Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

Senate Legal and Constitutional Affairs Committee

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Introduction

1. The Law Council welcomes the opportunity to provide comments on the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (the Bill).

2. The Bill makes a number of key amendments to the *Disability Discrimination Act 1992* (the Act). The Law Council will address the following amendments only:

   - It introduces an explicit and positive duty to make 'reasonable adjustments' for people with disability. The original intention of the Act was to recognise that such adjustments may be required to avoid disability discrimination. Comments of the High Court in the 2003 decision of Purvis[1] cast doubt on this. The proposed amendments implement a Productivity Commission recommendation to remove this uncertainty.

   - This duty to make such adjustments is balanced by limiting it to measures that would not impose 'unjustifiable hardship'. The general unjustifiable hardship defence is also being extended to all areas in which discrimination is unlawful under the Act—an amendment recommended by the Productivity Commission. The amendments also clarify that the onus of proving unjustifiable hardship falls on the person claiming it, and clarifies the matters to be considered when determining unjustifiable hardship.

   - The Bill extends the 'inherent requirements' defence available to employers to most employment contexts. This defence makes it lawful to discriminate in an employment context where the person would be unable to carry out the inherent requirements of the work sought.

   - The Bill also proposes to rectify discrepancies in the operation of the Act highlighted by the Federal Court in the case of Forest.[2] 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.

   - The amendments also extend 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.

3. The Bill amends the *Age Discrimination Act 2004* to remove the 'dominant reason' test. The amendment will provide that, if a person's age is just one of the reasons for taking discriminatory action that disadvantages them, then this will be sufficient to be considered discrimination. It will no longer be necessary for a person to prove that age was the dominant reason, which gives effect to a recommendation by the Legal and Constitutional Affairs Committee Report *Older people and the law*.

[1] *Purvis v NSW Department of Education and Training* (2003) 202 ALR 133
[2] *The State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96

4. The Bill amends the *Human Rights and Equal Opportunity Act 1986* to implement the change of the organisation's name and to improve its complaint handling efficiency. More substantively, the Bill extends 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. This gives effect to another recommendation by the Productivity Commission.

5. The Law Council is in general agreement with the legislation and its objectives, subject to some exceptions. The Law Council supports attempts to improve the operation and effectiveness of the Act. The Law Council also supports the government's commitment to upholding and strengthening the rights of people with disabilities.

6. Further, the Law Council has in the past supported certain recommendations made by the Productivity Commission in its 2004 report *Review of the Disability Discrimination Act 1992*,[3] and generally supports the implementation of the Commission's recommendations.

Introducing an explicit and positive duty to make 'reasonable adjustments' for people with disability

8. New subsection 5(2) implements Productivity Commission Recommendation 8.1 by making explicit the positive duty to make reasonable adjustments for a person with disability.

9. The Explanatory Memorandum describes the new provision as follows:

   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' is defined in subsection 4(1) as adjustments that do not impose an unjustifiable hardship on the person making the adjustments.

10. It has in the past been assumed that this duty existed by implication. However, in *Purvis v NSW and the Human Rights and Equal Opportunity Commission*[4] the High Court appeared to narrow significantly the protection that the Act was thought to provide in this respect.

11. The Law Council welcomes the clarification of this matter. The Law Council agrees that it is necessary in providing adequate protection of the rights of persons with disabilities that there be a positive duty to make reasonable adjustments. However, the Law Council notes the Productivity Commission's observation that, "No issue caused as much comment during this inquiry as 'reasonable adjustments'…reasonable adjustments can mean different things to different people.[5]

[3] See the Law Council's 2008 submission to the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs on the implementation of the United Nations Convention on the Rights of Persons with Disabilities at www.lawcouncil.asn.au.
[4] [2003] HCA 62
[5] Productivity Commission Inquiry Report, *Review of the Disability Discrimination Act 1992*, 3 April 2004 at p 185. See http://www.pc.gov.au/__data/assets/pdf_file/0010/39655/dda1.pdf

In the light of this observation and relevant case law, the Law Council agrees with the submission of the Public Interest Advocacy Centre[6] that the proposed definition of 'reasonable adjustment' in clause 13 of Schedule 2 should be amended to include words to the effect that an adjustment is a reasonable adjustment if it minimises to the greatest extent possible the discriminatory impact of an act, omission, requirement or condition. Such an amendment would add greater clarity to the definition.

12. The amendment also contributes to implementing Australia's obligations under the recently enacted United Nations Convention on the Rights of Persons with Disabilities. Article 5(3) of that Convention states that in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that 'reasonable accommodation' is provided. 'Reasonable accommodation' is defined as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The new subsection 5(2) provides a means of compliance with this obligation, which could be further strengthened by the amendment suggested above.

Discrimination in relation to associates, carers, assistants, assistance animals and disability aids

13. The Law Council also welcomes the clarification that discrimination against a person on the basis of a disability of any of that person's associates, or due to a person possessing or being accompanied by an aid or assistant animal, interpreter, reader, assistant or carer, is equivalent to discrimination on the basis of that person's disability.

Disability Standards

14. The implementation of Productivity Commission Recommendation 14.3 to extend the power to make disability standards to all areas dealt with in the Disability Discrimination Act is also welcome.

15. The disability standards form part of the second level of achieving human rights for people with disabilities, addressing systemic discrimination beyond the usual reach of individual complaint processes.[7] 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.

16. The extension of the power to create disability standards increases the ability to deal with systemic discriminatory practices to a larger number of grounds, which the Law Council views as a welcome amendment.

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[6] Public Interest Advocacy Centre Submission, 12 January 2009 at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=ada4a4b3-411e-46ed-8a4d-c2ac7385720b

[7] Basser and Jones, cited by Neil Rees, Katherine Lindsay and Simon Rice (2008) *Australian Anti-Discrimination Law: Text, cases and materials*, Federation Press.

Changes to indirect discrimination provisions

17. Currently, the Act 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

18. The Law Council agrees that the 'proportionality test' for indirect discrimination places an extra evidentiary burden on people with disabilities.. The Law Council therefore supports the simplification of this element of the definition by way of implementing Productivity Commission Recommendation 11.3.

18. The amendment to section 6, which places the burden of proving the reasonableness of a requirement or condition on the respondent to a discrimination complaint, is also a welcome amendment.

Amendments to the Age Discrimination Act 2004

19. Section 16 of the Age Discrimination Act currently states that 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.

20. The Law Council agrees with the Australian Human Rights Commission that the test as it currently stands is too prescriptive.[8] The 'dominant reason' test is also out of step with the tests applied by other pieces of discrimination legislation.

21. The Law Council therefore supports the introduction of the new section 16 that implements recommendation 43 of the House Standing Committee on Legal and Constitutional Affairs' 2007 report, *Older People and the Law*. As the Explanatory Memorandum to the Bill states:

    The proposed new section 16 inserted by this item provides the test that discrimination occurs if an act is done for two or more reasons and one of those reasons is the age of the person, or because of characteristics that appertain or are generally imputed to persons of the age of a person.

Amendments to the Human Rights and Equal Opportunity Act 1986

22. The Law Council also welcomes the implementation of Productivity Commission Recommendation 13.2 that the *Human Rights and Equal Opportunity Act 1986* be amended to increase the period of time within which complainants may lodge an application with the court from 28 days to 60 days. This reduces a potential restriction facing complainants in the enforcement of their rights.

[8] The Commission raised these concerns in its submission to the 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry in to Older Persons and the Law.

Extension of the 'unjustifiable hardship' defence

23. The Bill extends the availability of the defence of unjustifiable hardship to all unlawful discrimination on the ground of disability (except harassment and victimisation). This provision implements Productivity Commission Recommendation 8.2.

24. Currently, the unjustifiable hardship defence does not cover education after enrolment, employment between hiring and dismissal, or administration of Commonwealth laws and programs, sports, and land.

30. The Law Council recognises that there will be circumstances where it may be unreasonable to make adjustments for a person with a disability due to the financial effects on the person who has to provide the adjustments.

32. While the Law Council recognises the arguments supporting the Productivity Commission's recommendation for extension, it notes that similar defences in all State and Territory discrimination statutes are rarely available to all areas of public life covered by the legislation.[9] 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.

33. Other amendments in relation to 'unjustifiable hardship' including the clarification of the matters to be considered when determining unjustifiable hardship, and the clarification that the onus of proving unjustifiable hardship falls on the person claiming it, are welcome amendments that should improve the operation of the Act.

Extension of the 'inherent requirements' defence to cover most employment contexts

35. New section 21A extends the defence of 'inherent requirements' so that it is available to employers in most employment situations, and implements Productivity Commission Recommendation 8.4.

36. Although the Law Council recognises the arguments supporting the Productivity Commission's recommendation, it also agrees with the submission of the Public Interests Advocacy Centre that there should be some amendments to clarify the

[9] For example, a defence of unjustifiable hardship, or some related term, is available in the ACT in areas of employment, education, access to premises, provision of goods and services, accommodation, and club membership; in NSW in the areas of employment, membership of registered clubs and industrial organisations, and the provision of goods and services, education, and accommodation; in the Northern Territory only when a person has a 'special need' and it is 'unreasonable to require the… supply of special services or facilities'; in Queensland in the areas of employment, club membership provision of goods and services, education and accommodation; in South Australia only in the provision of goods and services; in Tasmania in the areas of employment, access to public spaces, and the provision of goods and services; in Victoria in the areas of employment and the provision of education and services, and in Western Australia in employment, club membership, and the provision of goods and services, education and accommodation.

operation of the 'inherent requirements' defence.[10] The Law Council agrees that there should be an amendment to clarify that the onus of proving 'inherent requirements' falls on the party claiming the defence, as with the 'unjustifiable hardship' defence. The Law Council also agrees that the party claiming the defence should have to prove that he or she considered whether the person could fulfil the requirements at the time of the challenged decision and not subsequently.

Conclusion

37. The Law Council is supportive of changes to the Act and other human rights legislation that provide for a more consistent and coherent application of definitions and aim to make discrimination law more effective. As stated in the Second Reading speech, the amendments in the most part appear to "modernise the operation of the [Disability Discrimination Act] and further achieve the objects of the act to eliminate, as far as possible, discrimination against people with disability." This is a worthy goal and, subject to the comments above, the Law Council is supportive of the amendments addressed.

[10] Public Interest Advocacy Centre Submission 12 January 2009 at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=ada4a4b3-411e-46ed-8a4d-c2ac7385720b

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.