Additional Comments by Senator Guy Barnett, Deputy Chair

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

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

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

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

Definitions too broad

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

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

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

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

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

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

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

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

Recommendation

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

Assistance animals

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

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

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

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

5 Disability Discrimination Act Amendment Bill 2003

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

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

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

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

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

Retention of 'comparator'

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

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

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

Reasonable Adjustments

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

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

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

10 Proposed section 5(1).

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

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

Co-regulation of Disability Standards

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

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

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

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

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

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

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

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

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

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

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

Australian Human Rights Commission

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

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

15 PC – rec 14.5.

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

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

Comprehensive review

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

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

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

Electoral access

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

Age Discrimination amendments

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

Senator Guy Barnett

Deputy Chair

18 ACCI, p. 1.