Chapter 3

ISSUES

Introduction

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

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

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

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

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

---

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

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

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

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

Amendments to the Age Discrimination Act

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

Amendments to the Disability Discrimination Act

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

Direct discrimination

The 'comparator' element

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

3.9 The Bill proposes to define direct discrimination by reference to less favourable treatment of a person, because of their disability, than would be enjoyed by a person without the disability, in circumstances that are not materially different.[6] Thus, the definition includes an element of causation (the treatment must be 'because of disability') and a comparative element (a comparison with a person 'in circumstances that are not materially different'). An aggrieved person must prove both elements.

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

---

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

6 New section 5.

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

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

3.11 The NSW Disability Discrimination Legal Centre submitted that:

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

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

> …The comparator test overlooks the inability of a person with a disability to control circumstances that are caused by their disability, such as disruptive behaviour … or infectiousness, as is characteristic of persons with HIV/AIDS. For this reason the comparator test is particularly problematic for people who have intellectual or non-physical disabilities.
>
> …
>
> … a complaint of disability discrimination should not fail simply because a comparator cannot be found, or because the comparator displays the very characteristics of the person's disability that resulted in the discriminatory treatment. Such an approach fails to ensure substantive equality for persons with a disability and instead promotes identical treatment irrespective of difference and irrespective also of any discriminatory consequences.[10]

3.13 A number of submitters proposed the adoption of the definition contained in the *Discrimination Act 1991 (ACT)* which provides simply that discrimination occurs when the discriminator treats or proposes to treat the other person unfavourably because the other person has a prescribed attribute.[11] Critically, such an approach does not require an explicit comparative element. However, an officer from the Attorney-General's Department submitted that:

---

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

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

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

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

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

3.14 Proponents of the model seem not to argue with this observation. It was argued that, under such a simplified test, comparative analysis may still often provide a useful analytical tool in determining whether particular treatment was partly or wholly on the ground of a protected attribute and not some other unrelated reason. The distinguishing factor is that the comparator element, while potentially useful, does not form a threshold which must be cleared by the complainant in order to make their case. [13]

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

> …result in a simple test: a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because of the other person's disability. This gets to the heart of what nondiscrimination is about and avoids the artificial and sometimes tortuous search for a hypothetical comparator.[15]

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

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

---

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

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

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

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

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

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

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

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

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

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

General limitations provision and the breadth of anti-discrimination law

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

---

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

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

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

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

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

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

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

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

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

Indirect discrimination

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reasonable adjustment

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

> …that a provision to the following effect be inserted after the definitions of direct and indirect discrimination in [subsections] 5 and 6:
>
> **Duty to make reasonable adjustment**
>
> For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if the discriminator refuses or fails to make a reasonable adjustment.
>
> 'Reasonable adjustment' should be defined as a modification or adjustment that:
>
> - alleviates a disadvantage related to an aggrieved person's disability; or
> - assists an aggrieved person to have opportunities which are, as far as possible, equal to persons without the aggrieved person's disability.[39]

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

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

---

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

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

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

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

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

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

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

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

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

Consistency

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

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

---

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

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

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

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

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

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

Extension to cover associates, carers, animals and aids.

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

3.51 Mr Arnaudo went on to conclude that:

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

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

Requests for information

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

---

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

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

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

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

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

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

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

3.56 The Australian Human Rights Commission echoed these concerns, submitting that:

> …the proposed exemption in s 30(3) should be amended to impose a clear burden on respondents to prove that they did not request information unreasonably or for the purpose of discriminating against them. … The proposed section places only a very low evidential burden on a respondent: it would appear that any evidence, however probative, 'to the effect that' the person lacked a discriminatory purpose will be sufficient. It is then for an applicant to rebut that evidence. It is not clear why a respondent is not required to bear the ordinary burden of proving the defence, as required for other defences in the DDA. The Commission submits that it does not pose an unduly or unfairly heavy burden on respondents to prove that they had a lawful reason for requesting the information. It will often be the case that only the respondent will know why information was requested. This may

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

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

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

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

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

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

3.58 ACCI opposed the amendment, arguing that:

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

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

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

---

58 AHRC, *Submission* 16, pp 19–20.

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

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

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

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

Amendments to other Acts

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

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

Extension of Unjustifiable hardship

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

Migration

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

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

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

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

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

---

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

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

71 Explanatory Memorandum, paragraph 106.

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

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

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

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

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

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

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

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

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

---

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

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

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

Inherent requirements

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

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

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

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

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

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

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

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

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

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

Standing before a court or commission

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

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

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

---

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

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

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

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

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

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

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

Access to electoral process

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

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

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

---

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

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

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

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

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

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

Recommendation 1

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

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

Recommendation 2

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

Recommendation 3

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

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

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

Senator Trish Crossin

Chair