Dr Paul Harpur

TC Beirne School of Law

University of Queensland

Friday, 15 November 2013

The Executive Director

Australian Law Reform Commission

GPO Box 3708

Sydney NSW 2001

Email: disability@alrc.gov.au

**RE: Submission in response to the Equality, Capacity and Disability in Commonwealth Laws Issues Paper**

I thank the ARLC for the opportunity of providing a submission in their Review of equal recognition before the law and legal capacity for people with disability.

My submission refers to Question 6. What issues arise in relation to Commonwealth anti-discrimination

law that may affect the equal recognition before the law of people with disability and

their ability to exercise legal capacity? What changes, if any, should be made to the

Disability Discrimination Act 1992 (Cth) to address these issues?

When considering the operation of anti-discrimination laws at page 41 of the issues paper the significant problems with direct discrimination, were not addressed. This submission focuses on the limitations of the direct discrimination provisions as they appear in the *Disability Discrimination Act 1992* (Cth).

*Direct discrimination*

The *Disability Discrimination Act* 1992 (Cth) s 5 describes direct discrimination:

1. 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, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

Direct discrimination compares the treatment of a person with a disability with the treatment of a real or hypothetical person who does not have the disability. The way in which this comparison has been approached by the courts has altered and attracted substantial criticism. This is because the protection afforded by direct discrimination has been considerably narrowed by the current approach to the comparator test. The comparator test was reinterpreted and narrowed by the High Court of Australia in *Purvis v New South Wales (Department of Education and Training)*.[[1]](#footnote-1)

To determine if direct discrimination exists, the tribunal separates the manifestations from the disability. In performing this comparison, the High Court in *Purvis* compared the treatment the complainant received against the treatment a hypothetical person who did not have the complainant’s disability, but manifested the same symptoms, would have received.[[2]](#footnote-2) In other words the person with a disability is compared against 'a person without the disability in the same position in all material respects as the aggrieved person’. In *Purvis* this approach to the comparator enabled a school to lawfully expel a student because that student was exhibiting symptoms of his disability. In *Purvis* the student suffered a disability which meant he could not control his temper. The High Court in *Purvis* compared this student against a hypothetical student who had no disability and who had voluntarily decided to misbehave. As the school would have treated the student who had elected to misbehave the same as the complainant who misbehaved due to his disability, then the High Court held the discrimination was based upon the student’s behaviour and was not based upon the student’s disability.[[3]](#footnote-3) The fact the complainant was suffering a disability which meant he could not alter his behaviour was largely immaterial.

The comparator test has concerning implications for persons with disabilities. This can be illustrated by

considering the situation for persons with disabilities who use guide or assistance dogs and analysing the

experiences of a disability advocate, Forest.[[4]](#footnote-4) Due to the current interpretation of the comparator test Forest

encountered substantial problems in demonstrating the unfavourable treatment was due to his disability.

Queensland Health claimed that Forest was refused access, not because he was disabled, but because his

dogs were not adequately trained and members of staff had witnessed the dogs misbehaving. The court effectively asked whether Queensland Health treated Forest less favourably than a person who desired to bring their pets into the hospital. The problem Forest confronted was proving that the refusal was based on his dogs status as assistance dogs and not because his dogs were accused of engaging in misconduct. The fact Queensland Health had refused to give Forest service while he was accompanied by his assistance dogs was held not to mean he was discriminated on the basis of his disability. The Full Court of the Federal Court asked whether Queensland Health would have treated a hypothetical person without a disability the same way if that person had dogs which appeared to misbehave. Justices Spender and Emmett JJ explained:

While it may be that Queensland Health discriminated against Mr Forest … because it treated him less favourably because of the fact that he was accompanied by his dogs, it did not do so on the ground of his psychiatric disability. The ground on which Queensland Health discriminated against Mr Forest … 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. It follows that there was no unlawful conduct on the part of Queensland Health.[[5]](#footnote-5)

Similar to Justices Spender and Emmett JJ, Black CJ focused upon the alleged conduct of Forest’s assistance dogs:

It could be said that attributes of a particular animal, such as being dangerous or infectious, were matters relating to the fact of a person being accompanied by that animal. In general, however, attributes of this nature are unlikely to have anything to do with whether the conduct is, in truth, discriminatory. If, for example, a public health institution had a carefully considered, non-discriminatory, policy that allowed for the admission of assistance animals and the facts showed that the policy was properly administered, it would hardly advance the objects of the Act if, on a particular occasion, a person accompanied by a patently dangerous assistance animal were refused entry to a hospital. In such an instance, it would not be foreign to the objects of the Act if access were refused not “because of the fact that the person was accompanied by the animal” or “because of any matter related to that fact”. The object of eliminating discrimination on the ground of disability and the further object of ensuring, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community, are not advanced by a construction of such width as, in effect, to allow any animal into any public premises under any circumstances. Such extremes may have nothing to do with discrimination and indeed could frustrate the objects of the Act by impeding the increasing acceptance of the important functions not only of guide dogs but of other appropriately trained assistance animals. The precise scope of the provision is not easy to determine and will need to be worked out over time on a case by case basis.[[6]](#footnote-6)

Underpinning the reasoning of Black CJ, Spender and Emmett JJ was the grounds that the unfavourable conduct was based upon the dog’s misbehaviour. If courts do not rigorously investigate and challenge the discriminator’s evidence and conclusions then there would be nothing stopping people in the future claiming they observed conduct which they regarded as unsafe. The decision to exclude Forest was based upon observations of a Queensland Health employee. The quality or accuracy of these observations was never challenged in court. Was the employee an experienced dog handler or qualified to make a judgment on a dog’s apparent misbehaviour? What did misbehaviour constitute? Was the dog simply acting playfully and posed no actual risk? Did the Queensland Health employee have a phobia of dogs? These important questions were not asked in the Forest case. As a consequence the decision to exclude Forest could have been unjustified.

The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) did not amend the operation of the comparator test. The Standing Committee which was considering the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) received considerable evidence that the comparator test was resulting in people being unable to prosecute genuine direct discrimination claims.[[7]](#footnote-7) Despite this evidence the Standing Committee decided not to recommend the removal of the comparator test and proposed the continuation of the status quo.[[8]](#footnote-8) This submission reiterates the arguments to the Standing Committee about the operation of the comparator test and argues that the application of the comparator, as interpreted in *Purvis*, is not consistent with the concept of disability discrimination in the CRPD. The CRPD regards any negative treatment based upon an attribute of a person’s disability to constitute discrimination. In contrast to the CRPD, the comparator test as interpreted by *Purvis* provides that unfavourable treatment based upon an attribute does not necessarily constitute disability discrimination. This means even though *DDA* s 8(1) provides that the *DDA* ‘applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability’ this does not mean discrimination based upon an assistance animal will be unlawful. In *Purvis* the treatment was based upon behaviour which was caused by a disability. In *Forest* the treatment was based upon the alleged conduct of dogs. Under the new *DDA* ss 5, 8 and 9 the comparator test can still be used to exclude people for attributes of their disability such as the alleged conduct of a guide or assistance dog. This submission submits that the comparator test in the DDA should be amended to reflect the CRPD so that genuine direct discrimination claims to be successfully prosecuted.

The continuing use of the comparator test and the *Forest* decision has serious implications for persons who use guide or assistance dogs. While *Forest* concerned an assistance dog, the decision is equally applicable to persons using guide dogs. It is foreseeable that people who are innately scared of dogs may feel threatened by a guide or assistance dog where that dog is well behaved and is not demonstrating any aggressive behaviour. The comparator test does not consider whether or not the decision of the alleged discriminator was reasonable. The test simply asks if the discrimination was based upon a disability or upon the dogs' alleged misconduct. It is submitted that whether or not a guide or assistance dog is misbehaving is immaterial to whether or not the person has been discriminated against. Even if the dog is a risk to hygiene this should not be relevant for the comparator test. The comparator test should focus upon the question of whether or not discrimination had occurred and then the onus should shift so the discriminator is required to defend their conduct under *DDA* s 54A.

*DDA s* 54A contains circumstances where direct discrimination against guide and assistance dogs is lawful. Section 54A(2) permits a person to require that a guide or assistance dog remains under the control of their handler or a person who is accompanying the person with a disability. Section 54A(4) then permits discrimination against a guide or assistance dog where the discriminator ‘reasonably suspects that the assistance animal has an infectious disease … and the discrimination is reasonably necessary to protect public health or the health of other animals.’ If a person believes the guide or assistance dog is a threat then ss 54A(5) and (6) permit a person to require the person with a disability to produce evidence that:

1. the animal is an assistance animal; or
2. the animal is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

If the person with a disability does not produce such evidence then it is lawful to discriminate against them.

The comparator test is intended to determine whether a person has suffered unfavourable treatment due to their disability. This submission argues that the inclusion of additional factors into this assessment distorts the test for disability discrimination. If a person directly discriminates against a person because they are accompanied by a guide or assistance dog then it is reasonable for the onus to shift to the alleged discriminator to defend their conduct under *DDA* s 54A. This approach of having a wide definition of disability discrimination and placing other factors in exceptions to the prohibition against discrimination reflects the approach in the CRPD. The Federal Government should urgently review the operation of the comparator test in the *DDA* and consider amending the comparator test.

*Expertise in Disability Laws*

My expertise surrounding disability discrimination laws comes from personal experiences as a guide dog user and as an academic lawyer. Most guide dog users have experienced direct discrimination due to their guide dog. Taxis, restaurants, hotels and bars have all discriminated over the years. As a lawyer I am equipped to resolve most matters. I have personally experienced the same issues that were raised against Forest in the above example.

My research agenda as a legal academic focuses largely around disability rights. I am currently a lecturer at the TC Beirne School of Law at the University of Queensland and have a range of publications in this area including:

**Articles**

1. Paul Harpur, 'Combating Prejudice in the Workplace with Contact Theory: The Lived Experiences of Professionals with Disabilities' (2014) 1 *Disability Studies Quarterly*.
2. Paul Harpur and Nic Suzor, ‘Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm’ (2013) 36 *University of New South Wales Law Journal* 3- In press.
3. Paul Harpur, 'From universal exclusion to universal equality: Regulating Ableism in a Digital Age' (2013) 40 *Northern Kentucky Law Review* 3, 529-565.
4. Paul Harpur, Ben French and Richard Bales, 'Australia’s *Fair Work Act* and the Transformation of Workplace Disability Discrimination Law' (2012) 30 *Wisconsin International Law Journal*, 190-248.
5. Paul Harpur, 'From Disability to Ability: Changing the Phrasing of the Debate' (2012) 27 *Disability and Society* 3, 325-337.
6. Paul Harpur, Embracing the New Disability Rights Paradigm: The importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability and Society* 1, 1-14.
7. Paul Harpur, Ben French and Richard Bales, 'Australia’s Solution to Disability Discrimination Enforcement' (2011) 11 *Cornell HR Review*.
8. Paul Harpur and Rebecca Loudoun, ‘The Barrier of the Written Word: Analysing Universities’ Policies to Include Students with Print Disabilities and Calls for Reforms’ (2011) 33 *Journal of Higher Education Policy and Management* 2, 153-167.
9. Paul Harpur, 'New Governance and the Role of Public and Private Monitoring of Labor Conditions: Sweatshops and China Social Compliance for Textile and Apparel Industry/CSC9000T' (2011) 38 *Rutgers Law Record*.
10. Paul Harpur, ‘Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change’ (2011) 45 *Valparaiso University Law Review* 3, 1271-1296.
11. Paul Harpur, ‘Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam’ (2011) 36 *Employee Relations Law Journal* 4, 79-98.
12. Paul Harpur and Richard Bales, ‘ADA Amendments Issue: The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience’ (2010)37 *Northern Kentucky Law Review*, 363-.398.
13. Paul Harpur and Kerry Brown, ‘The Global Financial Crisis and the strategic alignment of asset management in the tourism industry’ (2010) 3 *Deakin Business Review* 1, 46-53.
14. Paul Harpur, ‘The Convention on the Rights of Persons with Disabilities and Australian anti-discrimination laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?’ (2010) 29 *University of Tasmania Law Review* 1, 49-77.
15. Paul Harpur, 'Ensuring equality in education: How Australian laws are leaving students with print disabilities behind' (2010) 15 *Media and Arts Law* Review 1, 70-83.
16. Jackbeth K. Mapulanga-Hulston and Paul D. Harpur, ‘Examining Australia's Compliance to the International Covenant on Economic, Social and Cultural Rights: Problems and Potential’ (2009) 10 *Asia-Pacific Journal on Human Rights* *and the Law* 1, 48-66.
17. Paul Harpur, ‘Developments in Chinese Labour Laws: Enforcing people with disabilities’ right to work?’ (2009) *Lawasia Journal: journal of law association for asia and the pacific*, 26-43.
18. Paul Harpur, ‘Sexism and Racism, why not Ableism? Calling for a cultural shift in the approach to disability discrimination’ (2009) 35 *Alternative Law Journal* 3-8.
19. Paul Harpur, ‘Clothing Manufacturing Supply Chains, Contractual Layers and Hold Harmless Clauses: How OHS Duties can be Imposed Over Retailers’ (2008) 21 *Australian Journal of Labour Law* 3, 316-339.
20. Nic Suzor, Paul Harpur and Dylan Thampapillai, ‘Digital Copyright and Disability Discrimination: From Braille Books to Bookshare’ (2008) 13 *Media and Arts Law Review* 1-17.
21. Paul Harpur, ‘Occupational Health and Safety Issues and the Boardroom: Company Directors Face Jail and Fines For Their Companies’ Lack Of Safety’ (2008) *Bond University Corporate Governance* *E-Journal, 1-9*.
22. Paul Harpur, ‘The Evolving Nature of the Right to Life: The Impact of Positive Human Rights Obligations’(2007) 9 *The University of Notre Dame Law Journal*, 95-125.
23. Paul Harpur, ‘Occupational Health and Safety Duties to Protect Outworkers: The Failure of Regulatory Intervention and Calls for Reform’ (2007) 12 *Deakin Law Review* 2, 48-87.
24. Paul Harpur, ‘Regulating Multi-National Corporations Through State-Based Laws: Problems with Enforcing Human Rights Under The Alien Tort Statute’ (2006) 13 *Australian* *International Law Journal*, 233-246.
25. Paul Harpur, ‘Work Choices: An International Comparison’ (2007) 6 *QUT Law and Justice Journal* 1, 89-106.
26. Paul Harpur, ‘The Financial Benefit For Insurers: Mediate in Personal Injuries Disputes’ (2004) 2 *Australasian Dispute Resolution Journal*,70-80.
27. Paul Harpur, ‘Charity Law’s Public Benefit Test: Is Legislative Reform in the Public Interest?’ (2003) 3 *QUT Law & Justice Journal* 422-439.

**Books and Chapters**

1. Tom Devine, Paul Harpur and David Lewis, 'Civil and Employment Law Remedies' in Edited by A. J. Brown, David Lewis and Richard Moberly (Eds.) *International Handbook on Whistleblowing Research* (2013) Edward Elgar, Chapter 18.
2. Ben French, Paul Harpur and Olav Muurlink 'A Pandora’s Box of General Protections under the Fair Work Act 2009' in Bruce Hearn-Mackinnon, Leanne Morris and Kerrie Saville, (eds.) *The Fair Work Act: Revision or Restitution* (2012), Heidelberg Press Australia.
3. Paul Harpur, 'When is There Sufficient Information to Decide if There is an R2P Situation or Not? from the Intervention in Timor Leste to the Crisis in Sri Lanka' in Charles Sampford and Ramesh Thakur (Eds), *R2P and Sovereignty: A Decade after Kosovo and East Timor* (2012) Ashgate, chapter 4.
4. Paul Harpur, *Governance of Information in Public Tendering: Balancing the Right to Information and Commercial Affairs in Queensland* (2010) VDM Publishing House Ltd.
5. Paul Harpur, ‘OHS issues to the Board: Company Directors Face Jail and fines for their Companies’ Lack of Safety’ in Institute of Chartered Financial Analysts of India (Ed) Directors Liability (2008) Amicus Books.
6. Paul Harpur, ’Private Fears, Public Monies: FOI Disclosure of Private Sector Tender Information’ (2005) shaping administrative law for the next generation: fresh perspectives, Australian Institute of Administrative Law, 130.

1. (2003) 217 *CLR* 92, [11] (Gleeson CJ), [224] (Gummow, Hayne and Heydon JJ); see for discussion: Colin Campbell, ‘A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)’, (2007) 35 *Federal Law Review* 111, 113-115; General academic analysis: Elizabeth Dickson, ‘Disability Discrimination in Education: *Purvis v New South Wales (Department of Education and Training*), Amendment of the Education Provisions of the *Disability Discrimination Act 1992* (Cth) and the Formulation of Disability Standards For Education’ (2005) 24 The *University of Queensland Law Journal* 213, 219; Susan Roberts, ‘The Inequality of Treating Unequals Equally: The Future of Direct Discrimination Under the *Disability Discrimination Act 1992* (Cth)?’ (Speech delivered at ANU Public Law Weekend, Canberra, 6 November 2004) at 30; Belinda Smith, ‘From *Wardley* to *Purvis* – How far has Australian Anti-Discrimination Law come in 30 years?’ (2008) 21 *Australian Journal of Labour Law*, 3. [↑](#footnote-ref-1)
2. (2003) 217 *CLR* 92, [11] (Gleeson CJ), [224](Gummow, Hayne and Heydon JJ); see for discussion: Colin Campbell, ‘A Hard Case Making Bad Law: *Purvis v New South* Wales and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)’, (2007) 35 *Federal Law Review* 111, 113-115 for an interesting discussion of this issue. [↑](#footnote-ref-2)
3. (2003) 217 *CLR* 92, [11] (Gleeson CJ), [224](Gummow, Hayne and Heydon JJ). [↑](#footnote-ref-3)
4. For the Forest litigation see: Full Court of the Federal Court in *Queensland Health v Forest* (2008) 249 *ALR* 145. [↑](#footnote-ref-4)
5. (2008) 249 *ALR* 145, 168. [↑](#footnote-ref-5)
6. (2008) 249 *ALR* 145, 154. [↑](#footnote-ref-6)
7. Standing Committee on Legal and Constitutional Affairs, ‘Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008’ (Final report, 2009) 43. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)