Submission to the Standing Committee on Legal and Constitutional Affairs

By Vision Australia

Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

January 2009

1 Introduction

1.1 About Vision Australia

Vision Australia is the largest provider of services to people who are blind or have low vision in Australia. The organisation has been formed over the past four years through the merger of several of Australia's oldest, most respected and experienced blindness and low vision agencies. Our vision is that people who are blind or have low vision will increasingly have the choice to participate fully in every facet of life in the community.

To help realise this goal, we are committed to providing high-quality services to the community of people who are blind or have low vision, and their families, in areas that include early childhood, orientation and mobility, employment, accessible information, recreation and independent living. We also work collaboratively with Government, business and the community to eliminate the barriers people who are blind or have low vision face in accessing the community or in exercising their rights as Australian citizens.

The knowledge and experience that Vision Australia gains through its interaction with clients and their families, and also by the involvement of people who are blind or have low vision at all levels of the Organisation, means that it is well placed to provide advice to governments, business and the community on the challenges faced by people who are blind or have low vision fully participating in community life.

Vision Australia believes that it is important for us, as an organisation in the blindness sector, to submit comment on the proposed amendments to the Disability Discrimination Act 1992 ("the DDA"). Our clients are profoundly affected in all aspects of their lives by the discrimination, disadvantage and inequalities that are still prevalent in Australian society. The DDA has had a

positive impact on community attitudes and has done much to reduce disability discrimination, but some aspects of the Act remain problematic and open to interpretations that, in some cases, thwart the beneficial intent of the legislation. We therefore welcome the intention of the proposed amendments to clarify and simplify the Act and reduce uncertainty for both complainants and respondents.

However, we do have a number of concerns related to particular aspects of the proposed amendments. These concerns are discussed in the following sections of this submission.

1.2 Scope and Structure of this Submission

This submission deals specifically with the proposed amendments to the DDA that are set out in the First Reading *Disability Discrimination and Other Human Rights Legislation Amendment Bill* 2008. These amendments are contained in Schedule 2 of this Bill.

The submission is structured as follows:

- Section 2 provides an outline of the general principles that form the foundation to our submission;
- Section 3 presents our response to the various amendments;

1.3 A Note on Access to the Inquiry's Submissions

We feel compelled to draw the Committee's attention to the fact that all the submissions relating to the present Inquiry are only available on the Committee's website in PDF format, which is not accessible to many people who are blind or have low vision. We note that the Australian Human Rights Commission (AHRC) has stated clearly in S2.3 of its *Worldwide Web Access Disability Discrimination Act Advisory* Notes, that:

> "The Commission's view is that organisations who distribute content only in PDF format, and who do not also make this content available in another format such as RTF, HTML, or plain text, are liable for complaints under the DDA.[1]"

It is both ironic and disappointing that an Inquiry into an Act that aims to eliminate discrimination is, in this respect, perpetuating the very discrimination it is trying to eliminate, by denying people who are blind or have low vision the opportunity to study the material that is being presented to the Committee.

Recommendation 1

[1]HREOC (2002): *World Wide Web Access: Disability Discrimination Act Advisory Notes Version 3.2, August 2002*; Archived on the Worldwide Web at www.humanrights.gov.au/disability_rights/standards/www_3/www_3.html

That the Committee review its current practices relating to publication of submissions received as part of its inquiries and investigations, and:

a) at the very least, ensure that submissions received in an accessible format (such as Word, HTML, or RTF) are published on its website in that format, alongside the PDF version;

b) require that all submissions received electronically include an accessible version as well as any PDF version submitted.

2
General Principles as Foundations for this Submission

This submission is about amendments to the DDA and other human rights legislation that have been proposed by the Australian Government, and which form the subject of a current inquiry by the Senate Constitutional and Legal Affairs Committee. The views and opinions that we express in this submission are derived from a number of general underlying principles, as well as the specifics of the proposed amendments. We outline these general principles in the following subsections.

2.1 The Primacy of Lived Experience

Through our extensive interactions with people of all ages across Australia who are blind or have low vision, we are aware that many people face disability discrimination on a regular basis. From the person who cannot obtain Centrelink forms in an accessible format, to the person who is denied carriage by a taxi driver because they are accompanied by a dog guide., to the person who is not able to do their grocery shopping online because the company website is not accessible—many, and probably almost all, people who are blind or have low vision experience the indignity and disadvantage that results from disability discrimination.

The number of people in this section of the community is increasing. Vision loss is, by and large, a disability that is age-related, and as the population in Australia is ageing, the incidence of age-related vision loss from such causes as macular degeneration and Type 2 diabetes will increase in the years ahead. Some estimates suggest that the figure will almost double over the next two decades. Regardless of the level of precision of the statistical projections, there is no doubt that there is an accelerating increase in vision loss, just as there is a similar acceleration in the percentage of the adult population that has a hearing impairment.

The DDA is a vital element in the campaign to assert the rights of people with disability and to eliminate disability discrimination at both an individual and a systemic level.

People who are blind or have low vision do not constitute a homogeneous group. In particular, there is a growing incidence of hearing impairment, just as there is in the general community. It is also important to realise that there is a small but significant subgroup comprising people who are deafblind. This group of people are typically faced with much greater disability discrimination, much of it indirect and systemic, and for this group, the DDA is particularly important as a means of promoting full social inclusion and participation.

For the DDA to be optimally effective, it should as far as possible be clear to both prospective complainants and respondents, and people with disability must be able to have confidence that by taking advantage of the Act, they will be able to have instances of disability discrimination redressed without undergoing further indignity and disadvantage as a result of the operation of the legal process.

2.2 The DDA must Promote the Objectives of the UN Convention

In December 2006, the UN General Assembly adopted the Convention on the Rights of Persons with Disabilities (referred to as "the Convention" throughout this submission). Australia was among the first countries to sign the Convention, and in May 2008 it became a part of international law following its ratification by 20 nations. Australia ratified the Convention in July 2008, and is currently conducting an inquiry into whether it will ratify the Convention's Optional Protocol for dealing with complaints from individuals about alleged breaches of the Convention.

The Convention is a landmark UN treaty, and is likely to have a significant positive impact on the lives of people with disabilities worldwide in the coming years. It redefines access and participation issues, relocating them as part of the human rights agenda, and it asserts the fundamental human rights of people with disability to participate fully in society, as well as calling on signatories to safeguard and promote these rights.

The Convention transcends ideologies and historically situated approaches to disability by establishing social, economic, political and cultural inclusion as fundamental and unchangeable rights enjoyed by people with disability. Signatories therefore have obligations to ensure that these rights are upheld, including through appropriate legislation.

The DDA has done much to ensure that Australia is well-placed to meet its obligations under the Convention, but Vision Australia believes that there is scope for improving the Act so that its beneficial intent and ameliorative mechanism are strengthened. We are pleased that the proposed amendments have these aims, and that the Bill includes specific recognition of the Convention (Sch. 2, items 4 and 20). Our suggestions in the following section are, in our view, easily incorporated, and will not unduly delay the passage of the Bill.

3
Proposed Amendments

This section provides discussion of the key proposed amendments to the DDA. In some cases, Vision Australia supports the amendment as proposed; in other cases we make recommendations for (mostly) minor changes that will more effectively promote the Act's objectives, the principles of the Convention, and the intention of the amendments themselves.

3.1 Definition of Direct Discrimination (Sch. 2, Item 17, S5)

Vision Australia welcomes the intent of the amendments to simplify the definition of direct discrimination, but we would like to see the definition simplified further. The proposed definition of direct discrimination includes two elements: the discrimination must be "because of" the disability (S5(1)), thus providing a test of causation. Secondly, unlawful discrimination requires that the discriminator must treat the person with a disability differently from the way they would treat someone without the disability in similar circumstances (S5(2)). It is this "comparator" test that has caused significant problems in the application of the Act: courts have often found it difficult to decide what the appropriate comparator should be in a particular case. The judgement of the High Court in Purvis *v* NSW illustrates just elusive it can be, and also shows that different judges can reach very different conclusions about the comparator.. We therefore believe that the proposed amendments should be seen as an opportunity to remove this comparator test as a requirement for establishing unlawful discrimination.

We support the view that a more appropriate way of defining direct disability discrimination can be derived from the approach taken in S8(1)a) of the *Discrimination Act 1991* (ACT), which states:

> "(1) For this Act, a person discriminates against another person if—
>
> (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7;
>
> …"

In the context of the DDA, this "attribute" refers to a disability.

If such a simplified definition were adopted, it would still be open to a court to use a comparator analysis to help clarify the issues, but such an analysis would not be mandatory, and so it would not be necessary for a complainant to include such an analysis, or refutations of alternative analyses, as part of its defence. We also believe that this simplified approach is more in keeping with the principles of the UN Convention, which include the assertion of the fundamental human rights of people with disability.

Recommendation 2

That the proposed definition of direct discrimination be amended to remove the comparator test and include only a test of unfavourable treatment because of a disability.

3.2 Indirect Discrimination (Sch. 2, Items 17-26, S6)

It is our impression that the majority of DDA complaints lodged by our clients involve alleged instances of indirect discrimination. The failure to provide information in an accessible format, the requirement that a job applicant have a driver's licence even though driving is not an inherent of the job, or a website that requires the use of a mouse, are all examples of indirect discrimination. We therefore welcome the intent of the proposed amendments to make the definition of indirect discrimination more workable. In particular, we support the proposal to remove the "proportionality" test from the definition. However, we do not feel that the proposal goes far enough, primarily because it has not removed (though it proposes to slightly modify the requirement that a person must be unable to comply with a particular requirement or condition as a necessary element of the substantiation of indirect discrimination. It is this concept of "unable to comply" that has proved most problematic in the operation of the DDA, and it has led to different and often counterintuitive results.

We particularly refer the Committee to the case of Hinchliffe *v*. University of Sydney[2]. This case arose from a DDA complaint brought by Ms Hinchliffe, a person with low vision, against the University of Sydney, where she was a student of occupational therapy. The court ruled that she was able to comply with a condition that all materials were supplied in standard (10-12 point) print on white paper, because she was able to reformat these materials so that she could read them most of the time. The court heard that:

- Her mother had to visit the University several times to find relevant books in the library. Each visit lasted 4 hours.
- Ms Hinchliffe and her mother spent many hours photocopying and scanning notes and articles.
- Her mother spent a significant amount of time reading notes with poor legibility and explaining diagrams and other information presented in a visual format.
- Her grandmother and mother converted sets of notes into audio tapes through a process that took 2 full days.
- Ms Hinchliffe also spent a considerable amount of time chasing up her university lecturers for appropriately-formatted materials.
- Ms Hinchliffe and her mother went to the State Library of NSW four times to investigate a software program to assist in

[2] (2004) 186 FLR 376, 383 [22], 391-2 [56]-[59].

> reformatting the notes. The program was found to be even more time-consuming. One of these visits took three hours.

The Court acknowledged that all this resulted in considerable inconvenience to Ms Hinchliffe and her family relative to other students, but nevertheless concluded that she was able to comply, and that such compliance did not constitute a "serious disadvantage". In our views, the court was in error in failing to grasp the extent of the disadvantage suffered by Ms Hinchliffe. She was able to complete the course despite the extreme stress and disadvantage that she experienced and this fact inclined the court to conclude that she could not have been seriously disadvantaged. One assumes that if she had failed, her case would have been strengthened. This is a completely untenable situation, and we find it remarkable that the hardship that Ms Hinchliffe was required to endure could be considered equivalent to compliance. The reasoning seems to have more in common with outmoded notions of perseverance and the endurance of suffering than with contemporary notions of social inclusion, dignity, and equality.

The essence of indirect discrimination involves relative disadvantage, and we believe that this should be reflected in the core of the definition in the DDA, in a similar way to its inclusion in the *Sex Discrimination Act 1985.* S5(2) of that Act reads:

> "(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person."

Under such a definition, if a respondent believed that the disadvantage claimed by the complainant were trivial or unreasonable, then the defence of "reasonableness" would be available.

Recommendation 3

That the proposed definition of indirect discrimination in the DDA be similar to that contained in the *Sex Discrimination Act 1985*, i.e., that it require a complainant to show that the respondent imposes a requirement or condition that causes disadvantage because of their disability.

3.3 Inclusion of Associates, carers, Etc. (Sch. 2, Item 17, SS7-9)

Vision Australian welcomes the proposed clarification that discrimination under the DDA includes discrimination against associates, assistants, carers, assistance animals, and disability aids, in the same way as it applies to people with a disability.

3.4 Definition of Assistance Animals (Sch. 2, Item 17, S9)

Vision Australia welcomes the clarification of the definition of assistance animals for purposes of the DDA; however, we are concerned that the proposed amendment will remove any explicit reference to dog guides (guide dogs). Historically and currently, dog guides have a special status in the community's perceptions of disability, and are not generally regarded as an "assistance animal" either by their users or the community generally, even though they are, within the meaning of the Act. We therefore believe that an explicit reference should be retained.

Recommendation 4

That S9(2) of the DDA include an explicit reference to "dog guides" ("guide dogs") either as a note or a parenthetical insertion, E.G., "(2) For the purposes of this Act, an assistance animal is a dog (including a guide dog (dog guide)) …"

3.5 Unjustifiable Hardship (Sch. 2, Item 18, 11)

Vision Australia welcomes the clarification of the criteria that must be taken into account when assessing a defence of unjustifiable hardship, and the clarification that the onus of proof lies with the person making this defence.

It is appropriate here to discuss our concern with another proposed amendment relating to unjustifiable hardship, viz., Sch. 2, Item 60, S29A. This new Section has the effect of making the defence of unjustifiable hardship available in almost all cases of discrimination covered by the Act. While Vision Australia agrees that the limited application of the unjustifiable hardship defence under the current provisions of the Act should be extended, but we do not believe that it should be extended to include complaints made in relation to the administration of Commonwealth laws and programs (S29).

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 as a defence to these complaints.

The DDA has been in operation now for over 15 years, but people who are blind or have low vision still face many areas of discrimination in the way Commonwealth laws and programs are administered. For example:

- They do not have independent access to voting in elections and referenda (though some trials of accessible electronic voting have been conducted);
- They are not able to independently complete most of the forms produced by Commonwealth departments and agencies, such as the Child Support Agency, and Centrelink;
- They do not have full and independent access to a significant amount of information made available online by Commonwealth departments and agencies because the information is not made available in accessible formats.

Our clients report many such instances of discrimination, and we are aware of instances where people who are blind or have low vision have had their Centrelink benefits terminated because they have been unable to complete forms and questionnaires that Centrelink requires recipients to provide from time to time in order to maintain their existing benefits. Despite this (in our view high) level of discrimination that our clients experience in the way Commonwealth laws and programs are administered, it is fairly rare for them to lodge formal complaints under the DDA. It is unnecessary to discuss the general disincentives to lodging DDA complaints here; suffice to say that it is our view that one incentive for lodging complaints relating to the administration of Commonwealth laws and programs is that a complainant knows in advance that they will not have to counter a defence of unjustifiable hardship. If that defence is extended to apply to such complaints, this incentive will be removed, and the number of complaints in this area will probably diminish even further.

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.

While there may be a general view that the Commonwealth does, indeed, have an extra burden of responsibility, making the unjustifiable hardship defence available in the manner proposed will mean that it will be open to the courts to interpret whether, and to what extent, this extra burden applies. Such a situation is not in the best interests of people who are blind or have low vision because it provides no certainty in any particular case. In any event, comparatively DDA complaints proceed to the Federal court, either because they are conciliated or because complainants fear an adverse costs determination so do not proceed after conciliation has failed. By making the defence of unjustifiable hardship available to the Commonwealth in the way proposed, we think that complainants will more frequently find themselves faced with the need to pursue court action, which they are unlikely to do. The Commonwealth has many more financial and legal resources available to it than do people who are blind or have low vision and who are considering lodging a DDA complaint.

Moreover, it is arguable that such an approach is consistent with the objectives of the Convention.

Recommendation 5

The proposed S29A be amended so that the defence of unjustifiable hardship is not available to the Commonwealth as a respondent to complaints about the administration of Commonwealth laws and programs. In the alternative, we recommend that the DDA include explicit recognition of the extra responsibility borne by the Commonwealth to implement the Objects of the Act.

3.6 Reasonable Adjustment (Ss5-6)

Vision Australia strongly supports the intent of the proposed amendments to make explicit the concept of "reasonable adjustment", i.e., the positive duty that organisations and individuals have to redress the disadvantages and imbalances that people with disability experience in society. This duty is in keeping with the beneficial purposes of the DDA, as well as being consistent with the Un Convention. However, we are concerned that the way in which the concept of reasonable adjustment is incorporated by the proposed amendments will thwart this intent because of the complexity it creates.

Sections 5(2) and 6(2) link the notion of reasonable adjustment with that of discrimination. In our view, the two concepts are different (though related), and linking them in this way confuses that difference, and also fails to make a clear statement about the positive duty to make reasonable adjustment. In any case, the resulting wording of these two subsections is abstruse and difficult to understand. Moreover, the same issues that apply to dealing with direct and indirect discrimination (the need for a comparator (S5), and the need to prove an inability to comply (S6)) will also apply to the application of reasonable adjustment. This, in turn, will render the concept much more uncertain and problematic than it should be. It is our view that the introduction of an explicit duty to make reasonable adjustment is one of the most significant aspects of the proposed amendment, and even taken in isolation, it is likely to have a valuable impact on improving the status of people with disability in society—but not if the current approach is followed.

Vision Australia supports the model of reasonable adjustment proposed by the Australian Human Rights Commission in its submission to the present Inquiry. This model adds a new provision (Duty to Make Reasonable Adjustment) following the definitions of discrimination in Ss5-6).

Recommendation 6

a) **That a separate provision to the following effect be inserted into the DDA:**

"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."

1. **That "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."**

4
Other Issues

Vision Australia is strongly supportive of the intention of the current proposals for amending the DDA. We would, however, like to see further amendments to the DDA in the medium-term. Such amendments would provide an opportunity to:

- Implement more of the recommendations from the Productivity Commission's 2004 review of the DDA[3];
- Harmonise relevant provisions of the DDA with similar provisions in related Acts such as the *Sex Discrimination Act 1985* (and, where appropriate, carry over into the DDA the essence of any amendments made to those Acts as a result of inquiries); and,
- Consider any other changes that would give effect to Australia's obligations under the UN Convention.

Vision Australia would especially welcome an amendment to the DDA that gave AHRC the power to initiate DDA complaints in matters of public interest. Many people who are blind or have low vision are deterred from lodging DDA complaints because they feel intimidated by the prospect of attending a conciliation conference with the respondent, who may have lawyers, senior management, and other technical staff. It is almost always a substantial emotional investment for an individual to lodge a DDA complaint, and the respondent is generally less emotionally involved, especially if they are a large organisation with legal or HR departments. Even individuals who are self-confident and have advocacy experience find the process of conciliation a challenging one. This is even more so if a complaint fails to conciliate and proceeds to the Federal court. For example, it is our understanding that in the case already discussed, Ms Hinchliffe did not exercise her right of appeal of

[3] Productivity Commission (2004): http://www.pc.gov.au/inquiry/dda/docs/finalreport

the Federal court's decision because she was completely overwhelmed and exhausted by the long and often acrimonious process of attempted conciliation and court hearings (not to mention the financial implications of a loss).

In other cases, a complainant may feel that they lack the technical knowledge to discuss why, for example, they cannot access a website. So they decide not to lodge a complaint. We are also aware of complaints where the complainant has settled for much less than they originally wanted because they were unable to make sense of the respondent's technical response as to why they could not meet the complainant's request. In a couple of instances, further complaints about the same matter, with better technical expertise to challenge the respondent's claims, revealed that the respondent's claims were not accurate, either because there was a genuine misunderstanding about what solutions would be achievable, or because there was a lack of interest in finding a solution that would meet the needs of the complainant.

Finally, instances of significant discrimination may remain unchallenged because a complaint is not lodged. Or, by the time a complaint is lodged, it may be too late to remedy the situation or the remedy may be so costly that a defence of unjustifiable hardship is successful. For example, while there is comparatively little extra cost involved in making a website accessible if accessibility is part of the design criteria from the outset, it can be much more costly to "retrofit" an inaccessible website once it has been designed. So we are aware of many websites that are inaccessible, and which will probably remain so.

We believe that the Commission is best placed to initiate DDA action in cases where it is unlikely that individual complaints will be pursued or where there are matters that go beyond the boundaries of an individual complaint. We are confident that appropriate mechanisms could be developed to ensure that perceptions of bias would be allayed.

Recommendation 7

That the Australian Government implement a medium-term program of amendments to the DDA, including an amendment that would give AHRC the power to initiate action in matters of public interest.