

Improved protection of disability rights: Disability Discrimination Act 1992 amended

Significant amendments to the *Disability Discrimination Act 1992* (DDA), which came into effect on 5 August 2009, clarify its operation in many areas, align some of its key definitions with other federal discrimination Acts and represent a significant improvement in the protection of the rights of people with disability.¹ This article will examine some of the most important changes, namely the:

- explicit duty to make reasonable adjustments;
- changes to the definition of indirect discrimination; and
- new assistance animal provisions.

Reasonable Adjustments

Arguably, the most significant change to the DDA is the introduction of an explicit duty to make reasonable adjustments. The DDA now expressly provides that the failure to make 'reasonable adjustments' may constitute either direct or indirect discrimination.²

It is accordingly unlawful not to make reasonable adjustments where:

- this has the effect of treating someone with a disability less favourably than someone who does not need the adjustments in the same circumstances (direct discrimination);³ or
- a person with a disability cannot, because of their disability, comply with a condition or requirement without reasonable adjustments and the failure to make reasonable adjustments disadvantages people with the disability (indirect discrimination).⁴

A 'reasonable adjustment' is any adjustment that does not impose an unjustifiable hardship on the person.⁵ This is a significant improvement to the protection of the rights of people with a disability because the High Court had expressly rejected that former s 5(2) of the DDA imposed an 'implied' obligation to accommodate or had the effect that a failure to provide accommodation would itself constitute 'less favourable treatment'.⁶

¹ See the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009(Cth)*.

² See DDA, s 5(2) and s 6(2).

³ DDA, s 5(2) (direct discrimination).

⁴ DDA, s 6(2) (indirect discrimination).

⁵ DDA, s 4.

⁶ *Purvis v NSW and the Human Rights and Equal Opportunity Commission* (2003) 217 CLR 92, 159 [217] (Gummow, Hayne and Heydon JJ).

Indirect Discrimination

The primary definition of indirect discrimination in s 6 of the DDA has also changed in a number of respects. It requires a person with a disability to show that:

- another person requires or proposes to require them to comply with a requirement or condition;
- *because of their disability* they cannot comply with a requirement or condition; and
- the requirement or condition disadvantages people with the disability.

Importantly, it is no longer necessary to prove that a substantially higher proportion of persons without the disability comply or are able to comply with an imposed requirement or condition.

The new definition also aligns the DDA with the *Sex Discrimination Act 1984* and the *Age Discrimination Act 2004* by shifting the burden of proving the reasonableness of the condition onto the respondent.⁷ Previously, complainants bore the onus of proving a condition was not reasonable.

However, the new s 6 definition still retains the problematic requirement that an applicant show that they are 'unable' to comply with the requirement or condition.⁸

Assistance animals

The provisions in the DDA about assistance animals⁹ have been clarified. The law was left uncertain after the case of *Queensland (Queensland Health) v Forest (Forest)*¹⁰. In *Forest*, the majority of the Full Federal Court found that an applicant wishing to establish they had been discriminated against within a protected area of public life because they were accompanied by an assistance animal had to also show that the relevant treatment was 'on the ground of their disability'.¹¹ They ultimately found that:

The ground on which Queensland Health discriminated against Mr Forest, within the meaning of s 9(1), is that his dogs were ill-behaved and ill-controlled and there was inadequate evidence of proper assistance dog training. Thus Queensland Health did not discriminate against Mr Forest on the ground of his disability, even though it may have discriminated against Mr Forest within s 9 of the Act.¹²

⁷ DDA, s 6(4). The Explanatory Memorandum explains that 'it is reasonable to expect that the person imposing the requirement or condition would have better access to information to explain or justify the reason for it', see: Explanatory Memorandum Disability Discrimination and Other Human Rights Legislation Bill 2008 (Cth), 10 [41-12].

⁸ For further discussion of this requirement, please see Federal Discrimination Law at <http://www.hreoc.gov.au/legal/FDL/index.html> (viewed 24 July 2009).

⁹ See DDA, ss 8, 9 and 54A.

¹⁰ [2008] FCAFC 96.

¹¹ [2008] FCAFC 96, [111]-[118] (Spender and Emmett JJ).

¹² [2008] FCAFC 96, [115] (Spender and Emmett JJ).

The majority's reasoning was criticised at the time as being 'overly technical and artificial' and 'eroding the intended protection and objectives of the DDA'¹³ as well as leading to 'absurd and unwanted consequences'.¹⁴

New s 8 of the DDA clarifies that discrimination on the ground of being accompanied by an assistance animal (or a carer, assistant or disability aid) is to be treated as discrimination on the ground of a disability.

New s 9(2) provides a comprehensive definition of 'assistance animal' making it clear that it includes any kind of animal that is appropriately trained.¹⁵ Section 54A clarifies the position of service providers interacting with people using assistance animals. It provides that it is not unlawful:

- to request or require that the assistance animal remain under the control of the person with the disability; or their associate (s54A(2))¹⁶;
- to discriminate against a person with a disability on the ground of the disability if:
 - they reasonably suspect that the assistance animal has an infectious disease; and
 - the discrimination is reasonably necessary to protect public health or the health of other animals (s54A(4)).
- to request the person with the disability to produce evidence that the animal meets the definition of 'assistance animal' in s 9(2); *or* the animal is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place (s54A(5)); and
- to discriminate on the ground that a person has the assistance animal if the person with the assistance animal fails to provide appropriate evidence that the animal has the appropriate accreditation or training (s54A(6)).

The new assistance animal provisions provide much needed clarification of the rights and responsibilities of both people with assistance animals and service providers.¹⁷

Other key changes

From 5 August 2009:

- the defence of unjustifiable hardship will now be available in all areas covered by the DDA except harassment and requests for information.¹⁸
- a court must now consider whether funding is available to the respondent when determining whether avoiding discriminating would impose an unjustifiable hardship;¹⁹ and

¹³ Ben Fogarty, 'Dog gone: Disability discrimination law and assistance animals in light of Queensland v Forest' *Law Society Journal* 75 (2009), 75-77,76.

¹⁴ See Dr Larry Laikind, 'Assistance Animals: Has the Full Federal Court removed the rights of those who rely on them?' *Proctor* (October, 2008), 21-23, 22.

¹⁵ The scheme falls short, however, of establishing a national accreditation scheme.

¹⁶ Section 54A(3) provides that for the purposes of subsection (2), an assistance animal may be under the control of a person even if it is not under the person's direct physical control.

¹⁷ See Explanatory Memorandum Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 19, [109] – [111].

¹⁸ DDA, ss 11, 21B and 29A.

- the ‘inherent requirements’ defence will now be available in a broader range of employment circumstances.²⁰

Practitioners should also note that from 5 August 2009:

- the legal name of the former Human Rights and Equal Opportunity Commission has changed to the Australian Human Rights Commission; and
- the time for making an application for *all* unlawful discrimination complaints (including disability discrimination) to the Federal Court or the Federal Magistrates Court has been extended from 28 to 60 days after the date the complaint is terminated by the Commission.²¹

¹⁹ See DDA, s11.

²⁰ See DDA, s 21A.

²¹ See s 46PO(2) of the *Australian Human Rights Commission Act 1986*.