

## THE DISABILITY DISCRIMINATION ACT (AUSTRALIA): TIME FOR CHANGE

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### I. INTRODUCTION

According to the protective model of labor law, there is an imbalance of power between the employer and the employee. Employees can be subject to arbitrary or unfair treatment by those who provide them with employment. Many employers, of course, treat their employees with fairness, but abuses do exist.<sup>1</sup> Trade unions have played a vital role in countervailing this power imbalance but they are not able to protect large numbers of employees from unfair employment practices. Addressing the power imbalance and curbing unfair or abusive employment practices is an important role of the law.

The participation of people with disabilities in the labor market is particularly affected by the power imbalance in the employment relationship, as they are liable to be discriminated against on the basis of their disability. This means that people with disabilities are an especially vulnerable group of employees. Discrimination may occur in hiring, the conditions on which people are employed, the exercise of employer authority, and the termination of employment.<sup>2</sup>

Accordingly, Australian legislatures have passed protective legislation that regulates the employment relationship for all employees, including people with disabilities.<sup>3</sup> The most significant

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1. BREEN CREIGHTON & ANDREW STEWART, LABOR LAW: AN INTRODUCTION 5, 269 (3d ed. 2000).

2. *Id.* at 269.

3. The Federal Parliament has introduced legislation to remove discriminatory conditions in employment and to promote greater equality. *See, e.g.*, § 93 of the Workplace Relations Act 1996 (Cth.). According to Creighton and Stewart, “[t]his is presumably intended to encourage

measure is anti-discrimination laws because they comprehensively address disability discrimination in employment.<sup>4</sup> Not only do these laws have a protective function, they also seek to promote greater equality in society. The principle of equality is presumed in the prohibition of discrimination.

At the Australian state level, anti-discrimination legislation prohibits discrimination on a range of grounds, including disability, race, and gender.<sup>5</sup> At the federal level, individual acts deal with these areas.<sup>6</sup> The Federal Parliament enacted the Disability Discrimination Act (DDA) in 1992. This Act applies to discrimination on the basis of physical, mental, or intellectual disabilities. Like legislation at the state level, the DDA is not confined to the area of employment but applies to a range of everyday situations. Under both federal and state laws, disability discrimination is declared to be unlawful in stated areas including employment, the provision of education, goods and services, and public transport.

People with disabilities can enforce their rights by making a complaint to special commissions under state and federal legislation. A commission will try to conciliate the claim, but if that fails, the matter may be heard by a specialist tribunal at the state level, or by the Federal Magistrates Court or the Federal Court at the national level. The specialist commissions also have an educational function: they have been created to promote greater equality and to assist complainants. The supervision of the DDA is the responsibility of the Human Rights and Equal Opportunity Commission (HREOC), which was established by the Human Rights and Equal Opportunity Commission Act 1986.<sup>7</sup>

The focus of this article is on how effectively the DDA eliminates discrimination against people with disabilities in the employment context. It addresses some key facets of disability discrimination, including the cost of a disability, the entitlement to be free from

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the Commission not to make discriminatory award provisions and to encourage the parties to proceedings before it to take account of equal opportunity principles." *Id.* at 142. *See also*, the Workplace Relations Act and Other Legislation Amendment Act, 1996 (Cth.) schedule 5, which was described by Creighton and Stewart as follows: "The review of awards that was mandated by Schedule 5 to the WROLA Act required the Commission to ensure that existing awards did not 'contain provisions that discriminate against employees because of, or for reasons including, . . . physical or mental disability'." *Id.* at 143. Schedule 5 was a transitional provision.

4. CREIGHTON & STEWART, *supra* note 1, at 274.

5. *See* Anti-Discrimination Act, 1977 (NSW); Anti-Discrimination Act, 1991 (Qld.); Equal Opportunity Act, 1984 (SA); Anti-Discrimination Act, 1998 (Tas.); Equal Opportunity Act, 1995 (Vic.); Equal Opportunity Act, 1984 (WA).

6. *See* Racial Discrimination Act, 1975 (Cth.); Sex Discrimination Act, 1984 (Cth.).

7. Human Rights and Equal Opportunity Commission Act, 1986, § 7(1) [hereinafter HREOC].

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discrimination, and the capacity of people with disabilities to enforce their rights.

## II. THE DISABILITY DISCRIMINATION ACT REVIEWED

In 2003, the DDA was reviewed by the Productivity Commission, a public authority that, in part, has the function to review legislation that affects competition. The Commission took a very broad range of considerations into account, including principles of equality, competition, and social impact. It issued a draft report called *Review of the Disability Discrimination Act 1992*.<sup>8</sup> The Commission's report is thoughtful, comprehensive, and sensitive to the position of people with disabilities.

The Commission acknowledged that "large numbers of Australians with disabilities are disadvantaged in many areas of life," and that there is "broad agreement that the rights of people with disabilities should be protected . . . in practice."<sup>9</sup> It concluded that the broad thrust of the DDA remained appropriate and consequently accepted that much of the DDA should not be amended.

Nonetheless, the Commission noted that the DDA has been least effective in reducing discrimination in employment, compared with its considerable success in other areas such as public transport and goods and services.<sup>10</sup> Therefore review of the application of the DDA to employment warrants special attention. One of the aims of this article is to assess some key findings and recommendations of the Productivity Commission's draft report, taking legislative developments and judicial interpretation of the Act into account.<sup>11</sup>

The DDA commences with objective clauses, followed by definitions of disability and discrimination. It then makes discrimination unlawful in a number of areas, including employment, and provides exemptions where it makes discrimination lawful. Finally, a provision is made for people with disabilities to enforce their rights under the DDA. I will explain these key features of the DDA, and assess their operation in light of the Commission's report.

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8. Disability Discrimination Act, 1992 (Cth.) [hereinafter DDA].

9. Productivity Commission Draft Report 2003 [hereinafter PCDR], at xxv.

10. PCDR 2003, at 88-89, 100-103; HREOC sub. 143, 59, 64-65

11. HREOC § 7(1).

### III. OBJECTIVES OF THE DISABILITY DISCRIMINATION ACT

The ineffectiveness of the objective clauses of the DDA is highlighted and proposed reforms are advanced, including the addition of an aspirational preamble.

#### A. *The Objective Clauses*

Objective clauses—in which the objectives of the law are stated—are common in Australian legislation. In assessing the effectiveness of the DDA, it is appropriate to investigate how capable the legislative scheme is of achieving its aims. The aims of the Act also provide a guide to its interpretation and application.<sup>12</sup>

Section 3 of the DDA contains the objective clauses. The first objective is to “eliminate, as far as possible, discrimination against people with disabilities” in a range of areas, including work. This section clearly expresses that it is the intention of parliament to eliminate discrimination, and that this intention should act as a guide to the interpretation of the Act. Moreover, the assertion that this objective must be pursued “as far as possible” forms a strong statement of legislative intent.<sup>13</sup> This primary purpose is also expressed and reinforced in several other key sections of the Act: the definitions of disability (section 4), direct and indirect discrimination (sections 5, 6), harassment (sections 35–40), and enforcement (sections 42–44, 69, 89).

The second objective, “to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community,” invokes a familiar right enshrined in the rule of law.<sup>14</sup> Accordingly, this right is to be applied through the DDA: all members of the community are subject to the DDA; the DDA will be administered impartially; and the DDA can be invoked by people with disabilities to protect their rights. However, the principle of equality before the law does not “imply any qualitative view about the sort of law to which all should be subject.”<sup>15</sup> Furthermore, the DDA itself does not contain any express guarantee

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12. Beth Gaze, *Context and Interpretation in Anti-Discrimination Law*, 325 MELB. U.L. REV. 26 (2002).

13. DDA § 3(a).

14. See *The Rule of Law*, in THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT 473-474 (Janet Coleman et al. eds., 1987).

15. G. Marshall, *Notes on the Rule of Equal Law*, in EQUALITY NOMOS IX 263 (J.W. Chapman & J.R. Pennock eds., 1967); see also J.R. Lucas, *Against Equality*, in JUSTICE AND EQUALITY 139 (H. Bedau ed., 1971); W. MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 139 (1983).

of a right to equality before the law in its substantive provisions. This is to be contrasted to section 10(1) of the Racial Discrimination Act 1975 (Cth.), which contains such an express right. Therefore, the principle of equality before the law enshrined in the objects of the Act, while fundamental, is severely limited.

The third objective, promoting recognition and acceptance “within the community that persons with disabilities have the same fundamental rights as the rest of the community,” is a broad and general principle. Yet, no effective means for implementing this principle in the employment context have been provided for under the DDA, apart from the prohibition of discrimination. For example, the Act does not provide people with disabilities a right to be in employment similar to the rest of the community.<sup>16</sup> For present purposes, therefore, the first objective of the Act is the operative clause, namely the elimination of discrimination against persons on the ground of their disability in their employment.

#### *B. Narrow Interpretations of Anti-Discrimination Legislation*

Guidance in interpreting Australian Acts can be found in section 15AA of the Acts Interpretation Act 1901 (Cth.).<sup>17</sup> Since 1981, when this provision was introduced, “an interpretation which promotes the purpose of the Act is to be preferred.” Pearce and Geddes observe that “the task of the court under s 15AA and State equivalents is to seek to discover [and if possible to] further the underlying purpose or object of the provision in question.”<sup>18</sup> There need not be an ambiguity for this Act to apply, in contrast to the purpose rule of construction at common law. In accordance with section 15AA, a judge must consider alternative constructions of the legislation.<sup>19</sup>

Yet, this kind of provision has not been discussed much by judges interpreting anti-discrimination legislation. Justice Mahoney stated: “The interpretation of a provision [can be] difficult, not because the policy or purpose of the legislation is not clear, but because the section is directed, not simply to effecting that policy or purpose, but

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16. Under the DDA, there is provision for Disability Employment Standards. While draft standards have been written, the Productivity Commission does not expect that they will be implemented. *See* [http://www.hreoc.gov.au/disability\\_rights/standards/Employment\\_draft/employment\\_draft.html](http://www.hreoc.gov.au/disability_rights/standards/Employment_draft/employment_draft.html).

17. Acts Interpretation Act, 1901 § 15AA (Cth.).

18. D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 28 (5th ed. 2001).

19. *Id.* at 25.

to achieving a compromise between it and other considerations.”<sup>20</sup> As Gaze points out, “such counterbalancing policies and purposes should be explicitly discussed in the context of interpretation.”<sup>21</sup>

Thus, it is worth considering in what ways the courts have given effect to the purposes and pursued their interpretations of anti-discrimination legislation. The High Court has offered little guidance on interpreting the DDA. However, High Court judges have given interpretations of other anti-discrimination legislation. When the High Court has talked about the purpose of anti-discrimination laws, it has firmly maintained that “they are given a beneficial and remedial construction.”<sup>22</sup> Nonetheless, and at the same time, the Court has adopted a narrow interpretation of specific terms in the legislation.<sup>23</sup> This later approach has been followed with such commitment by some lower court judges that Justice Davies, a Federal Court judge, remarked: “It is not appropriate to consider the question of reasonableness [in indirect discrimination] by commencing first with a view that human rights and discrimination legislation should be liberally construed. Nor is it correct to approach the meaning of reasonableness informed by the objects and purposes of the Act.”<sup>24</sup>

In light of this approach, Gaze observes:

Australian judges most often give a literal or a narrow reading of specific provisions or terms they are construing, using only textual methods to reach a decision. In this process, some very narrow and technical distinctions have been introduced, making success more difficult for complainants and discouraging the bringing of actions.<sup>25</sup>

Regrettably, judges in Australia have by and large construed anti-discrimination legislation in the same way as other Acts of Parliament: they have seen their role as merely interpreting the words.

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20. *Metal Manufacturers Pty., Ltd. v. Lewis*, 13 NSWLR 315, 326 (1988).

21. Gaze, *supra* note 12, at 332.

22. *Waters v. Public Transport Corp.*, 173 CLR 349, 362–365 (1991) (Mason, C.J. & Gaudron, J.), 378–9 (Brennan, J.), 383–4 (Deane, J.), 408–10 (McHugh, J.); *I. W. v. City of Perth* 191 CLR (1997) 12 (Brennan, C.J. & McHugh, J.), 27 (Toohey, J.), 35–6 (Gummow, J.), 52 (Kirby, J.). A similar view was expressed in *Qantas Airways Ltd v. Christie* (1998) 319 (Gummow, J.); and *X. v. Commonwealth* (1999) 222, 228 (Kirby, J.).

23. See, e.g., Gaze, *supra* note 12, at 332, who refers to *I. W. v. City of Perth* (1997) 191 CLR 1, 14–15 (Brennan, C.J. & McHugh, J.). Cf. at 52, 57–60 (Kirby, J.).

24. *Commonwealth Bank of Australia v. Human Rights and Equal Opportunity Commission*, 80 FCR 78, 88 (1997) (relying on the statement of Brennan, C.J. and McHugh, J. in *I. W. v. City of Perth*, 191 CLR 1, 15 (1997)). See below in section V for a discussion of the reasonableness test in the definition of indirect discrimination (DDA § 6).

25. Gaze, *supra* note 12, at 333.

C. *An Aspirational Preamble: Lessons from Canada*

The approach of Australian judges is to be contrasted with other jurisdictions, such as Canada, where anti-discrimination legislation has been recognized as having a more important status than ordinary legislation because of its subject matter: declaring the fundamental human rights of the people—the rights of everyone to equal treatment and to be free from discrimination.<sup>26</sup> Given the similarity of the fundamental rights protected in both the Canadian and Australian legislation, it would be open to Australian judges to interpret the DDA in a similar way.

Perhaps judges in Canada have been fortified in their interpretation by the fact that their anti-discrimination legislation is titled “human rights ‘acts’ or ‘codes.’” This kind of language clearly invokes human rights as a source of rights. In this context, the preamble to the Ontario Human Rights Code explains that the “public policy” of the Province of Ontario is to “provide for equal rights and opportunities without discrimination” and to create “a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.”

The adoption of a Canadian-style preamble for the DDA would enable Australian judges to declare that the “public policy” of the Commonwealth is “to promote the equal rights and opportunities of people with disabilities without discrimination.” The purpose of such a preamble would be twofold. First, it would express community aspirations and could draw usefully on the inspirational language of human rights. Second, it would express the resolution of members of a community to join together to address a social problem.

Thus, it would seem appropriate for the preamble to express values such as “dignity,” “equal worth,” and “community cohesion.” The recent Productivity Commission report criticized the imprecision of such human rights values, but then also claimed that these values are contained within the terms of the second objective of the DDA “community acceptance.”<sup>27</sup> However, the term “community acceptance” does not make these values explicit. Moreover, the significance of expressing such values is that these are vital in creating

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26. See *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 2 SCR 536 (1985); *Gaze*, *supra* note 12, at 332.

27. PCDR 2003, at 207.

a “climate” free from discrimination and ought not to be forgotten in the interpretation and application of the legislation.

In addition, comparison with some overseas jurisdictions reveals a critical problem with the construction of the purposes and text of anti-discrimination legislation by Australian courts. While the first legislative objects clause of the DDA makes a commitment to the elimination of discrimination, it does not address the more difficult problem of how its purposes are to be interpreted.<sup>28</sup> There have not been explicit attempts in Australia to provide advice to judges about how legislation is to be interpreted and, more importantly, applied. In other jurisdictions this challenge has been met: in Canada, for example, the preamble to the legislation informs judges of the public policy of the parliament and the social, political, and economic context of the legislation. Thus, there are suitable models for the insertion of a preamble into the DDA.

#### *D. Two Amendments to the DDA*

The Productivity Commission found that “[t]he objects of the *Disability Discrimination Act 1992* (§ 3) are appropriate and do not require amendment.”<sup>29</sup> The Commission seemed to favor the view that “[t]he objects of the DDA are obviously aspirational, verbalising a desired community standard, as is appropriate for legislation of this kind.”<sup>30</sup> My view, conversely, is that a desirable community standard and, most importantly, its interpretation, could be further clarified through two amendments. First, a new preamble could be introduced explicitly stating the “public policy” of the Commonwealth. Considerations of public policy have not hitherto been influential in the interpretation of Australian anti-discrimination legislation and have not been amenable to judicial consideration.

Second, the second objective clause could be strengthened by the enactment of a right to equality before the law in the substantive provisions of the DDA. Such an amendment could draw upon the example of the right to equality before the law in section 10(1) of the *Racial Discrimination Act 1975*. After all, the purpose of objective clauses, where appropriate, is to articulate a community standard that, where possible, is matched by supporting provisions in the legislation.

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28. Gaze, *supra* note 12, at 330.

29. PCDR 203, at 208.

30. *Id.* at 205.

#### IV. DEFINING DISABILITY

The definition of disability expressed in the Australian DDA has been seen as very inclusive until now. The breadth of the DDA's definition contrasts sharply with the definitions in other jurisdictions. However, the narrowing of the meaning of "disability" in the DDA has recently been proposed by the Federal Government.

##### A. *The Definition of Disability in the DDA*

There is a very broad definition of "disability" in section 4 of the DDA, which is based on the medical meaning of the term. The term covers mental, physical, or emotional impairment; a disease or illness; learning difficulties; and a total or partial loss of the body or bodily function. The definition includes "a disability that presently exists; or previously existed but no longer exists; or may exist in the future; or is imputed to a person."<sup>31</sup> The definition does not require any assessment of the type, severity, or permanency of the disability, or how or when it developed. Nor is the Act concerned with the nature of a disability.<sup>32</sup> Rather, the DDA focuses on whether a person has been discriminated against on the basis of their actual or perceived disability.<sup>33</sup>

The underlying philosophy of the DDA is that people should not be excluded from the operation of the Act based on a dispute about the nature of their impairment. There is no concern that there will be a flood of claims, because a complainant with a disability must still demonstrate that there has been an instance of unlawful discrimination.<sup>34</sup>

The DDA's existing definition of disability is highly desirable compared with definitions given in equivalent legislation in overseas jurisdictions. In the United States and the United Kingdom, significant legal resources are taken up by determining who is and who is not a person with a disability.<sup>35</sup>

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31. DDA § 4; PCDR 2003, at 208–210.

32. PCDR 2003, at 208.

33. *Id.* at 205.

34. Interview with Graeme Innes, Deputy Disability Discrimination Commissioner, Sydney, Australia, (Feb. 19, 2004).

35. HREOC § 146 (5, 6); PCDR 2003, at 208.

*B. Possible Amendments to the Definition of Disability*

Until now, it was thought that almost no aspect of a person's impairment was excluded from the definition in the DDA. However, the Productivity Commission recommended that the definition of disability in the DDA explicitly recognize "medically recognised symptoms (where the underlying cause is unknown), [and] genetic abnormalities or behaviours related to disabilities."<sup>36</sup> It would therefore seem to be beneficial to clarify these important points by adding them to the definition of disability in the DDA.

By contrast, some recently proposed amendments by the Federal Government seem far less desirable. In December 2003, the Federal Government proposed to amend the DDA to provide that it is not unlawful to discriminate against a person who is addicted to a "prohibited drug" on the basis of a disability caused by that addiction, including in their employment. It would remain unlawful to discriminate against a person if the use of the drug is authorized by law or where the person is receiving services to treat the addiction to the drug.<sup>37</sup>

The Human Rights and Equal Opportunity Commission (HREOC) does not favor this exclusionary proposal because it undermines the broad philosophy of the Act by defining what is, and what is not, an "acceptable" disability. Rather, the HREOC believes that the DDA can better accommodate drug addiction through the existing exemptions to unlawful discrimination under the Act.<sup>38</sup>

## V. DIRECT AND INDIRECT DISCRIMINATION: CONFLICTING MEANINGS

In the DDA, disability discrimination includes direct and indirect discrimination.<sup>39</sup> The key terms defining discrimination can be interpreted in conflicting ways. The definitions of direct and indirect discrimination also apply in an anomalous way to prospective discrimination.

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36. PCDR 2003, at 215.

37. See Disability Discrimination Amendment Bill, 2003 (Cth.), § 54A (2, 10); Workplace Relations Act, 1996 (Cth.), § 170CK (4A); these amendments were a response by the federal government to *Marsden v. Human Rights & Equal Opportunity Commission*, F.C.R. 1619 (2000).

38. HREOC § 143; see also Bills Digest, at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd084.htm>.

39. DDA §§ 5-9.

A. *The Definition of Direct Discrimination in the DDA*

Under section 5(1) of the DDA, direct discrimination occurs when a person is treated less favorably on the basis of their disability in similar circumstances compared to a person without a disability.<sup>40</sup> Direct discrimination typically “arises when a person with a disability is treated differently to others.”<sup>41</sup> For instance, it would be less favorable treatment to refuse to interview a person on the basis that they have a hearing impairment, compared to non-impaired applicants.

Direct discrimination includes the kind of technical, egregious arguments such as that a person is not being discriminated against because of the disability, but because of the nature of an “aid,” guide dog, or hearing interpreter. These are dealt with in sections 7–9 of the DDA. In a similar vein to the inclusive philosophy mentioned in the previous section in relation to the definition of disability, the legislation incorporates such instances into the ambit of the definition of discrimination.

B. *Reasonable Accommodation: A Suggested Amendment*

Section 5(2) of the DDA extends the scope of direct discrimination.<sup>42</sup> It states that the fact that different accommodation or services may be required by a person with a disability is not to be regarded as materially different treatment. Among federal anti-discrimination legislation, this provision is unique to the DDA.<sup>43</sup> Complaints by non-impaired employees claiming that unequal treatment to benefit employees with disabilities is discriminatory are therefore addressed by the Act.<sup>44</sup> However, in cases of direct discrimination in employment, a significant difficulty lies in proving that an employer’s failure to provide “reasonable accommodation” is in fact discriminatory. Although section 5(2) has been interpreted by HREOC and others “as implying a requirement for employers and others to make ‘reasonable adjustments’ to accommodate the needs of people with disabilities,” the section does not directly address this

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40. DDA § 5(1).

41. PCDR 2003, at 216.

42. *Id.* at 222.

43. *Id.* at 217.

44. *See, e.g., Commonwealth v. Humphries*, 86 FCR 324, 334 (1998) (Keifel, J.): “The comparison in this case must be as between Mrs Humphries, with her needs to enable her to function as an ASO1, and other ASO1’s who are not disabled, but who have reasonable needs for equipment which would enable them to carry out their duties.”

issue.<sup>45</sup> Moreover, the provision has not been interpreted consistently.<sup>46</sup> Inconsistent interpretations “could lead to absurd and undesirable results – for example, it *would be* ‘less favourable treatment’ to refuse to employ a person with a disability, but *not* ‘less favourable treatment’ to refuse to provide them with technologies to assist them at work.”<sup>47</sup> Accordingly, the Productivity Commission has rightly recommended that a “failure to provide ‘different accommodation or services’ required by a person with a disability” amounts to direct discrimination.<sup>48</sup>

### C. *The Definition of Indirect Discrimination in the DDA*

Indirect discrimination occurs when uniform treatment adversely affects people with disabilities. Section 6 of the DDA provides a more complex definition of indirect discrimination. Among other things, it requires that:

- a person must comply with a requirement or condition “with which a substantially higher proportion of persons without the disability comply or are able to comply” (the proportionality test); and,
- such an imposition upon the person with a disability is not reasonable in all the circumstances of the case (the reasonableness test).

The key difficulties in cases of indirect discrimination turn on the meaning of the term “reasonable” and the application of the proportionality test.

The current proportionality test in section 6(a) places an extra evidentiary burden on people with disabilities: the technical nature of the requirement is complex, time consuming, and undoubtedly expensive.<sup>49</sup> In addition, the proportionality test appears to add little to the definition of indirect discrimination. The Productivity Commission therefore appropriately recommended that “the DDA’s definition of indirect discrimination should be simplified by removing the proportionality test.”<sup>50</sup>

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45. PCDR 2003, at 10, 13, 217.

46. *Id.* at 224; compare *AJ & J v. A School* (No. 1), EOC 92–948 (1998) (Sir Ronald Wilson); *A School v. Human Rights and Equal Opportunity Commission*, 1437 FCA (1998) (Mansfield, J.); *AJ & J v. A School* (No. 2), HREOC (2000) (Commissioner McEvoy); *Clark v. Internet Resources*, HREOC (2000) (Commissioner Mahoney); *Commonwealth v. Humphries*, 86 FCR 324 (1998) (quoted in PCDR 2003, at 223). See also HREOC 2004, ¶ 4.2.

47. PCDR 2003, at 224 (emphases added).

48. *Id.*

49. See *Minns v. New South Wales*, FMCA 60, ¶ 253 (2002) (Raphael FM).

50. PCDR 2003, at 226.

*D. Dissent Over the Meaning of Reasonableness*

The term “reasonable” in section 6(b) of the DDA is not defined. However, reasonableness has been interpreted by the High Court in cases decided under similar definitions of indirect discrimination in other anti-discrimination statutes. In *Waters v. Public Transport Corporation* (1991), the Australian High Court disagreed over the meaning of the word “reasonable” in section 17(5) of the Equal Opportunity Act 1984 (Vic.): “[if] the requirement or condition is not reasonable.”<sup>51</sup> Chief Justice Mason and Justice Gaudron (dissenting) propounded a strict test, contending that the wording of the section formed part of the definition of discrimination itself. Its purpose, according to them, was to remove only “those cases in which a requirement or condition serves to effect a genuine distinction.”<sup>52</sup> Genuine distinctions were those that were appropriately adapted to the requirements and conditions that were permitted by the Act.<sup>53</sup> For instance, a job requirement that a person be of a certain height could be appropriate for a particular acting role, but a general preference for taller people may well have a disproportionate impact on certain people with disabilities.

Chief Justice Mason and Justice Gaudron interpreted the reasonableness test as requiring the Court to identify a limited range of cases in which an imposed requirement or condition would not be rendered impermissible by the Equal Opportunity Act (Vic.). They argued that it was inappropriate to take into account financial and economic factors that might have motivated the decision, because such factors might result in the kind of disproportionate treatment that are regarded as discriminatory under the Act.<sup>54</sup> For example, since it would be more expensive to provide a lift in the workplace, it might be considered reasonable not to make the modification, despite the disproportionate impact on people with mobility disabilities.

By contrast, Justices Brennan, Deane, Dawson, Toohey, and McHugh maintained that the term “reasonableness” involved a weighing of all relevant factors. This required consideration of the discriminatory effect upon the complainant and the reasons in favor of the imposition of the requirement or condition (including the financial

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51. *Waters v. Public Transport Corp.*, 173 CLR 349, 362–365 (1991) (Mason, C.J. & Gaudron, J.), 378–380 (Brennan, J.), 383–384 (Deane, J.), 394–396 (Dawson & Toohey, J.J.), 408–411 (McHugh, J.).

52. *Id.* at 363.

53. *Id.*

54. *Id.* at 364.

or economic circumstances of the defendant).<sup>55</sup> This “balancing of interests” reflects a liberal approach to defining “reasonableness.”

However, as Chief Justice Mason and Justice Gaudron pointed out, the effect of such an approach in this statutory context is open-ended. If the liberal approach is adopted, they argued, the legislative purpose might be defeated: “If ‘reasonable’ is not limited by the concept of ‘discrimination’, there is nothing else in the Act to limit the considerations to be taken into account in reaching a decision on that issue.”<sup>56</sup> Also, they argued, if the legislature had intended to provide for an exemption on that ground, it would have found a home in “Part V—General Exceptions.”<sup>57</sup> If reasonableness is given a broad view, it creates a new exception that is not provided for in the special part of the Act devoted to exceptions. This would be the proper place for such an exception, where it could be assessed against the other exceptions, which already permit exclusions from the Act based on the financial situation of the defendant. This is particularly so in relation to the undue hardship exemption in the DDA, as explained in section VI.B. below.<sup>58</sup>

Accordingly, under the majority’s approach in *Waters*, liberal notions of “reasonableness” are fundamentally proscribing the definition of indirect discrimination. Another disadvantage of the broader approach of the majority is that it blurs the line between what is discrimination and what is an exception or a defense to it. The stricter view of the minority in *Waters* is to be preferred, since it conforms more closely to common understandings of discriminatory practices and properly identifies the treatment of financial and economic considerations as a justification for an exemption to discrimination. Moreover, it appears to more properly reflect the distinction between the meaning of discrimination and unlawful discrimination contained in anti-discrimination Acts in Australia.

Interestingly, the Productivity Commission seems to follow the majority approach in *Waters*. As previously argued, this approach is not—as the Commission asserts—conducive to producing clarity, as it

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55. *Id.* at 378–79 (Brennan, J.), 383–84 (Deane, J.), 395–96 (Dawson & Toohey, J.J.), and 408–11 (McHugh, J.).

56. *Id.* at 365.

57. *Id.*

58. Following *Waters*, the Victorian Parliament enacted the Equal Opportunity Act, 1995, replacing the 1984 Act. The majority’s view of reasonableness in *Waters* is reflected in section 9(2) of the 1995 Act, and in other state Acts. See Glenn Patmore, *Disability Discrimination*, in *THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA* 208 (Tony Blackshield, Michael Coper & George Williams eds., 2001).

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blurs the relationship between reasonableness and the unjustifiable hardship exemption.

The point really is this: should financial factors be relevant to a consideration of “reasonableness,” or should they be put to one side until “unjustifiable hardship” is weighed? It is not always clear whether in existing cases courts have simply struck out claims on the basis that the modification would be “unreasonable” (at the definitional level), without considering “unjustifiable hardship” at the exemption and defense stage, or whether they have taken hardship into account while evaluating reasonableness.

A third view of the reasonableness test is that there is really only a single question (with a number of different factors) to be considered: Is the modification reasonable or is it unjustifiably hard? This view sees the process as one of finding a point on a continuum, with “reasonableness” at one extreme and “unjustifiable hardship” at the other. Along this spectrum, unreasonableness is the point where unjustifiable hardship begins. Modifications that are reasonable cannot be unjustifiably hard; modifications that are unreasonable will be unjustifiably hard. The difficulty lies in drawing the line in the middle.

The problem with this view is that at one point it equates “unreasonable” with “unjustifiably hard,” a view that is not apparently supported by the terms of the legislation.<sup>59</sup> There is also more to reasonableness than a lack of hardship; putting the question in these terms may place too much emphasis on financial factors.

Nevertheless, the third view means that courts have to clarify whether they base their decision about reasonableness on financial and/or other factors. Given the difficulties with the third approach, the better view appears to be that advanced by the minority in *Waters*.

#### *E. Shifting the Burden of Proof*

Another important issue is the burden of proving “reasonableness” in indirect discrimination cases. While the DDA does not stipulate who must prove “reasonableness,” in the “second reading” the Honourable Brian Howe, Minister for Health, Housing and Community Services, indicated that “the overall legal burden of proof, in proving discrimination unlawful, will remain with the complainant.”<sup>60</sup>

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59. Interview with Graeme Innes, Deputy Disability Discrimination Commissioner, Sydney, Australia (Feb. 19, 2004).

60. Hansard, Australian House of Representatives, (May 26, 1992).

Placing the burden of proving reasonableness on the complainant is problematic, because “the information necessary to make an assessment of what is reasonable, or to prove reasonableness, often lies with the respondent and is inaccessible to the complainant.”<sup>61</sup> For instance, in the employment context, the prospective employee is not likely to have access to all the information about the needs of the business, and also, the employer is best placed to explain why certain productivity standards are reasonable.<sup>62</sup>

Thus, the Productivity Commission concluded that it is neither appropriate nor efficient to place the burden of proving unreasonableness in the definition of indirect discrimination in the Disability Discrimination Act 1992 on the complainant.<sup>63</sup> The Commission recommended that the burden of proof should be placed on the discriminator (who is best placed to discharge it). This recommendation is to be welcomed and is consistent with the approach in the proposed Federal Age Discrimination Bill, section 15(2), and Sex Discrimination Act (Cth.), section 7C.

#### *F. Proposed Actions: An Anomaly in the DDA*

Finally, in relation to proposed actions, an anomalous distinction occurs between the definitions of discrimination under the DDA. Actions that have been proposed but not yet carried out are included in the definition of direct discrimination in section 5(1), but not in the definition of indirect discrimination in section 6. Thus, a person with a disability must “wait until a requirement or condition that indirectly discriminates against them is introduced before they can make a complaint.”<sup>64</sup>

The Productivity Commission concluded that this anomaly was both inefficient and unnecessary and should be addressed.<sup>65</sup> I agree that an amendment adding prospective discrimination to the definition of indirect discrimination would be worthwhile.

## VI. UNLAWFUL WORKPLACE DISCRIMINATION AND ITS EXEMPTIONS

The Disability Discrimination Act makes a distinction between the definition of discrimination and acts of discrimination that are

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61. PCDR 2003, at 228, *quoting* Equal Opportunity Commission Victoria, § 127, at 27–28.

62. *Id.*, *quoting* Age Discrimination Bill explanatory memorandum.

63. Disability Discrimination Act, 1992, § 6(b).

64. PCDR 2003, at 229.

65. *Id.*

unlawful. What constitutes unlawful discrimination is specifically spelled out in relation to employment. However, discrimination in employment may still be lawful if it is covered by an exemption in the Act.

*A. Unlawful and Lawful Workplace Discrimination*

In the DDA, disability discrimination is made unlawful in relation to a number of activities in the workplace. Section 15 of the Act makes it unlawful for an employer to discriminate in the recruitment of employees; the terms and conditions on which employment is offered; access to promotion, transfer or training, or to any other associated employment benefits; and in dismissing employees or subjecting them to any other detriment. The Act also extends to disability discrimination against non-employees, such as commission agents, contract workers, and partners.<sup>66</sup> Persons who are not employers, such as employment agencies, trade unions, and qualifying bodies, are also covered.<sup>67</sup>

In sum, the employment provisions in the DDA are very broad. However, they are limited by the Act's exemptions, which provide that disability discrimination is not unlawful in specified situations. The more significant of these exemptions in the Disability Discrimination Act ought to be maintained. However, some clarification of their scope and application is needed.

Three exemptions under the DDA are significant, because they affect the way financial and economic considerations are to be taken into account when justifying discrimination. The first two exemptions discussed below are justifications of discrimination adversely affecting people with disabilities, while the third is a defense against claims that programs that benefit people with disabilities are discriminatory.

A strong justification should be required to make acts of discrimination lawful that adversely affect people with disabilities. This is because such exemptions may undermine the first objective of the Act: to eliminate discrimination. On the other hand, lawful acts of discrimination that benefit people with disabilities should require a weaker justification. This is because generally such acts or programs further the purpose of the Act to eliminate disability discrimination.

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66. DDA §§ 16–18.

67. *Id.* §§ 19–21.

*B. The Unjustifiable Hardship Exemption*

Section 15(4)(b) of the DDA makes discrimination lawful if the employee requires the provision of services or facilities that would impose an “unjustifiable hardship” on the employer. The DDA does not define “unjustifiable hardship.” Rather, section 11 stipulates that “all relevant circumstances” must be taken into account and lists several non-exhaustive considerations. The relevant considerations are:

- the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- the effect of the disability of a person concerned; and,
- the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

The effect of these considerations varies according to the employer’s circumstances and the size of the employer’s business. For example, a large corporation might be expected to install a lift for a mobility-impaired person, but such a cost would not be imposed on a smaller business if the burden would seriously impair the viability of the enterprise.

The virtue of the unjustifiable hardship exemption is that it specifies criteria that clearly identify relevant considerations. Furthermore, this exemption “helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting any requirements that would impose excessive costs on individual employers.”<sup>68</sup>

However, the Productivity Commission has identified two problems with this defense. First, the unjustifiable hardship exemption only applies to the commencement and termination of employment:

Although it is unlawful to discriminate in all aspects of employment (including job interviews, job offers, wage offers, training, promotion, transfers and termination), the unjustifiable hardship defence is available only with respect to job offers and employment termination . . . . This limited coverage . . . might also have had the perverse effect of encouraging discrimination in initial recruitment and enrolments, to avoid the risk of having to provide different services or facilities later on, when the unjustifiable hardship defence will not be available.<sup>69</sup>

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68. PCDR 2003, at 245.

69. *Id.*; please note that the Commission was relying on HREOC’s submission, HREOC § 143, at 20.

Second, the Commission argued that an amendment to the exemption is required to accommodate its recommendation that the definition of direct discrimination be expanded so that a failure to provide “different accommodation or services” required by a person with a disability is a form of direct discrimination.<sup>70</sup> To ensure that the definition of direct discrimination operates “in a balanced and equitable manner,” the defense must be available “in all situations” requiring an adjustment that might impose an unjustifiable hardship.<sup>71</sup> Thus, the Productivity Commission concluded that “[t]he unjustifiable hardship defence should be available on an equal basis in all areas in which the DDA makes discrimination unlawful.”<sup>72</sup>

### C. *The Inherent Requirements Exemption*

Under section 15(4)(a) of the DDA, an employer may justify discrimination on the basis that the employee “would be unable to carry out the inherent requirements of the job.” The Productivity Commission found that the inherent requirements exemption in the DDA is “appropriate” and did “not require amendment.” However, it later qualified its view, stating: “Guidelines to explain how inherent requirements should be identified in practice could be useful.”<sup>73</sup> The Commission’s suggestion for the use of Guidelines intimates that the operation of the exemption is uncertain in practice.<sup>74</sup> Furthermore, the exemption has proved to be contentious.

In *X v. Commonwealth*, the High Court considered the meaning of the term “inherent requirements of employment” under the DDA in the context of a case of direct discrimination.<sup>75</sup> In 1993, the

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70. DDA § 5(2).

71. PCDR 2003, at 255.

72. *Id.* at 251.

73. *Id.* at 243. The inherent requirements provisions of the DDA are similar to a provision of the Workplace Relations Act, 1996 (Cth.), which does not make it unlawful for employers to dismiss an employee due to a disability (or other attributes) if that disability means the employee cannot meet the inherent requirements of the position (§ 170CK(2)). HREOC argued that “requirements contained in another law”—such as those arising from the Workplace Relations Act or occupational health and safety Acts—and qualification requirements “may well be recognised as inherent requirements or at least recognised as reasonable requirements for indirect discrimination purposes.” HREOC, sub. 143, ¶ 34; *see* PCDR, ch 9. It follows from HREOC’s submission that the inherent requirements exemption will generally be read subject to other pieces of legislation. Its interpretation is to be criticized, because it might prematurely foreclose an inquiry. The preferable view is that an inquiry should be undertaken to determine whether these provisions are in fact inherent requirements under the Act. HREOC later added that “the terms of applicable awards and agreements will be relevant to but not necessarily decisive of the inherent requirements of a job.” HREOC, sub. 219, at 33. This seems to be the appropriate response.

74. *See also* PCDR 2003, at 240.

75. (1999) 200 CLR 177.

appellant, X, was discharged from the Australian Defence Force (ADF) because he was HIV-positive. The discharge was made in accordance with the ADF's "Policy for the Detection, Prevention and Administrative Management of HIV Infection."<sup>76</sup> The whole Court accepted that HIV-positiveness is a disability and that the dismissal fell within the definition of discrimination in the Disability Discrimination Act, but divided on the application of the exemption in section 15.<sup>77</sup> The Court held that X's disability did not just pertain to the "incidents" of army service, but to its "inherent requirements."<sup>78</sup> The applicant's appeal was dismissed.

In this case, the majority propounded a broad interpretation of "inherent requirements" as including practical and operational considerations.<sup>79</sup> This means that employers can more readily argue that disabled employees are unable to perform the inherent requirements of a position. Justice Kirby adopted a narrower interpretation of "inherent requirements" as including only those duties that are "essential, permanent and intrinsic" to the employment.<sup>80</sup> Under this interpretation, the employer must demonstrate that the employee cannot perform these duties because of their disability, not merely that the employee may have difficulties in doing so. This means that the employer could not dismiss the employee based on his own criteria or interests, but only on the basis of the employee's incapacity to perform permanent and essential duties—ascertained in accordance with the object of the DDA.

According to some, the decision in *X* was an "extreme example" because it involved a person in the Defence Force.<sup>81</sup> Hence the majority's principle in *X* can be confined to its facts, and should not be applied generally to other cases.

Interestingly, perhaps in response to *X*, the Human Rights and Equal Opportunity Commission has provided guidelines that tend to confine the scope of the term "inherent requirements." Nonetheless,

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76. *Id.* at 182 (per McHugh, J.).

77. *X v. Commonwealth*, 200 CLR 177, 183 (1999) (McHugh, J.), at 203, (Gummow & Hayne, J.J., Gleeson, C.J., and Hayne, J., agreeing) at 217 (Kirby, J.).

78. *Id.* at 181–82, 197–99 (McHugh J), 209–10 (Gummow and Hayne JJ, Gleeson CJ and Hayne J, agreeing); see Patmore, *supra* note 58.

79. *X v. Commonwealth*, 200 CLR 177, 187–92 (McHugh, J.), 208–10 (Gummow & Hayne, J.J., Gleeson, C.J., agreeing), 232 (Callinan, J.).

80. *Id.* at 229.

81. If *X* was again litigated today, the Defence Force might be able to claim the defense under the regulations made pursuant to §§ 53 and 54, which provide for an exemption of the operation of the Act in respect of combat duties and peacekeeping by the armed forces and the Australian Federal Police respectively. The exemption was not available in *X*'s case, because § 53 only became operative once the Federal Parliament passed appropriate regulations.

the absence of a statutory definition and the doctrine of precedent mean that the majority's approach in *X* will be influential. The majority's approach means that operational requirements dictate the meaning of inherent requirements under the Act. Justice Kirby's dissenting approach is to be preferred, since it conforms better with the purposes of the legislation and with the ordinary meaning of the words "inherent requirements." By comparison, Canadian anti-discrimination legislation contains similar exemptions but uses the term "essential requirements."<sup>82</sup>

Legislative clarification and amendment of the section on inherent requirements would seem appropriate. It would have the effect of making the application of the exemption certain and clear.<sup>83</sup> If the words of the exemption in the Act were to be replaced with Justice Kirby's formulation, that would rectify the problem.

In sum, an employer can be justified in not expending funds to employ a person with a disability based on either the inherent requirements exemption or unjustifiable hardship. The term "inherent requirements" is too vague and broad; this defense therefore undermines the purpose of the Act to eliminate discrimination. By contrast, the criteria for the unjustifiable hardship exemption provide clear guidance for granting an exemption and compel a rigorous justification suitably meeting the objects of the DDA. Yet, there are some practical problems with the operation of the exemption that necessitate amendments to the DDA.

#### *D. The Special Measures Exemption*

The third and last exemption I will consider in depth is the special measures exemption, which provides that the expenditure of "extra" funds to assist people with disabilities is lawful in certain circumstances. Section 45 of the DDA provides that an act will be lawful if it is reasonably intended to promote equal opportunities or provide services, funds, or programs, whether direct or indirect, to meet special needs. The aim of the exemption is to protect measures that are beneficial for people with disabilities from challenge.<sup>84</sup> Thus it is lawful to provide certain national information and library service recordings only to people with certain disabilities.

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82. Human Rights Code, RSO 1990, Chapter H19, § 17(1); *X v. Commonwealth*, 200 CLR 177, 224–230 (1999).

83. PCDR 2003, at 242.

84. *Id.* at 269.

The special measures exemption applies in different ways from the provision for certain acts providing reasonable accommodation, discussed in Section V.B. In the first case, discrimination occurs, but it is lawful; in the second, the acts are not to be regarded as materially different treatment, so there is no discrimination. Another difference is that section 45 pertains to initiatives, policies, or programs that provide support for people with a disability in employment or education, while section 5(2) pertains to acts that provide reasonable accommodation.

Concern has been expressed over the scope of the special measures exemption for measures taken in the administration of a program. It has been suggested that any act, and not just a beneficial act, would be covered by this exemption. The Productivity Commission has therefore recommended that only beneficial acts done in the administration of a program be exempted: it wishes to retain the special measures exemption for the “establishment, eligibility and funding arrangements of ‘special measures’ that are reasonably intended to benefit people with disabilities.”<sup>85</sup> Non-beneficial acts would thus be subject to the provisions prohibiting disability discrimination under the DDA.

The Commission noted that there was uncertainty about the interaction between the “special measures” and productivity-based wages exemptions.<sup>86</sup> This was because some business services (or sheltered workshops), which ought to have been covered by the productivity-based wages exemption, could in fact be characterized as “special measures” and hence be exempt from the operation of the DDA.<sup>87</sup> It follows that people with disabilities could be paid a lower wage without a consideration of their “assessed relative productivity” as required by the productivity-based wages exemption. The Commission has rightly recommended that business services be covered by this exemption.<sup>88</sup>

It is indeed anomalous to exempt business services (or sheltered workshops) from the productivity-based wages exemption. After all, the legislative purpose of this defense is to move the issue of wages for

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85. *Id.* at 270.

86. DDA § 47(1)(c). Many people with disabilities are paid productivity-based wages, which are “lower than full wages, based on their assessed relative productivity.” Despite criticism, the Commission believed that the exemption covering “current provisions of the Disability Discrimination Act 1992 dealing with productivity-based wages are appropriate.” PCDR 2003, at 273.

87. PCDR 2003, at 273.

88. *Id.*

people with disabilities into the mainstream of industrial relations.<sup>89</sup> This is a policy that promotes greater integration of people with disabilities into the community.

#### *E. Other Exemptions*

The *DDA* also contains a range of other exemptions that are relevant to employment. These are only briefly discussed because their impact on the employment market is more limited. For example, there are certain limited exemptions for participation in active operations in the military and peacekeeping services.<sup>90</sup> While the policy objectives behind this exemption seems sensible, the objectives underpinning other exemptions are not so clear-cut. For example, the prohibition against discrimination in the recruitment and terms of employment afforded to the employee do not apply to private households.<sup>91</sup> In evidence to the Productivity Commission, HREOC indicated that it did not know the underlying rationale for the domestic duties exemption and that it favored a review of the extent of this exemption.<sup>92</sup> However, the Productivity Commission suggested that the rationale of the domestic duties exemption was to “preserve private life, where a greater degree of individual choice is recognised.” Alternatively, this exemption may presumably be justified on the basis of maintaining domestic harmony. However, in the area of domestic employment, disability discrimination is still unlawful in the terms of employment offered, termination of employment, and the subjection of an employee to any other detriment.<sup>93</sup> Nonetheless, the degree of uncertainty surrounding the rationale for the domestic duties exemption does justify HREOC’s favoring of a review of this exemption.

Another exemption is that none of the employment provisions apply to partnerships in practices with only two partners.<sup>94</sup> It is noteworthy that the Commission did not provide any rationale for the partnership exemption, but it could be supported as a measure to protect small businesses, or because such businesses should not be subject to the extra expenditure in employing people with disabilities. These are fairly weak justifications. Although there are differences between employment and partnership, discrimination in the case of a

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89. HREOC § 219, *cited in* PCDR 2003, at 273.

90. *DDA* §§ 53, 54.

91. *DDA* §§ 15(3)–(4).

92. PCDR 2003, at 274.

93. *DDA* §§ 15(1)(c), 15(2)(c)–(d).

94. *DDA* § 18.

partnership is unjustifiable and the exemption ought to be reviewed. Perhaps the time has come to remove these minor exemptions in the DDA in order to promote greater equality in our society.

## VII. IMPROVING THE COMPLAINTS PROCESS

Much of the above discussion has been concerned with the definitions, rights, and exemptions in the DDA, but the Act also offers people with disabilities a way to enforce their rights. But how is compliance with the Act achieved, and how effective is it?

### A. *The Complaints Process: Complaint, Conciliation, Court Case*

Compliance with the DDA is secured mainly through people with disabilities enforcing their rights by making an individual complaint. However, often the threat of a complaint alone can provide a powerful impetus for positive change.<sup>95</sup> In this way, the Act has a preventive effect, as employers are made aware of adverse consequences of discrimination.

Once a complaint is made, the first step in resolving it is conciliation. This involves an informal meeting between the parties and a conciliator.<sup>96</sup> The Productivity Commission acknowledged the benefits of conciliation, including the fact that conciliation is an accessible process producing quick, satisfying, and cost-effective outcomes.<sup>97</sup> On the other hand, the Commission recognized that there may be certain disadvantages associated with the complaints process, including the time involved in preparing a complaint and costs if a person has legal representation at the conciliation. Furthermore, the inequality of resources between employer and employee can undermine the basis of a successful conciliation, because it is assumed that the parties will have equal bargaining power.<sup>98</sup> Where

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95. PCDR 2003, at xxxvi.

96. Under § 46 of the HREOC Act, a complaint may be lodged. The complaint must then be referred to the President, who must inquire into the complaint and attempt to conciliate it. See DDA §§ 46PD, 46PF(1). Section 46PH lists grounds on which the President may terminate a complaint. If a complaint is lodged alleging that a person has done a discriminatory act under an award, the President must refer the award to the Australian Industrial Relations Commission unless he or she thinks that the complaint is "frivolous, vexatious, misconceived or lacking in substance." DDA § 46PW. Similar provisions relate to the referral of complaints alleging that a person has done a discriminatory act under a determination made by the Remuneration Tribunal or the Defence Force Remuneration Tribunal. DDA §§ 46PX, 64PY.

97. PCDR 2003, at 275.

98. *Id.* at 282.

conciliation fails, a case may be brought to the Federal Court or the Federal Magistrates Service.<sup>99</sup>

### *B. Barriers and Improvements*

There is a strong case for reform of the complaints process, given that the Victorian Equal Opportunity Commission has estimated that “some 70 per cent of people who think they’ve had their rights abused, generally across the board, in fact elected not to bring a complaint.”<sup>100</sup> The Productivity Commission too noted that some people with disabilities face large barriers to using the court process, including:

- uncertainty about whether one party will be ordered by a court to pay the legal costs of the other;<sup>101</sup>
- the formality and complexity of the court process;<sup>102</sup> and,
- fear of victimization, particularly if they belong to a small community or institution.<sup>103</sup>

The Commission argued that the conciliation and court process could be improved by the following proposals:

- To reduce the uncertainty in bringing a case to court, criteria should be set for when court costs will be awarded.<sup>104</sup>
- To achieve “greater systemic change,” disability organizations should now be allowed to initiate their own complaints.<sup>105</sup>
- To reduce inequalities of bargaining power between the parties to the complaints process, HREOC should be able to act as the complainant of last resort in limited circumstances.<sup>106</sup>

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99. A person can only apply to the Federal Magistrates Court or the Federal Court where the complaint is terminated by the President. If a complaint is terminated by the President under DDA § 46PE or DDA § 46PH and the President has given notice of the termination, persons affected in relation to the complaint may apply to the Federal Court or the Federal Magistrates Court. DDA § 46PO. HREOC may help the person to prepare the forms for the application. DDA § 46PT.

100. Submission by the Victorian Equal Opportunity Commission to the Inquiry. PCDR 2003, at 276.

101. PCDR 2003, at 278.

102. *Id.*

103. *Id.* at 281–83.

104. *Id.* at 302.

105. *Id.* at 309.

106. *Id.* at 317.

The proposal for representative complaints may go some way to redress the problem indicated by the Victorian Equal Opportunity Commission.

### VIII. EQUALITY AND PROTECTION

The key principles of equality and protection have already been referred to in this paper. These principles can be found in key provisions in the DDA. While the Productivity Commission report gives recognition to the principle of equality, it gives very little attention to the principle of protection in the employment provisions of the DDA.

#### A. *The Right to Equal Opportunities*

Equality is a vital principle of anti-discrimination law. Different forms of equality can be discerned in the text of the DDA. The prohibition of direct discrimination in section 5 of the Act promotes the principle of formal equality, which refers to “the right to be treated exactly the same as everyone else.”<sup>107</sup>

In practice, the application of this principle provides limited benefits to people with disabilities. As the Commission noted, sometimes treating a person with a disability in exactly the same way as an able-bodied person “will not remove the barriers to participation. Receiving the same printed information as everyone else is no help if you are blind.”<sup>108</sup>

The Commission therefore argued that the DDA gives people with disabilities the right to “substantive equality,” which refers “to the right to have the same opportunities as others.”<sup>109</sup> This right goes beyond formal equality’s requirement of equal treatment. The principle requires that “people and organisations must make sure that people with disabilities can take advantage of the same opportunities as other people, even if this means treating them differently.”<sup>110</sup>

But the extent to which people with disabilities have to be treated differently under the DDA is unclear. To clarify this obligation, the Productivity Commission has rightly recommended an amendment to the DDA. It proposed that, under DDA section 5, it is direct discrimination not to make adjustments required by a person with a

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107. *Id.* at xxix.

108. *Id.*

109. *Id.*

110. *Id.*

disability.<sup>111</sup> Yet, the principle of equal opportunity is limited by the Act. For instance, an employer will not have to make different adjustments if it would impose upon them an “unjustifiable hardship.”<sup>112</sup> While the Commission accepted that providing equal outcomes for people with disabilities is important, it pointed out that equality of outcome, which refers to “the right to end up with the same outcome as other people,” is not required by the DDA.<sup>113</sup>

### B. *Turning Opportunities Into Outcomes*

The Productivity Commission also noted equality of outcome is not applicable in the area of employment, because people with disabilities are required “to meet the inherent requirements of a job, and employers are able to choose the best applicant on merit.”<sup>114</sup> It accepted that it is up “to individuals to turn equal opportunities into outcomes, based on individual merit.”<sup>115</sup> The Commission conceded that it can be hard to agree on what merit means, asking: “What role should merit play?”<sup>116</sup> Similar questions have been raised and critically examined in the academic literature.<sup>117</sup> Compared to other areas in which discrimination occurs, the DDA has been least effective in reducing discrimination in employment.<sup>118</sup>

In Australia, people with disabilities are nearly ten times as likely to be unemployed as able-bodied people.<sup>119</sup> The significance of the problem is highlighted by the obvious point made by the Commission that employment “helps people participate more fully in society.” It follows that many people with disabilities are not full participants in the community. Unfortunately, the Commission’s examination of how employment opportunities for people with disabilities could be

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111. *Id.* at xxvii, 224.

112. *Id.* at xxviii.

113. *Id.* at xxix.

114. *Id.*

115. *Id.*

116. *Id.*

117. MARGARET THORNTON, *THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA* 183–84, 230, 243 (1990).

118. PCDR 2003, at xxxi, xxxix.

119. Organisation for Economic Co-operation and Development (OECD), *Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People* (France 2003). According to the *Transforming Disability into Ability 2003* report, the employment rate of disabled people in Australia was 42.9% in 2003. In other words, 57.1% of people with disabilities were unemployed, which is slightly higher than the OECD average of 55.5%. Compared to the official unemployment rate in Australia (6.1% in January 2003 and 5.7% in December), the unemployment rate in 2003 was nearly ten times as high for people with disabilities. See <http://www.abs.gov.au>.

improved was hampered by a lack of information.<sup>120</sup> Yet the Commission claimed that “often the only way to achieve equal outcomes [for people with disabilities] is to provide disability services.” Accordingly, it argued that equality of outcomes “should be pursued more directly through improved disability services and other mechanisms.”<sup>121</sup>

Although promotion of equality of outcomes by disability services “goes beyond the scope of anti-discrimination legislation,” there is still an important role for the Act.<sup>122</sup> The establishment and funding of disability services are solely the responsibility of the government, as are the specifications of eligibility criteria.

These policy matters fall outside the scope of the Act, presumably because budgetary considerations are properly the province of the legislature and not the courts. But the government, in its administration of these services, is subject to the principles of equality and is thus, in this respect, covered by the Act.

Nonetheless, there exists gross inequality in the employment opportunities for people with disabilities. A thorough investigation of this problem ought to be a high priority of either the Australian Government or the Productivity Commission. It is clear that the Commission’s recommendations will be insufficient to dramatically increase employment opportunities for people with disabilities.

### C. *The Protective Function of the DDA*

Another important issue meriting reform is the protective function of the DDA in employment. The protective function of labor law—as mentioned in the introduction of this article—is widely recognized by employment lawyers in Australia.<sup>123</sup> The protective function of the law is to protect employees in their situation of unequal power. This function is reflected in the provisions of the DDA that make discrimination in employment unlawful.

It is noteworthy that the Productivity Commission’s report does not examine in any detail the protective function of the DDA with respect to labor relations. In particular, there is no reference to the protective function in chapters 9 (Objectives and Definitions) and 10 (Defences and Exemptions). Perhaps this omission occurred because the Commission was specifically created to consider the effects of

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120. PCDR 2003, at xxxix–xl.

121. *Id.* at xxix.

122. *Id.*

123. CREIGHTON & STEWART, *supra* note 1, at 5.

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legislation on competition policy, and therefore it did not delve into some other important aspects of law reform. In this case, the function of the Commission appears to have limited the focus of its report.

An express consideration of the protective function of the law might have assisted the Commission in developing more effective policies to redress employment discrimination. For instance, it might have inquired further into the practical effect of the DDA compared to other labor laws in protecting employees' entitlements to be free from discrimination. In addition, it could have considered whether the DDA should take priority over other labor laws, because the DDA protects basic civil rights. The current employment provisions in the DDA do serve an important protective function, and the recommendations made in this paper would in part strengthen them.

#### IX. CONCLUSION

The Disability Discrimination Act is Australia's most important legislation pertaining to disability discrimination in employment. Compared with similar laws in other countries, the Act is more inclusive in its definition of disability. Thus it has avoided difficult and unnecessary definitional disputes. The Act specifies important employment standards, protecting people with disabilities from unfair discriminatory employment practices. Yet disability discrimination in employment remains persistent and widespread.<sup>124</sup>

There is a compelling case for reform of the key provisions of the DDA. Many of the recommendations in the Productivity Commission's 2003 draft report would address pressing social, economic, and legal problems. Such reforms would also promote the principles of equality and protection. Nonetheless, some reforms not contemplated by the Commission are required, and some suggestions for reform by the Commission do not go far enough in addressing disability discrimination. Finally, the stark under-employment of people with disabilities in Australia cries out for a well-resourced and extensive governmental inquiry that delves deeply into the systemic causes and consequences of this pressing social problem.

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124. HREOC 2003, at 2, 52.

