human rights law resource centre

Submission to the

Senate Legal and Constitutional Affairs Committee

on the

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

16 January 2009

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
www.hrlrc.org.au
ABN 31 117 719 267

Contact:

Emily Howie
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4432
F: + 61 3 8636 4455
E: emily.howie@hrlrc.org.au
W: www.hrlrc.org.au

This submission was written and researched with the substantial assistance of Melanie Schleiger and Julian Riekert of Lander & Rogers.

The views expressed in this submission are those of the Human Rights Law Resource Centre and not necessarily those of Lander & Rogers.

Contents

Acronyms and Abbreviations **1**

About the Human Rights Law Resource Centre **1**

2. Introduction **2**

2.1 Scope of this Submission 2

3. Summary of Recommendations **2**

3.1 Positive Aspects of the Amending Bill 2

3.2 List of Recommendations 3

4. General Comments on Reform of Anti-Discrimination Laws **5**

4.1 Need for Broader Review and Reform of Anti-Discrimination Law, including the DDA 5

4.2 Applicable Recommendations from the Committee's SDA Report 6

4.3 Other Amendments Required for Australia to Comply with its International Obligations 7

5. Submissions on the Amending Bill **9**

5.1 Amendments to Definition of Direct Discrimination: the Comparator Test 9

5.2 Amendments to Definition of Indirect Discrimination 13

5.3 'Reasonable Adjustments' 17

5.4 Exemptions: Requests for Information 23

5.5 Exemptions: Migration 24

6. Conclusions **26**

Acronyms and Abbreviations

Australian Human Rights Commission	Commission
Charter of Human Rights and Responsibilities Act 2006 (Vic)	Victorian Charter
Convention on the Rights of Persons with Disabilities	CRPD
Disability Discrimination Act 1992 (Cth)	DDA
Human Rights and Equal Opportunity Commission	HREOC
Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
Sex Discrimination Act 1984 (Cth)	SDA
Universal Declaration of Human Rights	UDHR

About the Human Rights Law Resource Centre

1. The Human Rights Law Resource Centre (the ***HRLRC***) is the first national specialist human rights legal centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

2. The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

   (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

   (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

   (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

2. Introduction

2.1 Scope of this Submission

3. On 4 December 2008, the Senate referred the provisions of the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (the ***Amending Bill***) to the Legal and Constitutional Affairs Committee (the ***Committee***) for inquiry and report.

4. The HRLRC commends the Australian Government on its commitment to improving the *Disability Discrimination Act 1992* (Cth) (the ***DDA***). This submission does not seek to address all of the amendments proposed by the Amending Bill, but instead focuses on specific amendments of concern (see Part 5).

5. However, the HRLRC is concerned that the DDA, even with the amendments contained in the Amending Bill, continues to fall short of Australia's obligations under international human rights law and leaves people vulnerable to disability discrimination in many walks of life. Although the Committee is not currently undertaking a comprehensive review of the DDA, the HRLRC submits that a full scale comprehensive review of all federal anti-discrimination laws is required in order to protect society's most vulnerable and marginalised persons from all forms of discrimination. Therefore, prior to a discussion of the HRLRC's concerns about particular amendments proposed in the Amending Bill in Part 5, this submission briefly sets out the broader issues of anti-discrimination law reform (in Part 4).

3. Summary of Recommendations

3.1 Positive Aspects of the Amending Bill

6. The HRLRC congratulates the Government on the following aspects of the Amending Bill.

   (a) The replacement of the dominant reason test in the *Age Discrimination Act 2004* with the proposed section 16.

   (b) Reference to the *Convention on the Rights of Persons with Disabilities*[1] (***CRPD***) in section 12(8)(b) of the DDA.

   (c) The removal of the proportionality requirement in the definition of indirect discrimination in proposed section 6.

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

(d) The further protection provided against discrimination in respect of associates of persons with a disability and carers, assistants, assistance animals and disability aids, at proposed sections 7-9.

(e) Proposed section 11(2), which explicitly places the burden of proving the imposition of an unjustifiable hardship on the person claiming unjustifiable hardship.

3.2 List of Recommendations

7. The HRLRC makes the following recommendations for further amendment of the Amending Bill.

Recommendation 1: Review of anti-discrimination legislation

(a) The Government should conduct a comprehensive review of all existing federal anti discrimination Acts as recommended by the Committee in the SDA Report (Recommendation 43).

(b) If the comprehensive review of all federal anti-discrimination legislation is not conducted, the Government should at least conduct a comprehensive review of the operation and effectiveness of the DDA.

Recommendation 2: Removal of the comparator test

The definition of direct discrimination should be amended by removing the comparator test and adopting a definition similar to that contained in section 8(1)(a) of the *Discrimination Act 1991* (ACT).

Recommendation 3: Introduction of a general limitations provision

A general limitations provision, such as that contained in section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), should be included in the DDA to set out the circumstances when the right to non-discrimination may be abrogated or limited.

Recommendation 4: Removal of subsection 6(1)(b) from the test for indirect discrimination

Subsection 6(1)(b) should be removed from the definition of indirect discrimination so that a complainant does not have to prove that the requirement or condition was one with which they could not comply because of their disability.

Recommendation 5: Removal of 'inability to comply' requirement from subsection 6(2)

If section 6(2) is retained, subsection 6(2)(b) should be amended so that a complainant does not have to prove that the requirement or condition was one with which they could not comply because of their disability. At the very least, the word 'only' should be removed from subsection 6(2)(b).

Recommendation 6: Clarification of the reasonableness of a requirement or condition

The DDA should be amended so that the reasonableness of a requirement or condition in subsection 6(3) is determined according to limitation principles that mirror section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 7: Positive obligation to make reasonable adjustments

The reasonable adjustments provision in proposed new subsections 5(2) and 6(2) should be redrafted to impose a positive obligation to make reasonable adjustments required because of a disability.

Recommendation 8: Reasonable adjustment provision should stand alone

The reasonable adjustment provisions should be removed from subsections 5(2) and 6(2) and should instead be inserted as a stand alone provision in the DDA.

Recommendation 9: Assumption that adjustments are reasonable

The definition of 'reasonable adjustment' in section 4(1) should be clarified to reflect that:

(a) it creates an assumption that an adjustment is reasonable; and

(b) the assumption is rebuttable, but that the onus is on the person claiming unjustifiable hardship to prove that the adjustment is not reasonable.

Recommendation 10: Safeguards on the provision of genetic information

Subsection 30(3) should be redrafted to impose a positive duty on the employer to prove, on the balance of probabilities, that there is a lawful non-discriminatory purpose for requesting the information.

Recommendation 11: No exemption required in the migration context

The exemption of the operation of Divisions 1, 2 and 2A of the DDA to the provisions of the Migration Act and regulations, and to those things permitted or required to be done under those instruments, should be repealed.

4. General Comments on Reform of Anti-Discrimination Laws

4.1 Need for Broader Review and Reform of Anti-Discrimination Law, including the DDA

8. The DDA commenced operation more than 16 years ago and, while it is a meritorious statute, it is now due for major review and reform in order to provide proper protection from disability discrimination. The HRLRC submits that such a review should form part of a broader inquiry into all Commonwealth anti-discrimination legislation (as the Committee recently recommended in the ***SDA Report***)[2] which should consider, among other things:

   (a) whether existing federal anti-discrimination Acts should be brought together in a single Equality Act;

   (b) what additional grounds of discrimination require protection under Commonwealth laws;

   (c) whether the model for enforcement of anti-discrimination laws should be changed; and

   (d) any additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.

9. The HRLRC submits that the review should also encompass the question whether the scope of the DDA should be amended to ensure that it applies more broadly to all areas of public life and whether the permanent exceptions and exemptions are required.

10. Although a major review of the DDA was conducted by the Productivity Commission, a further review of the DDA is necessary, given that the Productivity Commission has specific economic functions.[3] The goal of the DDA is not to improve economic efficiency but to affect

[2] Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act 1984 *in eliminating discrimination and promoting gender equality,* December 2008, (hereinafter referred to as **Committee's SDA Report**), Recommendation 43.

[3] As prescribed under the *Productivity Commission Act 1998* (s.8(1)). These functions include having regard to 'the need: to improve the overall economic performance of the economy…; to reduce regulation of industry…; to encourage the development and growth of Australian industries that are efficient in their use of resources…; to recognise the interests of

social equality, although economic benefits may be a positive side effect. As a result, the Productivity Commission is not the appropriate body to determine whether the DDA is operating effectively.

4.2 Applicable Recommendations from the Committee's SDA Report

11. In the absence of a full scale review of all Commonwealth anti-discrimination laws, an inquiry is necessary into the effectiveness of the DDA, similar to the Committee's recent inquiry into the *Sex Discrimination Act 1984* (Cth) (the ***SDA inquiry***). Many recommendations in the Committee's SDA Report are equally applicable to the DDA, including, at the very minimum, the Committee's recommendations that:[4]

    (a) the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including, in the case of disability discrimination, the *CRPD* (SDA Report, Recommendation 3);

    (b) the definitions of 'direct discrimination' in the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment (SDA Report, Recommendation 5);

    (c) the Act be amended to include a general prohibition against disability discrimination in *all* areas of public life and a general equality before the law provision modelled on similar provisions in the *Racial Discrimination Act 1975* (SDA Report, Recommendation 8);

    (d) a provision be inserted in the Act so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate (SDA Report, Recommendation 22);

    (e) the remedies available under subsection 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders (SDA Report, Recommendation 23);

industries, employees, consumers and the community, likely to be affected by measures proposed by the Commission; and to increase employment…; and for Australia to meet its international obligations and commitments'.

[4] The HRLRC submits that Recommendations 1, 2, 5, 6, 8, 9, 19, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 40, 43 in the Committee's SDA report are, either in whole or in part, also applicable to the DDA.

(f) increased funding be provided to community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for disability discrimination matters (SDA Report, Recommendation 24);

(g) further consideration be given to removing the existing permanent exemptions in the Act and replacing these exemptions with a general limitations clause (SDA Report, Recommendation 36);

(h) the Act be amended to require the Commissioner (in this case, the Disability Discrimination Commissioner) to monitor progress towards eliminating disability discrimination and achieving equality, and to report to Parliament every four years (SDA Report, Recommendation 33); and

(i) the Disability Discrimination Commissioner be given the power to investigate alleged breaches of the Act, without requiring an individual complaint (SDA Report, Recommendation 37).

4.3 Other Amendments Required for Australia to Comply with its International Obligations

12. The HRLRC further submits that the DDA requires additional amendments to those outlined above in order for it to comply with Australia's obligations under the CRPD and other international human rights instruments, and in turn to properly protect people from disability discrimination. To this end the HRLRC makes the following recommendations, which also accord with best practice in anti-discrimination law:[5]

(a) Measures should be introduced to enable the DDA to better address systemic discrimination. Such measures must provide for or enable a mixture of both 'hard' and 'soft' regulations and remedies that are appropriately tailored to address issues of systemic discrimination.

(b) The DDA should be amended to provide that where a complainant formulates his or her complaint on the basis of different grounds of discrimination covered by separate federal legislation, the Australian Human Rights Commission (the ***Commission***) or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, the Commission or the court must consider the interrelation of the complaints and accord an appropriate remedy if it is substantiated.

[5] These recommendations were made by the HRLRC in its submission to the SDA Inquiry. The HRLRC SDA Submission reflects best practice in discrimination law and promotes compliance with Australia's obligations under international human rights law, including the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, 003 U.N.T.S. 3 (entered into force January 2, 1976).

(c) The special measures provision at section 45 of the DDA should removed from Division 5, which deals with exemptions, and placed elsewhere in the DDA to reflect that this provision does not relate to practices which are discriminatory.

(d) The permanent exceptions and exceptions in the DDA should be repealed.

(e) Any application for exemption should be subject to a limitations analysis that is consistent with international human rights law principles, such as that contained in section 7(2) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (***Victorian Charter***). The DDA should include an additional requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with the principles contained in section 7(2) of the Victorian Charter, on an ongoing basis. Exemptions should be granted for a period of no more than two years.

(f) In making awards of damages for discrimination, the Commission and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature (and shall specify these factors in reasons).

(g) In accordance with Australia's obligation to provide an effective remedy of violations of the right to non-discrimination under various international human rights instruments, including the CRPD the ICCPR and the ICESCR, the DDA should be amended to provide the Commission with broad powers to:

(i) investigate potential breaches of the DDA, including powers to enter and inspect premises and to compel the production of material;

(ii) take proactive steps to investigate compliance with orders under the DDA;

(iii) commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and

(iv) develop enforceable codes of conduct to encourage a culture of compliance.

13. The HRLRC urges the Committee to recommend broader reform of the DDA and other Commonwealth anti-discrimination legislation in accordance with its recommendations in the SDA Report.

Recommendation 1: Review of anti-discrimination legislation

(a) The Government should conduct a comprehensive review of all existing federal anti discrimination Acts as recommended by the Committee in the SDA Report

(Recommendation 43).

(b) If the comprehensive review of all federal anti-discrimination legislation is not conducted, the Government should at least conduct a comprehensive review of the operation and effectiveness of the DDA.

5. Submissions on the Amending Bill

14. The HRLRC does not make any submission on the appropriateness of each of the amendments proposed in the Amending Bill. Instead this submission focuses on the amendments of particular concern proposed in the following areas:

- the comparator test in the definition of direct discrimination;
- the reasonable adjustments provisions;
- the 'inability to comply' requirements in the definition of indirect discrimination;
- requests for information under section 30; and
- the exemptions provided in the migration context.

Each of these areas is discussed in turn below.

5.1 Amendments to Definition of Direct Discrimination: the Comparator Test

(a) The comparator test

15. The HRLRC welcomes the proposed amendment to the definition of 'disability' which will clarify that 'disability' includes behaviour that is a manifestation or symptom of the disability.[6] This amendment reflects the High Court decision of *Purvis v The State of New South Wales (Department of Education and Training)*[7] (***Purvis***).

16. However, the Amending Bill does not address another problematic aspect of the DDA that was illustrated in *Purvis*, being the comparator test in the definition of direct discrimination and, specifically, how to identify an appropriate comparator. While the High Court in *Purvis* confirmed that a person's 'disability' includes the behavioural manifestations of their disability, the majority also held that the appropriate comparator is a person who does not have the disability but who exhibits like behaviour. So the appropriate comparator in *Purvis*

[6] Amending Bill, s 6.

[7] [2003] HCA 62.

was considered to be a student without a disability who exhibited violent behaviour similar to that exhibited by the complainant as a result of his disorder.

(b) Problems with the comparator test

17. This interpretation of 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, as in *Purvis,* or infectiousness, as is characteristic of persons with HIV/AIDS.[8] For this reason the comparator test is particularly problematic for people who have intellectual or non-physical disabilities.[9]

18. The necessity of a comparator also poses particular problems for persons who have been treated less favourably as a result of their disability when compared with other persons with a different form of the same disability, for example when accessing disability services. In such circumstances a comparator may not be found at all because people without the particular disability may not require the service.[10] Commenting on this problem in relation to the *Anti-Discrimination Act 1977* (NSW), the NSW Law Reform Commission has stated that:[11]

> where there is no direct comparison, the hypothetical exercise does not readily arise in some cases. For example, a particular organisation may make its services or benefits available only to a particular group, say people with disabilities. If a person with a disability is treated detrimentally because of his or her disability, there may be no discrimination despite an apparent connection between the treatment and the ground.

19. The HRLRC is currently advising a client with a rare genetic disease who is facing this very problem. There is currently treatment available for the physical component of the disease. However, this treatment is only government-funded for persons who have a strain of the disease that does not also impact them neurologically. The client is being denied this government funded treatment because, although the disease impacts on him in the same physical way, he has a form of the disease that also causes him neurological impairment. So he has been denied the treatment despite his high level of functionality and the significant

[8] See for example, *Dopking v Commonwealth of Australia* [HREOC 1994].

[9] Productivity Commission, *Review of the Disability Discrimination Act 1992*, (Productivity Commission Inquiry Report Vol 1, Report No 30), 30 April 2004 (hereinafter referred to as ***Productivity Commission Report***), 308, referring to submissions by: Disability Action Inc, submission 43, 2; and National Council for Intellectual Disabilities, submission 112, 12.

[10] Productivity Commission Report, above n 9, 308.

[11] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) [3.34]

physical benefit that he has experienced as a result of receiving the treatment to date. (He currently receives the treatment gratis from a pharmaceutical company).

20. While a hypothetical comparator may provide a 'practical benchmark, against which the action of the discriminator can be measured',[12] 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.

21. More generally, identifying an appropriate comparator has proved to be a confounding task for both courts and parties.[13] As stated by the NSW Law Reform Commission, '[t]he limitations imposed by the need for a comparator give rise to conceptual difficulties as well as problems associated with proof for complainants'.[14] Commenting on this problem, the Commission has stated:[15]

> The issue of how an appropriate comparator is chosen in a particular case has been complicated and vexed since the commencement of the DDA. While the law appears to have been settled by the decision of the High Court in *Purvis,* the issue is likely to remain a contentious one.

22. In its current form, the Amending Bill does not address the problems caused by the comparator test.

(c) Effect of Removing the Comparator Test

23. If the comparator test were removed from the definition of direct discrimination, an appropriate limitations provision would need to be introduced into the DDA to ensure that the right to non-discrimination can be limited in certain circumstances, such as in circumstances where it is unreasonable to require a person to accommodate the disability because of unavoidable occupational health and safety or public safety risks.

---

[12] Productivity Commission, above n 9, 307.

[13] See for eg, *Trindall v NSW Commissioner of Police,* [2005] FMCA 2; *Ware v OAMPS Insurance Brokers Ltd,* [2005] FMCA 664.

[14] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) [3.51].

[15] Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (2008), available online at www.humanrights.gov.au/legal/FDL, 179.

(d) General Limitations Provision

24. To effectively deal with this issue, the DDA should incorporate a section which provides guidance on permissible limitations on the right to non-discrimination as protected by the DDA, perhaps by including a provision that mirrors section 7(2) of the Victorian Charter. Section 7(2) of the Victorian Charter provides that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

25. Section 7(2) also sets out the following inclusive list of these relevant factors:

    (a) the nature of the right;

    (b) the importance of the purpose of the limitation;

    (c) the nature and extent of the limitation;

    (d) the relationship between the limitation and its purpose; and

    (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

26. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. For example, an exercise of the right to freedom of expression should not be allowed to vitiate the right to privacy. Rather, a balancing exercise is envisaged. The Human Rights Consultative Committee which investigated and recommended the adoption of the Victorian Charter recognised that rights need to be balanced against one another and also against competing public interests. This view is consistent with the case law of comparative jurisdictions, such as the UK and New Zealand, and international jurisprudence.

(e) Recommendations

27. The HRLRC recommends that the comparator test be removed from the test for direct discrimination in the proposed sections 5(1) and 5(2) of the DDA. This would result in a definition of direct discrimination similar to that contained in section 8(1)(a) of the *Discrimination Act 1991* (ACT), which provides that 'a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because the other person has [a disability]'.

28. While courts may nonetheless conduct a theoretical comparison of the treatment that a complainant would have received but for their disability, they would not be compelled to do so in circumstances where such comparison is impossible or inappropriate.

29. As indicated above in paragraphs 24 to 26, a general limitations provision should also be included in the DDA.

Recommendation 2: Removal of the comparator test
The definition of direct discrimination should be amended by removing the comparator test and adopting a definition similar to that contained in section 8(1)(a) of the *Discrimination Act 1991* (ACT).
Recommendation 3: Introduction of a general limitations provision
A general limitations provision, such as that contained in section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), should be included in the DDA to set out the circumstances when the right to non-discrimination may be abrogated or limited.

5.2 Amendments to Definition of Indirect Discrimination

(a) Subsections 6(1)(b) and 6(2)(b) – inability to comply with a condition or requirement

30. The HRLRC commends the somewhat simplified test for indirect discrimination proposed in the Amending Bill. However, the proposed definition for indirect discrimination could be further improved by the removal of subsection 6(1)(b) and the removal of the word 'only' in section 6(2)(b). (Additional problems with the 'reasonable adjustment' provisions, contained in proposed sections 5(2) and 6(2), and recommendations for improvement are discussed below in section 5.3.)

31. In its current form, the proposed section 6(1) of the DDA provides as follows.

> 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:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
>
> (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

32. Section 6(2) of the DDA, as provided in the Amending Bill, imposes an obligation to make reasonable adjustments so that a person with a disability can comply with a requirement or condition. The proposed section 6(2) of the DDA provides as follows.

> For the purposes of this Act, a person (the ***discriminator***) also discriminates against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
>
> (c) the failure to make the reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

33. As a result of subsections 6(1)(b), complainants must prove that they cannot comply with a requirement or condition imposed by the discriminator. Similarly, section 6(2)(b) limits the protection against discrimination to situations where, because of their disability, an aggrieved person could comply with a requirement or condition '*only* if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so' (emphasis added). Thus, the adjustment must only be made if it is essential to enable a person's compliance with the requirement or condition. This means that so long as a person with a disability can somehow cope with a condition or requirement imposed on them, the imposition of that condition or requirement will be lawful even if it substantially disadvantages the person with the disability.

34. The absolute nature of sections 6(1)(b) and 6(2)(b) is problematic because it fails to assist persons who, through their own effort or with the assistance of carers, manage to cope with significant disadvantage resulting from requirements or conditions that have a discriminatory effect.

(b) Problems with imposing an 'inability to comply' requirement in section 6

35. The anomalous impact of the 'inability to comply' requirement is illustrated in the case of *Hinchliffe v University of Sydney*[16] (***Hinchliffe***). The applicant in this case was enrolled in an occupational therapy course at the University of Sydney. The applicant had a visual impairment which made it very difficult for her to read printed words or diagrams that were

[16] [2004] FMCA 85 (17 August 2004).

not enlarged and which were printed on white paper. As a result, the applicant had to reformat the course materials, which was time-consuming and laborious.

36. The applicant made a complaint of indirect discrimination against the university on the basis that it imposed a condition or requirement 'that students deal with course materials provided by the university in a… format that the university chose to provide to all students'.[17]

37. Despite the difficulty that this requirement caused the applicant, Driver FM held that it was a requirement with which the applicant could comply because 'she could make use of course material provided to her in a standard format by converting it to a different format'.[18] Driver FM held that in order to prove 'an inability to comply' with a requirement the applicant must have suffered '"serious disadvantage" with the result that the applicant could not "meaningfully participate" in the course of study for which she had been accepted'.[19]

(c) Incompatibility with objects of the DDA

38. This approach is 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[20] 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'.[21] 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.

(d) Incompatibility with Australia's international human rights obligations

39. The Committee on Economic, Social and Cultural Rights has confirmed the importance of ensuring that persons with disabilities enjoy substantive equality, in accordance with Article 2(2) of ICESCR, stating that:[22]

> The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and

[17] Ibid, [108].

[18] Ibid, [115].

[19] Ibid, [115], quoting from *Catholic Education Office v Clarke,* (2003) 202 ALR 340 at [66] and [126].

[20] DDA, s 3(a).

[21] DDA, s 3(b).

[22] Committee on Economic, Social and Cultural Right, General Comment No. 5 (1994) *Persons with Disabilities*, E/C.09/12/94, 1994 [9].

> disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required'.[23]

40. The effect that the 'inability to comply' requirement had in *Hinchliffe* is also clearly inconsistent with Australia's obligation under the CRPD to 'ensure an inclusive education system at all levels' which realises the right to an education without discrimination on the basis of disability.[24]

(e) Effect of removing subsection 6(1)(b) and amending subsection 6(2)(b)

41. If subsection 6(1)(b) were removed from the definition of indirect discrimination and subsection 6(2)(b) were amended, such arguments as were proposed in *Hinchliffe* could be appropriately raised when determining whether the requirement or condition is reasonable, in accordance with subsection 6(3), or whether any adjustments sought would impose an unjustifiable hardship.

42. However, the HRLRC agrees with the Productivity Commission's finding that:[25]

> The definition of indirect discrimination in the [DDA] does not provide sufficient guidance on how to determine whether a requirement or condition is 'not reasonable having regard to the circumstances'.

43. To clarify the meaning of 'reasonable' in subsection 6(3), and ensure that the term is interpreted in a way that is compatible with Australia's international human rights obligations, the reasonableness of a requirement or condition should be tested by applying the criteria set out in section 7(2) of the Victorian Charter. (Section 7(2) of the Victorian Charter contains the limitations provision discussed above in paragraphs 24 to 25).

(f) Recommendations

44. The HRLRC recommends the removal of subsection 6(1)(b) from the definition of indirect discrimination. The HRLRC prefers a definition of indirect discrimination similar to that contained in the *Sex Discrimination Act 1984* (Cth),[26] or in section 8(1)(b) of the

---

[23] Committee on Economic, Social and Cultural Right, General Comment No. 5 (1994) *Persons with Disabilities*, E/C.09/12/94, 1994 [9].

[24] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), Article 24(1).

[25] Productivity Commission Report, above n 9, 317, Finding 11.5.

[26] *Sex Discrimination Act 1984* (Cth) ss 5(2), 6(2), 7(2) and 7B.

Discrimination Act 1991 (ACT), which provides that 'a person discriminates against another person if the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have' a disability.

45. The HRLRC also recommends that the DDA be amended so that the reasonableness of a requirement or condition must be tested according to limitation principles that mirror section 7(2) of the Victorian Charter.

46. In section 5.3 of this submission (below) the HRLRC recommends substantial amendments to the reasonable adjustment provisions at proposed sections 5(2) and 6(2), However, if the current wording of section 6(2) is retained, the HRLRC alternatively recommends that the word 'only' be removed.

Recommendation 4: Removal of subsection 6(1)(b) from the test for indirect discrimination

Subsection 6(1)(b) should be removed from the definition of indirect discrimination so that a complainant does not have to prove that the requirement or condition was one with which they could not comply because of their disability.

Recommendation 5: Removal of 'inability to comply' requirement from subsection 6(2)

If the current wording of section 6(2) is retained, subsection 6(2)(b) should be amended so that a complainant does not have to prove that the requirement or condition was one with which they could not comply because of their disability. At the very least, the word 'only' should be removed from subsection 6(2)(b).

Recommendation 6: Clarification of the reasonableness of a requirement or condition

The DDA should be amended so that the reasonableness of a requirement or condition in subsection 6(3) is determined according to limitation principles that mirror section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

5.3 'Reasonable Adjustments'

(a) The proposed reasonable adjustment provisions and the rationale

47. Proposed new subsection 5(2) of the DDA is contained under the heading of 'direct disability discrimination' and provides for discrimination to be found where there is a failure to make reasonable adjustments to accommodate disability. It states:

> For the purposes of this Act, a person (the ***discriminator***) also discriminates against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

48. Proposed new subsection 6(2) of the DDA is contained under the heading 'indirect disability discrimination' and provides for discrimination to be found where there is a failure to make reasonable adjustments to enable a person with a disability to comply with a condition or requirement imposed by the discriminator. This section is outlined above in paragraph 32.

49. Reasonable adjustments is defined in section 4(1) as follows:

> ***Reasonable adjustment***: an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

50. In principle, the HRLRC commends amendments to the DDA that seek to ensure substantive equality by imposing positive obligations to make reasonable adjustments to accommodate a person's disability. However, there are four key problems with the reasonable adjustment provisions as drafted in proposed new subsections 5(2) and 6(2):

    (a) the provisions are framed in the negative, rather than as a positive obligation;

    (b) the reasonable adjustment provisions in s 5(2)(b) focus on the effect of acts done, rather than acts done, which is anomalous in the context of the rest of the Act;

    (c) the Act does not make it clear enough that there is an assumption in the definition of 'reasonable adjustment' that an adjustment is reasonable unless unjustifiable hardship is established by the defendant; and

    (d) the provisions are confusingly juxtaposed with the definitions of direct and indirect discrimination.

51. Each of these problems is discussed in turn below, however it is useful first to set out the background and rationale for including a reasonable adjustment provision.

(b) Rationale for the reasonable adjustment provisions

52. In its review of the DDA in 2004, the Productivity Commission recognised that a duty to make reasonable adjustments was an important means of creating substantive equality

between people with and without disabilities.[27] It is well accepted that people with disabilities may require different treatment in order to achieve equality with persons without that disability.[28] A substantive equality approach involves obligations to accommodate a person's impairment or disability needs, and underpins contemporary non-discrimination law, including the CRPD.[29] In fact the Productivity Commission in its report on the DDA in 2004 (the ***Productivity Commission Report***) stated that 'if disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages'.30

53. It is worth noting that the duty to make reasonable adjustments appears to have been intended to be included in parts of the DDA when it was first introduced in 1992, but the extent of that duty has been questioned in a series of court decisions, most notably the *Purvis* decision in the High Court.[31] Part of the difficulty with the decision in *Purvis* has been the negative manner in which the Act operates in the absence of an identifiable positive duty to make reasonable adjustments. Associate Professor Lee Ann Basser described the difficulty to the Productivity Commission as follows:

> … in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to McHugh and Kirby JJ there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination.[32]

54. Given the uncertainty of the law since *Purvis* and the need to impose positive obligations to ensure substantive equality, the Productivity Commission recommended that the DDA be amended to include a general duty to make reasonable adjustments, which would clarify the duties under the DDA and reposition it as a force for change.[33]

---

[27] Productivity Commission Report, above n 9, 193.

[28] The principle was stated by Ronald Wilson in the Equal Opportunity Commission in *AJ & J v A School (No 1)*, (1998) EOC 92-948, 78,313, underpins the approach adopted in the *Convention on the Rights of Persons with Disabilities* and was strongly supported by the Productivity Commission Report (see below).

[29] See Kayess, R and French, P, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' *Human Rights Law Review* 8:1 (2008) 1-34, 8.

[30] Productivity Commission Report, above n 9, 193.

[31] *Disability Discrimination Act 1992*, Explanatory Memorandum and the Second Reading Speech both demonstrate an intention to impose a duty to make reasonable accommodation for a person with a disability: see Second Reading Speech at Australia 1992a, pp 2751-53. However, the duty to make reasonable adjustments was questioned by the High Court in *Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62.

[32] Productivity Commission Report, above n 9, 187.

[33] Ibid, pp 194-195.

(c) The reasonable adjustment provisions are framed in the negative

55. The first problem with proposed new subsections 5(2) and 6(2) is that, despite the recommendations of the Productivity Commission, it is framed in the negative. That is, the subsection focuses on the consequences of the discriminator failing to make reasonable adjustments (instead of requiring reasonable adjustments to be made). In that sense, rather than clarify the state of the law following *Purvis*, the reasonable adjustments provision codifies that very confusion.

56. As stated above, the rationale behind proposed new subsections 5(2) and 6(2) is to impose positive obligations to accommodate disability.[34] As the Productivity Commission stated, the reasonable adjustments provisions are intended to get people with disabilities to 'the same notional "starting line" as people without disabilities'[35] and the failure to provide a reasonable adjustment should *itself* be unlawful discrimination and the subject of a complaint.[36]

57. The drafting of proposed new subsections 5(2) and 6(2) does not implement the purported intention of the provision to impose *positive* obligations to make reasonable adjustments to accommodate peoples' disabilities. The HRLRC submits that proposed new subsections 5(2) and 6(2) should be redrafted to reflect the Productivity Commission's recommendation to insert a positive obligation to make reasonable adjustments for persons with a disability.

58. The HRLRC considers that a stand alone reasonable adjustments provision is necessary to properly reflect the aim of introducing positive obligations to ensure substantive equality.

(d) 'The effect of acts done' in subsection 5(2)

59. The proposed new subsection 5(2)(b) focuses on the 'effect of' acts done, rather than acts done, which creates confusion when read in the context of the DDA more broadly. For example, how would this provision interact with section 10 of the DDA, which provides that where an act is done for a discriminatory reason and for another reason, it will be taken to be done for the discriminatory reason? Section 10 refers to 'acts done' and not 'effects of' acts done. So even where the effect of the failure to make adjustments results because of a disability in less favourable treatment, a respondent might argue that the less favourable

[34] The *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth)*, Explanatory Memorandum states that subsection 5(2) was introduced to implement Productivity Commission Recommendation 8.1 'which recommended that the Disability Discrimination Act should be amended to clarify that there is a general duty to make reasonable adjustments, with the exception of adjustments that would cause unjustifiable hardship' (at [37]). The amendments also make the DDA consistent with the requirement under the CRPD to make reasonable accommodation.

[35] Productivity Commission Report, above n 9, 193.

[36] Ibid, pp 194-195.

treatment is 'the effect' of another factor and no discrimination should be found. This would be inconsistent with the spirit of section 10 of the Act and the rationale for introducing reasonable adjustment provisions.

(e) Assumption that adjustments are reasonable

60. The third problem with proposed new subsections 5(2) and 6(2) is that the Act does not make it sufficiently clear that the definition of 'reasonable adjustments' contains an assumption that adjustments are reasonable. (Note: The third problem with proposed new subsections 5(2) and 6(2) may not arise if the section is re-drafted as recommended above. However it is worth noting the third problem in the event that the submission above is not accepted.)

61. The wording of the new definition of 'reasonable adjustment' appears to create an assumption that adjustments are reasonable unless making the adjustment would impose an unjustifiable hardship (s 4(1)). Further, new subsection 11(2) confirms that the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship. This approach is, in principle, a good one as it places the burden of proving unjustifiable hardship on the discriminator.

62. However, despite the wording of the definition and perhaps not intentionally, there is some uncertainty as to whether the definition of 'reasonable adjustment' should be interpreted as containing that assumption. The definition does not use the word 'assumption' and where the Explanatory Memorandum discusses the meaning of reasonable adjustment it does not mention any implied assumptions.[37]

63. It is particularly important that the Act is clear on this point as without the assumption that adjustments are reasonable, the effect of the provision could be to reverse the onus of proof, which would be unacceptable. That is because an aggrieved person would be required to prove that there would not be an unjustifiable hardship to the discriminator in making reasonable adjustments. Such an approach would require the applicant to prove that defences do not exist in order to prove his or her case.

64. The drafting of the legislation should make it abundantly clear:

    (i) that the definition of reasonable adjustment creates an assumption in an aggrieved person's favour that an adjustment is reasonable; and

[37] In fact the discussion of the definition of reasonable adjustments in the Explanatory Memorandum could be construed as requiring the aggrieved person to prove that there is no unjustifiable hardship: see *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth)*, Explanatory Memorandum, [28].

(ii) that the assumption can be rebutted, but the burden is on the defendant to prove that the adjustment would impose an unjustifiable hardship.

65. Any confusion in the current drafting can be remedied either by a drafting note in the definition of reasonable adjustment, or by amending the words of the definition to state that an adjustment is 'assumed to be' reasonable. Alternatively, the amendment proposed by the Commission in its submission to this inquiry (at [73]) would also sufficiently clarify this issue.[38]

(f) Juxtaposition with the definitions of direct and indirect discrimination

66. The final problem with the reasonably adjustments provisions is that they are currently juxtaposed with the definitions of direct and indirect discrimination. This adds unnecessary confusion to the reasonable adjustment provisions, particularly given the accompanying obligations to identify an appropriate comparator (section 5(2)(b)), and to prove an inability to comply with a requirement or condition (section 6(2)(b)). This complexity could be avoided by having a stand alone reasonable adjustments provision that is separate to the definitions of direct and indirect discrimination.

67. The HRLRC has considered the alternative reasonable adjustment provisions proposed by the Commission in its submission to this inquiry.[39] The HRLRC supports the Commission's rewording of the duty to make reasonable adjustments as set out in paragraph [58] of the Commission's submission. The duty in this form would stand separate from the definitions of direct and indirect discrimination and properly introduce positive obligations to make reasonable adjustments. However, the HRLRC is concerned that the Commission's definition of reasonable adjustments (at [59]) does not contain an assumption that adjustments are reasonable. The HRLRC supports a definition of reasonable adjustments that includes a presumption in favour of adjustments being reasonable, particularly given that the unjustifiable hardship provisions provide adequate opportunity for rebutting the presumption.

(g) Recommendations in relation to reasonable adjustments

Recommendation 7: Positive obligation to make reasonable adjustments

The reasonable adjustments provision in proposed new subsections 5(2) and 6(2) should be redrafted to impose a positive obligation to make reasonable adjustments required

[38] See Australian Human Rights Commission Submission to the Senate Committee on Legal and Constitutional Affairs, 15 January 2009, [73], https://senate.aph.gov.au/submissions/comittees/ViewSubmissions.aspx?inquiryid=129.
[39] Ibid, [58] and [59].

because of a disability.

Recommendation 8: Reasonable adjustment provision should stand alone

The reasonable adjustment provisions should be removed from subsections 5(2) and 6(2) and should instead be inserted as a stand alone provision in the DDA.

Recommendation 9: Assumption that adjustments are reasonable

The definition of 'reasonable adjustment' in section 4(1) should be clarified to reflect that:

(a) it creates an assumption that an adjustment is reasonable; and

(b) the assumption is rebuttable, but that the onus is on the person claiming unjustifiable hardship to prove that the adjustment is not reasonable.

5.4 Exemptions: Requests for Information

68. According to the Explanatory Memorandum, proposed new section 30 implements recommendations made by the ALRC[40] to 'prohibit an employer from requesting or requiring genetic information from a job applicant or employee, except where the information is reasonably required for purposes that do not involve unlawful discrimination, such as ensuring that a person is able to perform the inherent requirements of the job.'[41]

69. However, the prohibition will not apply if evidence is 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. 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.

70. 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*.

[40] *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003), Recommendation 31-3.

[41] *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth)*, Explanatory Memorandum, para 85.

71. Subsection 30(3) should be redrafted to provide appropriate safeguards for persons with disabilities by imposing a positive obligation on the employer to prove, on the balance of probabilities, that there is a lawful non-discriminatory purpose for requesting the information.

> ***Recommendation 10: Safeguards on the provision of genetic information***
>
> Subsection 30(3) should be redrafted to impose a positive duty on the employer to prove, on the balance of probabilities, that there is a lawful non-discriminatory purpose for requesting the information.

5.5 Exemptions: Migration

(a) *The current provisions and the proposed amendments*

72. The amendments to section 52 of the Act are intended to reduce the scope of the exemptions currently provided in the migration context. Currently there are broad exemptions provided from Divisions 1 and 2 of the DDA for provisions in the *Migration Act* 1958, migration regulations and for 'anything done by a person in relation to the administration of that Act or those regulations'.[42] This means that exemptions apply to all activities and decisions concerning, among other things:

- the arrival and presence in Australia of non-citizens;
- selection criteria, application processes and compliance for all visa categories;
- migration sponsorships;
- detention of, deportation of and recovery of costs from non-citizens; and
- registration and duties of migration agents.[43]

73. Proposed new section 52 still provides exemptions for the *Migration Act* and regulations, but states that only those acts that are 'permitted or required to be done by the Act or instrument' will be exempt from the operation of the DDA. According to the Explanatory Memorandum, the effect of the new section 52 is that the exemption will no longer apply to 'incidental administrative processes' conducted under the Act.[44]

---

[42] *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth)*, Explanatory Memorandum, paras 106-107.

[43] The Productivity Commission Report sets out in more detail the areas in which the exemption has application: see Productivity Commission Report, above n 9, 342.

[44] *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth)*, Explanatory Memorandum, para 106.

74. This amendment purports to implement Productivity Commission recommendation 12.3, which stated that amendment of section 52 was required to ensure it 'exempts only those provisions which deal with issuing entry and migration visas to Australia'.[45] The Productivity Commission's rationale for the continued exemption in circumstances where entry and migration visa decisions are made was that there may be legitimate public policy reasons for imposing health requirements, such as the protection of public health and safety. However, the exemption contained in the proposed new section 52 is clearly much broader than the narrow exemption envisaged by the Commission.

(a) *HRLRC submissions on the Migration exemption*

75. The HRLRC agrees with the Productivity Commission that, at the very least, there should not be any exemptions provided from the operation of the DDA in any aspects of migration other than the issue of entry and migration visas to Australia. However, the effect of proposed new section 52 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.

76. The HRLRC goes further than the Productivity Commission, and submits that there is no justification for the exemption provided in circumstances where entry and migration visa decisions are made.

77. Australia has committed to ensure and promote the full realisation of human rights, including non-discrimination, for *all* persons with disabilities.[46] This obligation does not distinguish between citizens and non-citizens, or make exceptions for governments administering a migration scheme. In fact, Australia has committed to ensuring that all public authorities and institutions will act in conformity with principles of anti-discrimination.[47] Persons with disabilities are entitled to be protected from discrimination on the basis of disability, particularly discrimination by public authorities, regardless of whether they are a citizen of Australia or not. Their right arises from the fact that persons with disabilities are human beings, and as such are born free and equal in dignity and rights.[48]

78. In order to comply with its international obligations, Australia must ensure that people with disabilities are not automatically refused entry into Australia merely on the basis of their

[45] Productivity Commission Report, above n 9, 348.

[46] *Convention on the Rights of Persons with Disabilities*, Article 4.

[47] *Convention on the Rights of Persons with Disabilities*, Article 4.

[48] Universal Declaration of Human Rights, Article 1. The ICCPR also states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'

disability, as disability alone is not a justifiable reason.[49] The relevant justifications given by Department of Immigration and Multicultural and Indigenous Affairs (***DIMIA***) to the Productivity Commission for the exemption from the DDA were that health requirements are necessary to contain public health expenditure and to maintain access to health and community services for Australian residents.[50] Whilst these are important public policy considerations, they are not justifications for the blanket removal of all protection from disability discrimination.

79. There is no reason why the provisions of the DDA could not incorporate a consideration of relevant public policy considerations such as those outlined by DIMIA. The crux of the issues raised by DIMIA is really the cost of reasonable adjustments for persons with disability. If that is the difficulty, then public policy considerations could be taken into account in analysing whether there is unjustifiable hardship in granting entry. That is, if a person with a disability sought to enter Australia, the department could claim that the cost of services or the impact on the health system would constitute an unjustifiable hardship. If the current unjustifiable hardship criteria are not considered adequate to enable this consideration, the criteria could be amended for the purpose of the limited class of decisions of immigration authorities.

80. Whilst a reduction of the scope of the migration exemption is commendable, the amendments to section 52 do not go far enough. The amendments do not properly implement the recommendations of the Productivity Commission and continue to allow an unjustifiably broad scope for disability discrimination by immigration authorities.

Recommendation 11: No exemption required in the Migration context

The exemption of the operation of Divisions 1, 2 and 2A of the DDA to the provisions of the Migration Act and regulations, and to those things permitted or required to be done under those instruments, should be repealed.

6. Conclusions

81. Whilst the HRLRC commends those aspects of the Amending Bill that seek to prescribe substantive equality, further work is required to ensure that the Amending Bill properly

[49] See the extract of the submission by the Disability Council of New South Wales extracted in Productivity Commission Report, above n 9, 345.
[50] Ibid, 343.

implements the Productivity Commission's recommendations and the intentions of the Government.

82. Where possible, the HRLRC would be pleased to assist the Committee in its consideration of the Amending Bill or to otherwise provide comment on any further amendments proposed to the provisions of the Amending Bill discussed above.