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# 2009

## Improved rights protection for people with disability

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Commentary on the 2009 changes to the  
*Disability Discrimination Act 1992 (Cth)* and  
related measures

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## 1 Introduction

The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) has made a range of significant changes to federal discrimination laws. The focus of this paper is on the major changes to the *Disability Discrimination Act 1992* (DDA), which commenced for the most part on 5 August 2009.

The main impetus for the changes to the DDA was the 2004 report of the Australian Productivity Commission, *Review of the Disability Discrimination Act 1992*,<sup>1</sup> which recommended a range of changes to improve the operation of the DDA.

This paper considers the following changes:

- Recognition of the Disabilities Convention
- Changes to the definition of disability
- Changes to the principal definition of indirect discrimination
- Introducing what is described as a ‘positive duty’ to make reasonable adjustments
- Clarifying the rights and obligations relating to assistance animals
- Making the ‘inherent requirements’ defence available to employers in a wider range of circumstances
- Making the defence of unjustifiable hardship available in all areas of public life covered by the DDA
- Modifying the prohibition on requests for information relating to disability.

The paper also provides a brief summary of significant changes to other federal human rights laws relevant to claims of disability discrimination, including the effect of the *Convention on the Rights of Persons with Disabilities Declaration 2009*.

For comprehensive coverage of case law under the DDA and other federal discrimination laws, see the Commission’s publication *Federal Discrimination Law*, now available on AustLII at <[www.austlii.edu.au/](http://www.austlii.edu.au/)> and as a free download from the Commission’s website at <[www.humanrights.gov.au/legal/fdl](http://www.humanrights.gov.au/legal/fdl)>.

## 2 Recognition of the Disabilities Convention

Section 12 of the DDA sets out the circumstances in which the Act applies. Its effect is, amongst other things, to limit the operation of the DDA’s provisions to areas over which the Commonwealth has legislative power under the *Constitution*.

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<sup>1</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 2. The Productivity Commission’s report is available online: <<http://www.pc.gov.au/projects/inquiry/dda/docs/finalreport>> at 18 August 2009.

On 30 March 2008 Australia ratified the *Convention on the Rights of Persons with Disabilities*<sup>2</sup> ('Disabilities Convention') and the 2009 amendments inserted an explicit reference to the Disabilities Convention in s 12(8)(ba) of the DDA.<sup>3</sup> The DDA now has effect to the extent that its provisions 'give effect to the Disabilities Convention'.

This amendment strengthens the Constitutional basis for the DDA and ensures that it will have a broad operation.

Prior to the amendment, a number of cases considered the application of s 12(8)(e) of the DDA which provides that the Act has effect to the extent that its provisions 'relate to matters of international concern'. It was held that preventing disability discrimination was a 'matter of international concern'. For example, in *Souliotopoulos v La Trobe University Liberal Club*,<sup>4</sup> Merkel J found that the provisions of the DDA relating to clubs and associations had effect because the prohibition of disability discrimination is a matter of 'international concern'.

### **3 Changes to the definition of disability**

The definition of disability in s 4 of the DDA has been changed to include a genetic predisposition to a disability. It is therefore unlawful to discriminate against a person because of a genetic predisposition to a disability.

The definition has also had a note added that states:

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

This note reflects the state of the law following the High Court decision in *Purvis v New South Wales (Department of Education and Training)*.<sup>5</sup>

### **4 Changes to the principal definition of indirect discrimination<sup>6</sup>**

The principal definition of indirect disability discrimination has been amended in a number of respects. Section 6 now relevantly provides:

#### **6 Indirect Disability Discrimination**

- (1) For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:

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<sup>2</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>3</sup> Schedule 2 pt 1 item 20 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

<sup>4</sup> (2002) 120 FCR 584.

<sup>5</sup> (2003) 217 CLR 92.

<sup>6</sup> Note that the amending legislation also makes changes to the principal definition of direct discrimination in s 5(1), but the changes appear to be designed to simplify the language of the section and do not seem likely to alter its operation: *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2, pt 1, item 17.

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
  - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- ...
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
  - (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

Significant changes from the previous definition of indirect discrimination are as follows:

- the definition of indirect discrimination has been extended to include *proposed* acts of indirect discrimination (s 6(1)(a));
- the section no longer requires the applicant to prove that a ‘substantially higher proportion of persons without the disability comply or are able to comply’ with the relevant requirement or condition (the ‘proportionality requirement’ in the former s 6(a));
- instead, the section now requires that an applicant prove that the requirement or condition ‘has or is likely to have, the effect of disadvantaging persons with the disability’ (s 6(1)(c)); and
- the burden of proving the ‘reasonableness’ of the requirement or condition now rests on the alleged discriminator, not the applicant.

It is still necessary for an applicant to show that they cannot comply with the requirement or condition (former s 6(c)) and they must also now show that their inability to comply is ‘because of the disability’ (s 6(1)(b)). This change seems unlikely to have any practical effect. Applicants have typically challenged requirements or conditions that have had a disparate impact upon them because of their disability and not for any other reason.<sup>7</sup>

#### **4.1 ‘Disadvantaging persons with the disability’**

Section 6(1)(c) now requires an aggrieved person to prove that the condition or requirement ‘has or is likely to have the effect of disadvantaging persons with the disability’.

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<sup>7</sup> See the coverage of indirect discrimination cases in 5.2.3 of *Federal Discrimination Law*.

The term ‘disadvantaging’ is not defined in the DDA. The Explanatory Memorandum states only that that ‘in order for there to be discrimination, there must be a differential impact’.<sup>8</sup>

Two particular issues would seem likely to arise under the new s 6(1)(c):

- defining the group of people with the disability of the aggrieved person; and
- the evidence required to establish that the group is disadvantaged by the condition or requirement

**(i) Defining the group of people with the disability of the aggrieved person**

The need to identify the relevant ‘disability’ with some precision is likely to be particularly important in this context. A broad definition of a person’s disability (for example ‘vision impairment’) may make proof of this element more difficult: it may require an aggrieved person to show that persons with a similar but less acute disability are also disadvantaged by the relevant requirement or condition.

**(ii) Evidence of disadvantage**

The nature of the evidence needed to prove that a requirement or condition ‘has, or is likely to have, the effect of disadvantaging people with the disability’ is likely to vary from case-to-case.

In the context of the *Sex Discrimination Act 1984* (Cth) (SDA), it has been successfully argued that the requirement to work full-time is a condition, requirement or practice that has the effect of disadvantaging women. The courts have accepted, generally as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities.<sup>9</sup>

There are also indications of a similar approach in decisions under the pre-2009 indirect discrimination provisions of the DDA concerning the ‘proportionality requirement’, but it is clear that it will depend upon the nature of the case.

For example, in *Penhall-Jones v State of NSW*,<sup>10</sup> the applicant alleged that she had been indirectly discriminated against because her employer required her to attend formal and stressful interviews. Under the former indirect discrimination provisions, the applicant was required to show that a substantially higher proportion of people without her disability (which was adjustment disorder) could comply. Raphael FM rejected Ms Penhall-Jones’ claim because she had not led any evidence of how other persons with her disability would have responded to such an interview, nor how

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<sup>8</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 9 [41-3].

<sup>9</sup> See *Hickie v Hunt & Hunt* [1998] HREOCA 8, [6.17.10] (extract at (1998) EOC 92-910); *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [70].

<sup>10</sup> [2008] FMCA 832, [69].

persons without her disability would have responded. In reaching this conclusion, however, his Honour accepted

that there are occasions where one can take the evidence of one complainant as being typical of all members of the group. One person in a wheelchair who complained that she was unable to climb the stairs to the Opera House might be accepted as speaking for all persons in her position, but the very nature of the complaints made by Ms Penhall-Jones cries out for more particularisation of the group to which it is said she belongs. In the absence of such particularisation Ms Penhall-Jones cannot proceed with a claim of indirect discrimination.<sup>11</sup>

In *Rawcliffe v Northern Sydney Central Coast Area Health Service*,<sup>12</sup> Smith FM noted that the authorities on former s 6(a) 'allow considerable flexibility'<sup>13</sup> on the identification of the relevant groups for comparison, including the application of 'commonsense'<sup>14</sup> or 'ordinary human experience of which I can take judicial notice',<sup>15</sup> rather than necessarily requiring statistical or other such evidence.<sup>16</sup>

## **4.2 Shifting the burden of proof**

The burden of proving that a requirement or condition is reasonable has now shifted to the respondent (s 6(4)). This brings the DDA into line with the approach to indirect discrimination under the SDA and *Age Discrimination Act 2004* (Cth) (ADA).

The Explanatory Memorandum to the amending legislation explains that the change implements a recommendation of the Productivity Commission and that '[i]t 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.'<sup>17</sup>

## **5 Introducing a 'duty to make reasonable adjustments'**

Perhaps the most significant of the changes made by the 2009 amendments to the DDA is the introduction of what is described as a 'duty to make reasonable adjustments for a person with disability'.<sup>18</sup> Introducing a positive duty to make reasonable adjustments was one of the recommendations of the Productivity Commission's review and is consistent with the requirement to make 'reasonable accommodation' in the Disabilities Convention.<sup>19</sup>

The Explanatory Memorandum to the amending legislation states:

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<sup>11</sup> [2008] FMCA 832, [69].

<sup>12</sup> [2007] FMCA 931.

<sup>13</sup> [2007] FMCA 931, [84].

<sup>14</sup> [2007] FMCA 931, [87].

<sup>15</sup> [2007] FMCA 931, [86].

<sup>16</sup> Approving *Jordan v North Coast Area Health Service (No 2)* [2005] NSWADT 258.

<sup>17</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 10 [41-11]-[41-12].

<sup>18</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 8 [35].

<sup>19</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-7].

Until relatively recently, the general view, including in the case law, was that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination – subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted.<sup>20</sup>

However, the majority of the High Court in *Purvis v New South Wales*, considering the direct discrimination provisions of the DDA, rejected the suggestion that they imposed an obligation to provide reasonable adjustment to accommodate a person's disability.<sup>21</sup> Any obligation could therefore only arise through the operation of the indirect discrimination provisions.

The 2009 amendments are said to make 'explicit the positive duty to make reasonable adjustments for a person with disability'.<sup>22</sup> It should be noted, however, that despite the claim that there is now a 'positive duty', the amendments in effect provide a cause of action for a failure to make reasonable adjustments. There is not a pro-active obligation on service providers or government agencies etc to ensure that existing structural features that may disadvantage people with disability are removed or altered.

The duty is embedded into the definitions of both direct (s 5(2)) and indirect (s 6(2)) discrimination.

Note that in the educational context, the *Disability Standards for Education 2005* also impose an obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities.<sup>23</sup> This paper does not consider those existing provisions.

## **5.1 What are 'reasonable adjustments'?**

'Reasonable adjustment' is defined in subsection 4(1) as follows:

[a]n adjustment to be made by a person is a *reasonable adjustment* unless making the adjustment would impose an unjustifiable hardship on the person.

Accordingly, 'reasonable adjustments' are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.<sup>24</sup>

Section 11 contains a definition of unjustifiable hardship and provides that for the purposes of the DDA, 'the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship' (s 11(2)).

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<sup>20</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [38].

<sup>21</sup> (2003) 217 CLR 92, 159 [217]-[218] (Gummow, Hayne and Heydon JJ); 175 [273] (Callinan J agreeing); 127 [104] (Kirby and McHugh JJ).

<sup>22</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 8 [35].

<sup>23</sup> See Part 3 and paras 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c) and 7.2(6)(c).

<sup>24</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [36].

In practice, it seems that:

- it is for an aggrieved person to identify the adjustment(s); and
- a person who refuses or fails to make the adjustment(s) must demonstrate that making the adjustment(s) would impose an unjustifiable hardship upon them.

## **5.2 Reasonable adjustments and direct discrimination**

The definition of direct discrimination introduces a duty to make reasonable adjustments as follows:

- 5(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
  - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

This would seem to operate as follows:

- The aggrieved person identifies the adjustment(s)
- The respondent refuses or fails to make the adjustment(s)
- The respondent may argue that the adjustments are not reasonable because they impose an unjustifiable hardship
- If the adjustments are reasonable, the aggrieved person must show that
  - the failure to make the adjustments has the effect that the aggrieved person is treated less favourably than a person without the disability in the same circumstances; and
  - the less favourable treatment is *because of* the aggrieved person's disability.

The causal link between the disability and the less favourable treatment ('because of') should not be understood as requiring proof of any intention or motive to discriminate or disadvantage.<sup>25</sup>

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<sup>25</sup> See discussion of the cases on intention and motive in *Federal Discrimination Law* at 5.2.2(a)(i).



What s 5(2)(b) appears to require is that the *effect* of the failure to make reasonable adjustment (ie the less favourable treatment) can be linked to a person's disability rather than to some other factor.

### **5.3 Reasonable adjustments and indirect discrimination**

The definition of indirect discrimination also includes a duty to make reasonable adjustments. Section 6(2) provides:

- 6(2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

Section 6(3) provides relevantly that s 6(2) 'does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case'. The onus of proving reasonableness lies on the respondent (s 6(4)).

The Explanatory Memorandum to the amending legislation states that

a person does not discriminate if the person makes all reasonable adjustments to eliminate the disadvantage or minimise it to the greatest extent possible.

...the question of whether the person has made 'all reasonable adjustments' 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* – not what is possible *for that particular person*.<sup>26</sup>

The section would seem to operate as follows:

- The aggrieved person:
  - identifies a requirement or condition;
  - identifies a reasonable adjustment; and

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<sup>26</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-8] -10 [41-9] (emphasis in original).

- can prove that because of their disability they can comply with the requirement or condition only with the reasonable adjustment.
- The respondent refuses or fails to make the adjustment(s)
- The respondent may argue that the adjustment(s) are not reasonable because they impose an unjustifiable hardship
- If the adjustments are reasonable, the aggrieved person must show that the failure to make the adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- In any event, if the respondent can show that the requirement or condition is reasonable, the duty does not apply.

## **6 Clarifying the rights and obligations relating to assistance animals**

The 2009 amendments have sought to clarify the law following the decision of the Full Federal Court in *Queensland v Forest* ('*Forest*').<sup>27</sup> The effect of the decision of Spender and Emmett JJ in *Forest* was that it was not enough for an applicant to show that they have been treated less favourably because they were accompanied by an assistance animal under (the then) s 9 of the DDA. It was also necessary to show that the person had been discriminated against on the ground of their disability.<sup>28</sup> This left little room for s 9 to operate.

Section 8 now provides, relevantly:

- (1) This Act applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability.

Example: For the purposes of section 5 (direct discrimination), circumstances are not materially different because of the fact that a person with a disability require adjustments for the person's carer, assistant, assistance animal or disability aid (see subsection 5(3)).

- (2) For the purposes of subsection (1), but without limiting that subsection, this Act has effect in relation to a person with a disability who has a carer, assistant, assistance animal or disability aid as if:
  - (a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has the carer, assistant animal or aid; and
  - (b) each other reference to a disability were a reference to the carer, assistant, animal or aid.
- (3) This section does not apply to section 48 (infectious diseases) or section 54A (exemptions in relation to assistance animals)

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<sup>27</sup> [2008] FCAFC 96.

<sup>28</sup> [2008] FCAFC 96, [111]-[118].

This new section makes it clear that discrimination on the ground of having an assistance animal (or carer, assistant or disability aid) is to be treated as discrimination on the ground of disability. It is not necessary to separately prove that the discrimination occurs on the ground of disability.

## **6.1 What is an ‘assistance animal’?**

Section 9 (2) defines an assistance animal as a dog or other animal that is:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Note: For exemptions from Part 2 for discrimination in relation to assistance animals, see section 54A.

The Explanatory Memorandum to the 2009 amendments to the DDA states:

The purpose of this amendment is to provide greater certainty to both service providers and people with assistance animals. The third limb of the definition (paragraph 9(2)(c)) 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 Disability Discrimination Act (if they are able to demonstrate the requirements of the relevant sections).<sup>29</sup>

## **6.2 Exemptions relating to assistance animals**

The DDA now provides for specific exemptions relating to assistance animals. The Explanatory Memorandum to the 2009 amendments states that new s 54A provides ‘certainty for both people with assistance animals and service providers by clarifying the entitlements and obligations of both parties’.<sup>30</sup>

New s 54A provides that it is not unlawful:

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<sup>29</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11 [50].

<sup>30</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 19 [111].

- to request or require that an assistance animal remain under the control of the person with the disability or another person on behalf of the person with the disability (s 54A(2)); an assistance animal may be under the control of a person even if it is not under the person's direct physical control (s 54A(3)).
- for a person to discriminate against a person with a disability on the ground of the disability if:
  - they reasonably suspect that the assistance animal has an infectious disease; and
  - the discrimination is reasonably necessary to protect public health or the health of other animals (s 54A(4)).
- for a person to request the person with the disability to produce evidence that an animal:
  - is an 'assistance animal'; or
  - is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place (s 54A(5)).
- for a person to discriminate on the ground that a person has an assistance animal if the person with the assistance animal fails to produce evidence that the animal:
  - is an assistance animal; or
  - is trained to meet standards of hygiene and behaviour appropriate for an animal in a public place (s 54A(6)).

The provisions relating to assistance animals do not affect the liability of a person for damage to property caused by an assistance animal.<sup>31</sup>

## **7 Making the 'inherent requirements' defence available to employers in a wider range of circumstances**

From 5 August 2009, s 21A(1) of the DDA provides a defence to a claim of unlawful discrimination in work where:

- the discrimination relates to particular work(including promotion or transfer to particular work); and
- a person is, because of their disability, 'unable to carry out the inherent requirements of the particular work even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.'<sup>32</sup>

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<sup>31</sup> See DDA, s 54A(7).

This defence was previously contained in s 15(4). That section has been repealed.<sup>33</sup>

This defence applies equally to employees, contract workers, commission agents, partnerships and qualifying bodies.<sup>34</sup> It also applies in a broad range of work situations:

- in the arrangements made for the purpose of determining who should be offered employment (s15(1)(a));
- in the terms and conditions on which employment is offered (s15(1)(c));
- when offering employment, promotion or transfers (s 15(1)(d));
- in the terms and conditions of employment (s 15(2)(a)); and
- dismissing the employee (s 15(2)(c)).

However, the defence does **not** apply to:

- 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;
- subjecting the person with disability to any other detriment; or
- discrimination in s 20 (registered organisations under the *Fair Work (Registered Organisations) Act 2009*)

The Explanatory Memorandum to the 2009 amendments states:

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.

The second and third area exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, 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 and conditions), it cannot be a defence to claim that the reason for the

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<sup>32</sup> These changes were introduced by the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth), sch 1, item 41.

<sup>33</sup> Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth), sch 1, item 25.

<sup>34</sup> DDA, s 21A(3).

discrimination was that the employee was unable to carry out the inherent requirements of the job.

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.<sup>35</sup>

The onus of proving the elements of the defence is on the respondent.<sup>36</sup>

Section 21A(2) lists the factors the court must take into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the work as:

- (a) the aggrieved person's past training, qualifications and experience relevant to the particular work;
- (b) the aggrieved person's performance in working for discriminator if the aggrieved person already works for the discriminator;
- (c) any other factor that is reasonable to take into account.

## **8 Making the defence of unjustifiable hardship available in all areas of public life covered by the DDA**

The defence of unjustifiable hardship is now available in relation to discrimination in all areas of public life covered by the DDA (ss 21B and 29A). It is not available as a defence against a claim of harassment or in relation to requests for information.

Respondents must prove that avoiding discrimination would impose an unjustifiable hardship upon them (s 11(2)). This codifies the position established in the case law.<sup>37</sup>

There are two new factors a court must consider when determining what amounts to an unjustifiable hardship (s 11):

- the availability of financial and other assistance; and
- disability actions plans submitted to the Commission by *any* respondent.

The Explanatory Memorandum to the amendments states that first of these factors is:

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<sup>35</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 14 [75]-[77].

<sup>36</sup> *Commonwealth v Human Rights & Equal Opportunity Commission* (1996) 70 FCR 76, 87-88; *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254, [19] (Selway J); *Williams v Commonwealth* [2002] FMCA 89, [144].

<sup>37</sup> *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481, 492 [32]; cited with approval in *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561, 567-568 [23]-[24]

designed to allow for a more balanced assessment of the costs of making adjustments. For example, funding to assist in responding to the particular needs of people with disability is available in some circumstances.<sup>38</sup>

## **9 Modifying the prohibition on requests for information relating to disability**

The 2009 amendments have also modified the provisions relation to requests for information. Section 30 of the DDA makes it unlawful for a person to request information in connection with an act covered by the DDA if

- people who do not have the disability would not be required to provide the information in the same circumstances; or
- the information relates to disability.

It is a defence if

- (a) evidence is produced to the effect that none of the purposes for which the first person requested or required the information was the purpose of unlawfully discriminating against the other person on the ground of the disability; and
- (b) the evidence is not rebutted (s 30(3)).

The Explanatory Memorandum notes that this defence imposes only an evidential onus and

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. Rather, they are required to provide evidence that is within their knowledge and that evidence is taken to be probative of their purpose unless rebutted. They are not given the task of actually proving the proposition that they did not have any unlawful purpose. They are required to bring evidence of a purpose that is not unlawful discrimination.<sup>39</sup>

It is also not unlawful to request information if it is evidence in relation to an assistance animal (s 30(4)).

## **10 Other changes to federal discrimination laws**

### ***10.1 The Australian Human Rights Commission***

A significant change introduced by the 2009 amendments was the renaming of the Human Rights and Equal Opportunity Commission to the Australian Human Rights

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<sup>38</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 12 [57].

<sup>39</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 16 [87].

Commission. The Commission had been using the new name as its public ‘brand’ since September 2008 and this now has legal effect.

The Commission’s foundational legislation has accordingly also changed from the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

## **10.2 Procedural changes**

The most significant of the procedural changes made by the 2009 amendments is the extension to the limitation period for unlawful discrimination claims.<sup>40</sup> Once a complaint has been terminated by the President of the Australian Human Rights Commission,<sup>41</sup> an applicant now has 60 days (extended from 28) within which to make an application to the Federal Court or the Federal Magistrates Court.<sup>42</sup>

## **10.3 ‘Human rights’ functions to include the Disabilities Convention**

The Australian Human Rights Commission has a range of functions relating to human rights.<sup>43</sup> This includes monitoring, reporting and educative functions as well as the function of investigating complaints of breaches of human rights by the Commonwealth (or persons acting on their behalf).<sup>44</sup>

‘Human rights’ are defined under the AHRC Act by reference to particular international instruments including the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.<sup>45</sup>

On 20 April 2009, the Attorney-General declared the *Convention on the Rights of Persons with Disabilities* (Disabilities Convention) to be a ‘relevant international instrument’ for the purposes of the AHRC Act.<sup>46</sup> The effect of this declaration is to extend the Commission’s human rights functions to the rights contained in the Disabilities Convention.

As a result, people with disabilities will be able to complain to the Commission about an act or practice done by or on behalf of the Australian government that is alleged to breach their rights under the Disabilities Convention. If the Commission finds there has been a breach, it reports the breach to the Attorney-General. This report can

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<sup>40</sup> For other changes to the procedures of the Commission, see generally sch 3 pt 2 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

<sup>41</sup> Complaints are terminated under s 46PH of the AHRC Act.

<sup>42</sup> Section 46PO(2) of the AHRC Act; amended by sch 3 pt 2 item 154 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

<sup>43</sup> See s 11(1) and Division 3 of the AHRC Act.

<sup>44</sup> For information about making a complaint of a breach of human rights, see the Commission’s website: [http://humanrights.gov.au/complaints\\_information/HREOCA\\_breaches.html](http://humanrights.gov.au/complaints_information/HREOCA_breaches.html).

<sup>45</sup> The ICCPR is listed in the definition of ‘human rights’ in s 3 of the AHRC Act. The CRC was declared to be a ‘relevant international instrument’ under s 47 of the AHRC Act on 22 December 1992, bringing it within the definition of ‘human rights’ in s 3 of the AHRC Act.

<sup>46</sup> *Convention on the Rights of Persons with Disabilities Declaration 2009*.



include recommendations for preventing a repetition of the act or continuation of the practice, as well as the payment of compensation.<sup>47</sup>

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<sup>47</sup> Section 29 of the AHRC Act.