group

GIVEN, Ms Fiona, Policy Officer
NSW Disability Discrimination Legal Centre

HUNYOR, Mr Jonathon, Director, Legal Section
Australian Human Rights Commission

INNES, Mr Graeme, Human Rights Commissioner and Disability Discrimination Commissioner
Australian Human Rights Commission

MASON, Mr David, Director, Disability Rights Unit
Australian Human Rights Commission

PRICE, Mr Dean, Advocacy Project Manager
People with Disability Australia Incorporated

SHULMAN, Ms Joanna, Principal Solicitor
NSW Disability Discrimination Legal Centre

Melbourne, Thursday 29 January 2009

BUDAVARI, Ms Rosemary, Policy Lawyer
Law Council of Australia

HOWIE, Ms Emily, Senior Lawyer
Human Rights Law Resource Centre

SCHLEIGER, Ms Melanie, Lawyer
Human Rights Law Resource Centre

WEBSTER, Ms Heather, Executive Director, Public Transport Division
South Australian Department of Transport, Energy and Infrastructure

Canberra, Friday 6 February 2009

ANTONE, Ms Rachel, Legal Officer, Disability Discrimination Section, Human Rights Branch
Attorney-General's Department

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch
Attorney-General's Department

FOX, Mr Stephen, Legal Officer, Disability Discrimination Section, Human Rights Branch
Attorney-General's Department