

# 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.<sup>1</sup> 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<sup>2</sup> 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'.<sup>3</sup> 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.<sup>4</sup> This not only implements recommendations made by the Productivity Commission<sup>5</sup>, 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.<sup>6</sup>

2.6 The definition of disability is also amended to include behaviour that is a symptom or manifestation of the disability<sup>7</sup> 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 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*<sup>8</sup> cast doubt on this.<sup>9</sup> 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.<sup>10</sup> 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<sup>11</sup>.

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

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

Productivity Commission<sup>12</sup> 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*.<sup>13</sup>

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.<sup>14</sup> 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).<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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 it is 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

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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.<sup>19</sup> This item substantially implements a recommendation made by the Productivity Commission.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

### ***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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup>

### ***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.<sup>27</sup> 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.<sup>28</sup> 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).<sup>29</sup>

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.<sup>30</sup>

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.<sup>31</sup> This gives effect to another recommendation from the Productivity Commission's report.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> The

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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.<sup>35</sup>
- 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.<sup>36</sup>
- 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.<sup>37</sup>

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

### ***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.<sup>42</sup>

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

