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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DISABILITY DISCRIMINATION AND OTHER HUMAN RIGHTS LEGISLATION
AMENDMENT BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon Robert McClelland MP)

DISABILITY DISCRIMINATION AND OTHER HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2008

Outline

This Bill amends the *Disability Discrimination Act 1992*, which makes unlawful discrimination against people with disability in certain circumstances, and other human rights legislation including the *Age Discrimination Act 2004* and the *Human Rights and Equal Opportunity Act 1986*.

These amendments implement various recommendations made by the Australian Government Productivity Commission in its 2004 report entitled *Review of the Disability Discrimination Act 1992*. This Bill also implements the House of Representatives Standing Committee on Legal and Constitutional Affairs' recommendation to remove the 'dominant purpose' test from the *Age Discrimination Act 2004 (Older People and the Law, 2007)*, and makes various other amendments to the human rights legislation to improve the general operation of human rights law in Australia.

Key amendments to the Disability Discrimination Act are those that:

- make explicit that refusal to make reasonable adjustments for people with disability may also amount to discrimination
- make the defence of unjustifiable hardship available in relation to all unlawful discrimination on the ground of disability, except harassment and victimization
- clarify matters to be considered when determining unjustifiable hardship
- clarify that the onus of proving unjustifiable hardship falls on the person claiming it
- make clear that the definition of disability includes genetic predisposition to a disability and behaviour that is a symptom or manifestation of a disability
- replace the 'proportionality test' in the definition of indirect discrimination with the requirement to prove that the condition or requirement imposed has the effect of disadvantaging people with the disability of the aggrieved person
- shift the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with disability to the respondent, and
- extend the power to make standards under the Act.

The Bill provides certainty for people with assistance animals and service providers by recognising animals accredited either under a State and Territory law or by a relevant organisation, and by clarifying each party's obligations. The Bill also consolidates the provisions in the Disability Discrimination Act relating to carers, assistants and aids, and addresses the issues raised by the Full Federal Court in *Forest* [2008] by clarifying that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability.

In summary, these changes provide for a more consistent and coherent application of definitions, requirements and powers.

Amendments to the *Human Rights and Equal Opportunity Commission Act 1986* are also included. This implements the Government's agreed to formally change the name of the Human Rights and Equal Opportunity Commission after the Commission informally adopted the name 'Australian Human Rights Commission'. The new name reflects the Commission's role as Australia's national human rights institution. The Bill changes the name of the *Human Rights and Equal Opportunity Act 1986* and references to the Commission throughout that Act to reflect this, and makes consequential amendments to other legislation that refer to the Act. Key amendments to that Act also include the extension of the period within which a person can take a terminated complaint to the Federal or Federal Magistrates Court from 28 days to 60 days, and a number of amendments to improve the efficiency of the complaints handling process, such as allowing the President of the Commission to finalise a complaint where the complainant expresses no intention to pursue the matter.

Consistent with the current approach to drafting, the opportunity is also taken to modernise the form of the provisions in these Acts.

Financial Impact Statement

The amendments in this Bill have negligible financial implications.

Regulation Impact Statement

The amendments in this Bill have been assessed in accordance with *The Best Practice Handbook*. The amendments have low financial impact on business and individuals. The Office of Best Practice Regulation has confirmed that a Regulation Impact Statement is not required.

NOTES ON CLAUSES

Clause 1—Short Title

1. Clause 1 provides for the Act to be cited as the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2008*.

Clause 2—Commencement

2. Clause 2 provides for the commencement of the Act.

3. The table provided in the subclause 2(1) sets out a number of different commencement dates, the detailed reasons for which are set out in the notes to the items to which they relate. The note at the end of the table, which is in the standard form, informs the reader that the table only relates to the provisions of the Act as originally passed, and to which the Royal Assent has been given. It also states that the table will not be expanded to deal with provisions inserted into the Act after the Royal Assent. Subclause 2(2) provides that column 3 of the table is not an operative element of the table and the information in that column is provided for information only.

4. Table Item 1 provides for the commencement of the operative clauses, namely sections 1 to 3, on the day on which the Act receives the Royal Assent.

5. Table Items 2, 3, 7, 10 and 11 provide for the commencement of Schedule 1, Schedule 2 Part 1, Schedule 3 Part 1 Division 1, Schedule 3 Part 2 and Schedule 4, 28 days after the Act receives the Royal Assent.

6. Table Items 4 to 6 provide for the commencement of all the items in Schedule 2, Part 2. Table Items 4 and 6 provide for retrospective commencement of Items 101 and 102 and Item 106 of Schedule 2. These items together correct an error. There is no impact on any person's rights or liabilities. Table Item 5 provides for commencement of Items 103 to 105 as being the earlier of a date proclaimed or six months from the Act receiving the Royal Assent. This delay is to allow time to make provisions in the disability standards on Accessible Public Transport under the *Disability Discrimination Act 1992*.

7. Table Items 8 and 9 together cover all the items in Schedule 3 Part 1 Division 2. The respective items provide for the commencement of items in that schedule that would amend provisions inserted by the *Fair Work Act 2008* (Items 111-114) and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Items 115 and 116) respectively. The items provide that the items to which they refer will commence after the later of (i) 28 days after this Act receives the Royal Assent, or (ii) the commencement of the respective Acts to which reference is made and if those Acts do not commence, not at all.

Clause 3—Schedule(s)

8. Clause 3 is a machinery provision. Subclause 3(1) provides that each Act and each set of regulations specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule and any other item in the Schedule has effect according to its terms. Subclause 3(2) provides that the amendment of any regulation under subsection 3(1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

Schedule 1—Age Discrimination

Age Discrimination Act 2004

Item 1: Section 16

9. This item repeals and replaces section 16 of the *Age Discrimination Act 2004* to remove the ‘dominant reason’ test in subparagraph 16(b). Currently, if an act is done for two or more reasons, and one of those reasons is the age of the person, that reason must be the dominant purpose for which the act was done in order for discrimination to be established.

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

11. This item implements Recommendation 43 of the House Standing Committee on Legal and Constitutional Affairs’ recommended in its 2007 report, *Older People and the Law*. It also aligns the Age Discrimination Act with the other Commonwealth anti-discrimination laws.

Item 2: Application

12. This item provides that the amendment of section 16 applies only to acts done after the commencement of the amendment. This avoids new section 16 applying retrospectively.

Item 3: Subsection 39(6)

13. This item omits from subsection 39(6) reference to section 49A of the *Acts Interpretation Act 1901* and replaces it with section 14 of the *Legislative Instruments Act 2003*. Section 49A of the Acts Interpretation Act has been repealed. Section 14 of the Legislative Instruments Act is the replacement provision.

Schedule 2—Disability Discrimination

Disability Discrimination Act 1992

Part 1—Amendments commencing 28 days after Royal Assent

Items 1, 3, 7: Subsection 4(1)

14. These items insert new references into the interpretation provision of the Disability Discrimination Act (subsection 4(1)). They direct the reader to the definitions of ‘*assistance animal*’ ‘*carer and assistant*’ and ‘*disability aid*’ in subsections 9(1), 9(2) and 9(3) respectively.

Item 2: Subsection 4(1) (definition of *auxiliary aid*)

15. This item repeals the definition of ‘*auxiliary aid*’ in subsection 4(1) and is consequential upon the amendments made by Item 17. The term is no longer used because the new subsection 9(3) (Item 17) incorporates the definition of auxiliary aid in the definition of ‘*disability aid*’.

Item 4: Subsection 4(1)

16. This item inserts a definition of ‘*Disabilities Convention*’ into the interpretation provision of the Disability Discrimination Act; namely, the Convention on the Rights of Persons with Disabilities. The definition is inserted as a reference to the Disabilities Convention is included in subsection 12(8) by Item 20.

Item 5: Subsection 4(1) (paragraph (j) of the definition of *disability*)

17. This item adds a reference to a genetic predisposition to disability at the end of paragraph (j) of the definition of disability. This item makes it explicit that ‘*disability*’ does include a genetic predisposition to a disability.

18. This implements Productivity Commission Recommendation 11.1 to amend the definition of disability to make it clear that it includes a genetic predisposition to a disability that is otherwise covered by the Disability Discrimination Act. This was also recommended by the Australian Law Reform Commission and the National Health and Medical Research Council in their joint 2003 report, *Essentially Yours: The Protection of Human Genetic Information in Australia (Essentially Yours)*.

19. The current definition of ‘disability’ includes disabilities that may exist in the future or are imputed to a person. However, the recommendation to have an explicit statement to this effect has been accepted for the avoidance of doubt.

Item 6: Subsection 4(1) (at the end of the definition of *disability*)

20. This item inserts in the definition of ‘*disability*’ in the interpretation provision (subsection 4(1)) the statement that disability includes behaviour that is a symptom or manifestation of the disability.

21. This implements Productivity Commission Recommendation 11.1 to add a note to the definition of disability to clarify that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Disability Discrimination Act. Although this reflects the current status of the law as pronounced by the High Court in *Purvis v The State of New South Wales (Department of Education and Training)* [2003] HCA 62, the recommendation is being implemented for the avoidance of doubt.

Item 8: Subsection 4(1) (definition of *disability discrimination*)

22. This item repeals the definition of ‘*disability discrimination*’ in the interpretation provision (subsection 4(1)) as it is superfluous.

23. ‘Disability discrimination’ (both direct and indirect) is defined in sections 5 and 6 of the Disability Discrimination Act. The definition of ‘*disability discrimination*’ in the interpretation provision merely refer to those sections and repeat the definition of ‘*discriminate*’, which is also in the interpretation provision.

Item 9: Subsection 4(1)

24. This item inserts a definition for ‘*disability standards*’ in the interpretation provision of the Disability Discrimination Act (subsection 4(1)). It directs the reader to the meaning of ‘*disability standards*’ provided in subsection 31(1).

Item 10: Subsection 4(1) (definition of *discriminate*)

25. This item repeals the existing definition of ‘*discriminate*’ in the interpretation provision (subsection 4(1)) and substitutes it with a reference to ‘sections 5 and 6’. The item is consequential upon the amendments made by Item 17.

Item 11: Subsection 4(1) (at the end of the definition of *discriminate*)

26. This item inserts a note at the end of the definition of ‘*discriminate*’. This note points out that the effect of sections 7 and 8 is to extend the concept of discrimination to cover associates, carers, assistants, assistance animals and disability aids.

Item 12: Subsection 4(1) (definition of *institution of tertiary education*)

27. This item repeals the definition ‘*institution of tertiary education*’ in the interpretation provision. The term is not used in the Act and is redundant.

Item 13: Subsection 4(1)

28. This item inserts a definition of ‘*reasonable adjustment*’ into the interpretation provision. A ‘reasonable adjustment’ is an adjustment that does not impose unjustifiable hardship on the person. The requirement to make a reasonable adjustment is made explicit in the Disability Discrimination Act by Item 17.

29. The definition is consistent with the definition of ‘reasonable accommodation’ in Article 2 of the Disabilities Convention.

Item 14: Subsection 4(1) (definition of *technical and further education institution*)

30. This item repeals the definition of ‘*technical and further education institution*’ in the interpretation provision. This term was used in the definition of ‘institution of tertiary education’. As that definition is proposed to be repealed by the Item 12, the definition is redundant.

Item 15: Subsection 4(1) (definition of *this Act*)

This item repeals the definition of ‘*this Act*’. The current definition states, ‘this Act includes the regulations’. If a reference to the Regulations is proposed, it will be stated specifically.

Item 16: Subsection 4(1) (definition of *unjustifiable hardship*)

31. This item amends the existing definition of ‘*unjustifiable hardship*’ in the interpretation provision of the Disability Discrimination Act (subsection 4(1)) to make it clear that the term ‘unjustifiable hardship’ has a meaning affected by section 11.

Item 17: Sections 5 to 9

32. This item repeals and replaces sections 5 to 9, which are the provisions that define discrimination under the Disability Discrimination Act. The changes primarily implement recommendations of the Productivity Commission (Recommendations 8.1-8.4 and 11.3) made in its 2004 report. They also address discrepancies raised in the decision of the Full Federal Court in *The State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96.

Section 5—Direct Disability Discrimination

33. New section 5 adds the word ‘direct’ to ‘disability discrimination’ in its title. This is to clearly distinguish it from ‘indirect disability discrimination’ dealt with in section 6.

34. New subsection 5(1) contains minor modifications to improve readability. It does not make any substantive changes to existing subsection 5(1).

35. New subsection 5(2) implements Productivity Commission Recommendation 8.1 by making explicit the positive duty to make reasonable adjustments for a person with disability. It is also consistent with the requirement in the Disabilities Convention to make reasonable accommodation.

36. New subsection 5(2) provides that a person is discriminating against another person if he or she fails to make, or proposes not to make, reasonable adjustments for the person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability in circumstances that are not materially different. ‘Reasonable adjustments’ is defined in subsection 4(1) (Item 13) as adjustments that do not impose an unjustifiable hardship on the person making the adjustments.

37. This new subsection implements Productivity Commission Recommendation 8.1, which recommended that the Disability Discrimination Act should be amended to clarify that there is a general duty to make reasonable adjustments, with the exception of adjustments that would cause unjustifiable hardship.

38. Until relatively recently, the general view, including in the case law, was that that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination—subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted. However, comments made by members of the High Court in 2003 cast doubt on the existence of this duty (*Purvis v NSW and the Human Rights and Equal Opportunity Commission* [2003] HCA 62).

39. The proposed amendment removes this doubt by making explicit the duty to make reasonable adjustments, which are defined to exclude adjustments that would impose unjustifiable hardship. This will return the status of the law to the original intention when the Disability Discrimination Act was introduced.

40. New subsection 5(3) provides that, for the purposes of section 5, circumstances are not ‘*materially different*’ merely because of the fact that the person with disability requires adjustments to be made. This subsection replaces the existing subsection 5(2), which currently states that circumstances are not ‘*materially different*’ merely because of the fact that the person with disability may require accommodation or services. The new reference to ‘adjustments’ covers ‘accommodation or services’.

Section 6—Indirect disability discrimination

41. New section 6 is different from the existing section 6 in the following ways:

- (i) It replaces the ‘proportionality test’ with the test of whether a requirement or condition disadvantages the person with disability concerned.

- (ii) It extends the definition to include proposed acts of indirect discrimination.
- (iii) It makes explicit that there is a duty to make reasonable adjustments to avoid indirect discrimination.
- (iv) It shifts the burden of proof of the ‘reasonableness’ element of indirect discrimination.

(i) Replacing the ‘proportionality’ with a ‘disadvantage’ test

41-1: Currently, the Disability Discrimination Act defines indirect disability discrimination in terms of a person imposing a requirement or condition on a person with disability with which a substantially higher proportion of people without the disability can or would be able to comply (‘proportionality test’), but the person with disability cannot or would not be able to comply, and which is unreasonable in the circumstances.

41-2: New subsection 6(1) implements Productivity Commission Recommendation 11.3 to remove the proportionality test from the definition of indirect discrimination. The Productivity Commission concluded that it appears to be of little benefit and imposes an undue burden of proof on complainants.

41-3: However, in order for there to be discrimination, there must be a differential impact on the person. To provide for this, the new subsection 6(1) replaces the proportionality test with a requirement that the condition or requirement imposed by the discriminator has, or is likely to have, the effect of disadvantaging people with the disability of the aggrieved person.

41-4: The disadvantage test aligns the Disability Discrimination Act with the *Sex Discrimination Act 1984* (subsections 5(2), 6(2) and 7(2)) and the *Age Discrimination Act* (section 15(1)).

(ii) Proposed acts of indirect discrimination

41-5: Unlike section 5, section 6 of the Disability Discrimination Act does not currently include *proposed* acts of indirect discrimination. It requires that a condition or requirement is actually imposed before a complaint of unlawful discrimination can be made.

41-6: New subsection 6(1) extends the definition of indirect discrimination to cover incidences of proposed discrimination by specifically making reference to requirements or conditions that the discriminator ‘proposes to require’. This is consistent with the approach taken in the *Sex Discrimination Act*, the *Age Discrimination Act* and in the existing definition of direct discrimination in section 5 of the Disability Discrimination Act.

(iii) Reasonable adjustments

41-7: In addition to the new subsection 5(2), new subsection 6(2) also implements Productivity Recommendation 8.1 by making explicit the duty to make reasonable adjustments for a person with disability. It is also consistent with the requirement in the *Disabilities Convention* to make reasonable accommodation.

41-8: It does so by providing that a person does not discriminate if the person makes all reasonable adjustments to eliminate that disadvantage or minimise it to the greatest extent possible.

41-9: As ‘reasonable adjustments’ is defined in the new subsection 4(1) (Item 13) to exclude adjustments that cause unjustifiable hardship, the question of whether the person has made ‘all reasonable adjustments’ takes into account the circumstances of the parties involved, including what is or is not possible *for the person making the adjustments*. On the other hand, the question of what adjustments can be made to ‘minimise *as much as possible* the disadvantageous effect of the requirement or condition’ requires a consideration to be made of what adjustments are possible to be made *generally*—not what is possible *for that particular person*.

(iv) Burden of proof

41-10: The new subsection 6(4) places the burden of proving that a requirement or condition is reasonable on the person who imposes, or proposes to impose, the requirement or condition.

41-11: This amendment implements Productivity Commission Recommendation 11.3 to amend section 6 to require the respondent to a discrimination complaint to prove that a requirement or condition is reasonable.

41-12: It is reasonable to expect that the person imposing the requirement or condition would have better access to information required to explain or justify the reason for it.

41-13: This is also consistent with the approach taken in the Sex Discrimination Act and the Age Discrimination Act.

Section 7 – Discrimination in relation to associates

42. New section 7 provides that discrimination against a person on the basis of a disability of any of that person’s associates is equivalent to discrimination on the basis of that person’s disability.

43. Many sections of the Disability Discrimination Act prohibit discrimination against a person both on the basis of that person’s disability and on the basis of the disability of any of the person’s associates. However, the existing definitions of disability discrimination and indirect disability discrimination do not explicitly address discrimination on the ground of a disability of an associate. In practice, the definitions have been extended to such instances by analogy. The new section 7 clarifies that discrimination against a person because of the disability of any of his or her associates also amounts to discrimination under the Disability Discrimination Act.

Section 8 - Discrimination in relation to carers, assistants, assistance animals and disability aids

44. Existing sections 7-9 address discrimination on the grounds of a person possessing or being accompanied by an aid or assistant animal, and on the grounds of being accompanied by an interpreter, reader, assistant or carer. These sections specify that a person discriminates against a person with disability if the discriminator treats the aggrieved persons less favourably because the aggrieved person possesses or is accompanied by a carer, assistant, assistance animal or disability aid.

45. The Full Federal Court recently stated in *The State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96 that the provisions in Part 2 of the Act, which render certain

discrimination unlawful, refer only to discrimination on the grounds of the disability of a person or a person's associate—not the types of discrimination defined in sections 7-9.

46. This item addresses this discrepancy in the Disability Discrimination Act by providing in new sections 7-9 that the types of discrimination in these sections also constitute discrimination on the ground of disability.

Section 9 - Carer, assistant, assistance animal and disability aid definitions

47. New section 9 defines the terms 'carer or assistant', 'assistance animal' and 'disability aid'.

48. New subsection 9(1) defines 'carer or assistant' as a carer, assistant, interpreter or reader who provides assistance or services to a person because of his or her disability. This definition does not differ from that in existing section 8 of the Disability Discrimination Act, which defines disability discrimination on the basis of being accompanied by a carer, assistant, interpreter or reader.

49. Subsection 9(2) introduces a new definition of 'assistance animal'. It provides that an assistance animal is an animal that is:

- accredited under a State or Territory law relating to the accreditation of such animals
- accredited by a training organisation to be prescribed in the regulations, or
- otherwise trained to alleviate the effect of the person's disability and meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

50. The purpose of this amendment is to provide greater certainty for both service providers and people with assistance animals. The third limb of the definition (paragraph 9(2)(c)) is designed to ensure that people with disability who may not live in a State or Territory that has a relevant accreditation scheme, or who may not have access to a recognised assistance animal trainer, continue to be protected under the Disability Discrimination Act (if they are able to demonstrate the requirements of the relevant sections).

51. Subsection 9(2) relates to new section 54A (Item 76), which stipulates the obligations of discriminators and people with an assistance animal.

52. New subsection 9(3) defines 'disability aid' as equipment (including a palliative or therapeutic device) that is used by a person to alleviate the effect of his or her disability. This definition amalgamates the definitions in the current interpretation provision and the existing section 7, which currently defines disability discrimination on the basis of possessing or being accompanied by a palliative or therapeutic device or auxiliary aid.

53. New subsection 9(4) provides that, for the purposes of the Disability Discrimination Act, a person with a disability is taken to have a carer, assistant, assistance animal or disability aid if that person:

- is presently
- has previously been
- may in the future be, or
- is imputed to be

accompanied by, or in possession of, a carer, assistant, assistance animal or disability aid. This provides for instances of past, future and imputed accompaniment by, or possession of, a carer, assistant, assistance animal or disability aid to be covered by the Act.

Item 18: Section 11

54. This item repeals and replaces section 11, which sets out how ‘unjustifiable hardship’ is to be determined.

55. This item implements Productivity Commission Recommendation 8.3 by clarifying that the criteria for determining unjustifiable hardship includes consideration of the costs and benefits to *all* persons, expanding the criteria to include availability of financial and other assistance and clarifying that any respondent to a complaint can have their action plan considered (not only ‘service providers’).

56. Currently, section 11 provides that, in determining whether the defence of unjustifiable hardship is made out, all the relevant circumstances of the particular case must be taken into account, including ‘the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned’. Relevant case law has interpreted ‘any persons concerned’ as extending beyond the immediate parties to the dispute (for example, *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915). This item inserts an example at the end of the section to clarify that the nature of the benefit or detriment likely to accrue or be suffered by the community is one of the factors to be taken into account under paragraph 11(a). This item is not designed to change the current status of the law.

57. The availability of financial and other assistance to the person claiming unjustifiable hardship has also been added to the criteria to be taken into account under section 11 (paragraph 11(1)(d)). This is designed to allow for a more balanced assessment of the costs of making adjustments. For example, funding to assist in responding to the particular needs of people with disability is available in some circumstances.

58. New subsection 11(2) makes clear that the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

Item 19: Subsection 12(1)

59. Subsection 12(1) identifies items that are to be of limited application in the Act. This is a consequential amendment as a result of the creation of new Division 2A by Item 61.

Item 20: After paragraph 12(8)(b)

60. Some provisions of the Disability Discrimination Act (the limited application provisions) rely on specific Constitutional heads of power. One such power is the external affairs power (section 51(xxix)). Currently, the Disability Discrimination Act relies on a range of international human rights instruments (including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).

61. Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (the Disabilities Convention) on 17 July and it entered into force for Australia on 16 August 2008. This item adds the Disabilities Convention to the list in subsection 12(8) of the Disability Discrimination Act, which lists the international instruments to which the limited

provisions of the Disability Discrimination Act give effect and therefore rely upon the external affairs power in section 51(xxix) of the *Constitution* for constitutional validity.

Item 21: After paragraph 12(8(b))

62. This item is consequential upon the inclusion of a new division title—Division 2A (Item 61). Division 2A groups provisions relating to disability standards into one division.

Item 22: Paragraphs 13(4)(a) and 13(5)(a)

63. This item inserts in paragraphs 13(4)(a) and 13(5)(a) after the words ‘this Act’, the words ‘(including a matter dealt with by a disability standard)’. This ensures that the paragraphs also apply to standards made under the Disability Discrimination Act.

64. These paragraphs stipulate aspects of the relationship between the Disability Discrimination Act and State and Territory laws. Paragraph 13(4)(a) provides that, if a person is entitled to make a complaint alleging unlawful discrimination under both the Disability Discrimination Act and a State or Territory anti-discrimination law, that person can only make that complaint under one of those jurisdictions. Similarly, paragraph 13(5)(a) provides that, if an act or omission by a person constitutes an offence under both the Disability Discrimination Act and a State or Territory law, that person may only be prosecuted and convicted under one of those laws.

65. This amendment clarifies that a complaint alleging unlawful discrimination made under a Disability Standard, and an act or omission constituting an offence in a Disability Standard, are also covered by these provisions.

Items 23, 24, 26, 27, 30, 32, 35, 37-39, 42-44, 47, 50, 52, 53, 55, 56, 58, 59 and 65

66. These items omit references to the disability of any of a person’s associates from the provisions of Part 2 as a consequence of the introduction of new section 7 (added by Item 17).

67. The new section 7 provides that the Disability Discrimination Act applies to a person with an associate with a disability in the same way as it applies in relation to a person with a disability. Thus the separate references to discrimination against any of a person’s associates in the operative provisions in Part 2 are unnecessary.

Item 25, 28, 31, 33 and 36

68. These items repeal the provisions containing the ‘inherent requirements’ defence. They are no longer necessary because a new general ‘inherent requirements’ defence is inserted as new section 21A by Item 41.

Items 29, 34, 46, and 49

69. These are consequential drafting amendments to omit the reference to subsection (1) as a result of the repeal of subsection (2) in the relevant provisions.

Item 40: Subsection 21(2) and 21(3)

70. This item replaces subsection 21(2) and adds a new subsection 21(3). The existing subsection 21(2) provides a defence to an employment agency to discrimination complaint, if it

is reasonable to take into account that the person would not be able to carry out the inherent requirements of the work sought. The removal of that subsection is consequent upon the introduction of a new, general inherent requirements definition in new section 21A (inserted by Item 41).

71. The new subsections 21(2) and 21(3) clarify that an employment agency is not obliged to ensure that an employer complies with the Disability Discrimination Act. This is intended to clarify that an employment agency either acting on behalf of an employer or otherwise acting between the employer and potential employee is not to be held responsible for carrying out the *employer's* obligations under the Disability Discrimination Act, including the obligation to make reasonable adjustments. However, this does not affect the operation of section 122 of the Disability Discrimination Act, which provides that a person who causes, instructs, induces, aids or permits another person to do an unlawful act is taken also to have done that act. New subsection 21(3) has been introduced to avoid any doubt on that view.

Item 41: Section 21A

72. This item inserts a new section, section 21A, at the end of Division 1 of Part 2. This item substantially implements Productivity Commission Recommendation 8.4 to extend the defence of 'inherent requirements' so that it is available to employers in all employment situations.

73. The defence of 'inherent requirements' is a defence that provides that it is not unlawful to discriminate against a person with disability if he or she would be unable to perform the inherent requirements of the employment, even if reasonable adjustments were made. At present, the defence is only available to an employer responding to a claim of disability discrimination with respect to the offer of employment or dismissal (see existing subsections 15(4), 16(3), 17(2), 18(4) and 19(2)).

74. New section 21A extends the defence to all areas of discrimination in employment, except in:

- denying a person with disability access to opportunities for promotion, transfer or training
- denying a person with disability access to any other benefits associated with employment, and
- subjecting the person with disability to any other detriment.

75. The purpose of the first exclusion is to ensure people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others. Thus an employer could not, by denying access to the opportunity for promotion or transfer, deny an employee with disability the opportunity to demonstrate that he or she can in fact carry out the inherent requirements of the job sought.

76. The second and third areas exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, as the employee is already carrying out the inherent requirements of the job, the defence of inherent requirements would bear no meaning. That is, if the employee is carrying out the inherent requirements of the job, but is then denied access to a benefit or is subjected to a detriment by his or her employer (other than dismissal or a change in terms or conditions), it cannot be a defence to claim that the reason for the discrimination was that the employee was unable to carry out the inherent requirements of the job.

77. However, if an existing employee became unable to meet the inherent requirements of the job, the defence of inherent requirements would remain available to the employer, should he or she decide to dismiss the employee or to change the terms and conditions of the employment on that basis.

78. An employer who denies an employee access to any other employment benefit or subjects an employee to any other detriment would continue to have available the defence that avoidance of the discrimination would cause unjustifiable hardship (see the general defence of unjustifiable hardship inserted by Item 60 (new section 29A)).

Items 45, 48, 51, 54 and 57

79. These items repeal various subsections (or, in the case of Item 54, paragraph 25(3)(c)) as a consequence of the addition of new section 21B and new section 29A added in Items 41 and 60 respectively.

80. The repealed provisions provide a defence in various cases to unlawful discrimination in Part 2 of the Disability Discrimination Act if the avoidance of the discrimination would impose unjustifiable hardship. The repealed provisions are redundant since new section 21B inserted under Item 41 together with new section 29A inserted under Item 60 provide a defence of unjustifiable hardship applicable to unlawful discrimination wherever dealt with in Division 1 of Part 2 and Division 2 of Part 2 respectively (with the exception of section 30).

81. Item 54 also amends paragraph 25(3)(b) to improve its clarity and consistency with modern drafting style.

Item 60: Before Section 31

82. This item repeals section 30 and replaces it with two new provisions—section 29A and section 30.

Section 29A—unjustifiable hardship

83. New section 29A provides a general defence of unjustifiable hardship for Division 2 of Part 2 of the Disability Discrimination Act, with the exception of section 30. This implements Productivity Commission Recommendation 8.2 by making the defence available in all areas of the Disability Discrimination Act that make discrimination on the ground of disability unlawful.

Section 30—request for information

84. Existing section 30 provides that it is unlawful discrimination to request or require information from a person with a disability that would not be required from people without a disability if the information is sought for the purposes of unlawful discrimination. The new section 30, in addition to covering the same situations as the repealed provision, covers also the circumstance where a person requests the same information from all persons (ie not only from the person with the disability), if the purpose of obtaining the information is to unlawfully discriminate. This second case is restricted to seeking information about disability.

85. New section 30 implements Recommendation 31-3 of the Australian Law Reform Commission report, *Essentially Yours*, that the Disability Discrimination Act be amended to prohibit an employer from requesting or requiring genetic information from a job applicant or employee, except where the information is reasonably required for purposes that do not involve

unlawful discrimination, such as ensuring that a person is able to perform the inherent requirements of the job. The new section will apply to all requests for information to all areas of discrimination covered by the Disability Discrimination Act.

86. In new subsection 30(3) the onus is laid on the person seeking the information to establish that the purpose for which the information is sought was not for unlawful discrimination. This is a reversal of the usual onus on a complainant to first establish all the elements of the unlawful conduct.

87. There may be difficulties associated with requiring a person to prove a negative. However, the provision does not impose an unduly onerous burden requiring that the defendant totally eliminate the possibility that they may have had a purpose of unlawful discrimination. Rather, they are required to provide evidence that is within their knowledge and that evidence is taken to be probative of their purpose unless rebutted. They are not given the task of actually proving the proposition that they did not have any unlawful purpose. They are required to bring evidence of a purpose that is not unlawful discrimination. This is taken to be the purpose unless the complainant can bring evidence of an unlawful purpose or cast sufficient doubt on the credibility of the evidence put forward, such that the evidence of the respondent is rebutted. The note to new subsection 30(3) provides an example of how the provision would work in practice.

88. Given the nature of the requirement of this provision, the concept of unjustifiable hardship has no application. Section 30 is therefore excluded from the defence of unjustifiable hardship provided in new section 29A. This will not affect the current status of the Disability Discrimination Act in this regard as the defence of unjustifiable hardship does not currently apply to existing section 30.

89. New subsection 30(4) excludes from the operation of new section 30, the new subsection 54A(5). The latter provision allows a person to ask a person with disability that has an assistance animal for evidence that the animal is accredited as an assistance animal or evidence that the animal otherwise trained to an acceptable standard.

Item 61: Division 2A

90. This item inserts the heading ‘Division 2A—disability standards’ after section 29. It is a technical amendment. The subsequent provisions in existing Division 2 deal with disability standards. The creation of the new Division of Part 2 provides for a more logical grouping of the provisions.

Items 62: Section 31

91. This item repeals and replaces section 31. The new section 31 provides for the Minister to formulate disability standards on any matter covered by the Disability Discrimination Act. This amendment implements Productivity Commission Recommendation 14.3 to extend the power to make standards to all areas dealt with in the Disability Discrimination Act. The existing provision is limited to employment, education, accommodation, public transport, the administration of Commonwealth laws and programs in respect of people with disability and access to or use of premises that are publicly accessible.

92. The new section 31 also partly implements Productivity Commission Recommendation 14.2 to amend the Disability Discrimination Act to clarify that where the disability standards and State and Territory legislation address the same matter, the disability standards should prevail.

This is carried into effect through new paragraph 31(2)(b). The new paragraph provides that the Standards themselves may provide how they are to operate in relation to State and Territory laws. This power is moderated by the operation of subsection 31(3), which requires that Standards may not be made without the Minister taking into account comments made to him or her by a relevant Minister of a State or Territory. This restriction is not new insofar as there is a requirement already in subsection 132(2) for such consultation. However, its placement in the new section 31 makes this clearer.

93. The form of the new section 31 is different from the provision it replaces. The new provision provides explicitly that the disability standards are legislative instruments and provides a more comprehensive power for the standards to make provision in relation to reasonable adjustments, strategies and programs to prevent harassment and victimization of persons with disabilities, unjustifiable hardship and exemptions and the power of the Human Rights and Equal Opportunity Commission to grant such exemptions.

94. Provisions in the existing section 31 that provide for disability standards to be tabled and be subject to amendment are removed. They are unnecessary as these requirements are provided under the Legislative Instruments Act. As legislative instruments disability standards will be subject to tabling and disallowance in the usual way as provided under the Legislative Instruments Act. New subsection 31(4) retains the general stipulation in the current provision that the standards do not take effect until the completion of the period in which they could be disallowed by the Parliament.

Item 63: Saving—disability standards

95. This item does not amend the Disability Discrimination Act but operates to preserve and retain those disability standards existing and in force under the power of the repealed section 31. The item ensures that from the commencement of the amendments made by the Schedule, the amendments are treated as standards made under the authority of the new section 31.

Item 64: Section 34

96. This item is a technical change to section 34. The section provides that the Part does not apply to a person acting in accordance with a disability standard. The amendment adding the words ‘(other than this Division)’ in the relevant location in the section makes clear that the exclusion of the application of the Part does not include the new Division 2A, which deals not with unlawful discrimination but rather, with the making of disability standards.

Items 66, 67, 79 and 89

97. These items are technical amendments to add a reference to the new Division 2A as a consequence of it being added by Item 61.

Items 68 and 88

98. These items omit the monetary figures in the penalties specified in the Disability Discrimination Act and substitute penalty units in accordance with modern drafting practice. The penalty units are calculated in accordance with section 4AB of the *Crimes Act 1914* (Cth). ‘Penalty unit’ is defined in section 4AA of that Act.

Item 69 and 71

99. Item 69 makes a consequential amendment to section 45 as a result of the addition of subsection (2) to section 45 made by Item 71.

100. Item 71 adds a new subsection (2) to section 45. The new subsection provides a limitation and clarification of the exemption provided in the present section 45. Section 45 (ie subsection 45(1) as per Item 69) provides that it is not unlawful to discriminate in undertaking an act that is reasonably intended to, in broad terms, assist people with disability with special measures for their benefit. In Recommendation 12.4 the Productivity Commission proposed that the exemption be limited to the establishment, eligibility criteria and funding criteria of these measures but not extend to general acts done in their administration.

101. The new subsection (2) would implement this recommendation by limiting the exemption in two ways. First, the exemption is limited to the discrimination necessary to implement the measure for the benefit of the person with the disability. Other forms of unlawful discrimination are not exempted. This ensures the protection of the Disability Discrimination Act extends to general acts done in the administration of the special measures; for example, non-discriminatory access to the premises. The second limitation is that salaries and wages discrimination is not exempted. Provision in relation to discrimination in salaries and wages for people with disability is dealt with in paragraphs 47(1)(c) and 47(1)(d), as pointed out by the note to that effect at the end of the new subsection.

Item 70: Subparagraph 45(b)(i)

102. This item corrects a drafting error. It replaces ‘and’ with ‘or’ at the end of the subparagraph.

Item 72: Subsection 47(3)

103. This item repeals the subsection. Subsection 47(3) restricted the application of the Disability Discrimination Act so that during the first three years of the operation of the Act a person acting in direct compliance with another law was not liable for unlawful discrimination. As that period has now expired, the provision is redundant.

Item 73: At the end of section 48

104. Section 48 provides an exemption to discriminate against a person whose disability is caused by an infectious disease, if that discrimination is necessary for public safety. Since new provisions have been added in relation to assistance animals (see Item 76), this item adds a note to the end of section 48 alerting the reader to refer to subsection 54A(4) for information in regard to discrimination in relation to an assistance animal that has an infectious disease.

Item 74: Section 50

105. This item repeals section 50. Section 50 provides for an exemption for discrimination in the provisions of payphones and public phones. The exemption was (by subsection 50(3)) restricted to three years from introduction of the Disability Discrimination Act. As that period has expired, the provision is redundant.

Item 75: Section 52

106. Section 52 of the Disability Discrimination Act currently contains an exemption from Part 1 and Part 2 of the Disability Discrimination Act for provisions in the *Migration Act 1958* and regulations made under it and for the administration of that Act and regulations. Productivity Commission Recommendation 12.4 proposed that this be reviewed to ensure that the exemption extend only to those provisions that deal with issuing entry and migration visas to Australia and does not extend to administrative processes.

107. This item proposes to reduce the scope of the exemption in line with the recommendation by repealing and re-enacting section 52. It clarifies that incidental administrative processes are not exempted from Parts 1 and 2 of the Disability Discrimination Act.

108. This amendment will clarify that, for example, a person could allege unlawful discrimination under the Disability Discrimination Act if, during the administration of a process provided for in the Migration Act, information was not provided in accessible formats.

Item 76: Section 54A

109. This item inserts a new section 54A into the Disability Discrimination Act. The new section would exempt from unlawful discrimination, requests for information to confirm the accreditation of an assistance animal or for evidence of its training to a suitable standard or related requests that the animal be under the control of the person with the disability or of an associate.

110. It also exempts discrimination consequential to the failure of the person with the assistance animal to provide appropriate evidence that the animal has the appropriate accreditation or training. The provision also permits discrimination that is: (i) consequential upon reasonable suspicion that the animal has an infectious disease and (ii) reasonably necessary to protect public health. Amendments to align with this provision that define ‘assistance animal’ are provided in the new section 9 inserted by Item 17.

111. This amendment provides certainty for both people with assistance animals and service providers by clarifying the entitlements and obligations of both parties.

Items 77 and 78

112. Section 55 sets out the general provisions in the Disability Discrimination Act relevant to the powers of the Human Rights and Equal Opportunity Commission to grant exemptions. Item 77 removes the words ‘(other than sections 31 and 32)’ in subsection 55(1) in referring to provisions in Division 2. Because of the creation of new Division 2A in which these provisions appear (Item 61), the exclusion is not necessary. Item 78 makes a technical change to subsection 55(1B) to omit reference to paragraph 31(1)(d). This paragraph no longer exists in the new section 31.

Item 80: Section 59

113. This item repeals and replaces section 59. The existing section 59 defines the term ‘*service provider*’. This definition is removed by the amendment and replaced by a definition of ‘*action planner*’. This is in order to provide for a wider class of persons who may make action plans. The persons in this wider group are referred to as the ‘*action planner*’.

114. Presently the class of persons who can prepare action plans (see section 61 of the Disability Discrimination Act for what action plans do) is restricted. In line with general changes in the Disability Discrimination Act effected by this Bill, the application of the provisions is made more generic and general with a view to avoiding unnecessary inconsistencies and limitations in the operation and powers relevant to individual cases in the future.

Items 81-86

115. These items make technical changes to sections 60 to 64 respectively in line with the change made by Item 80. The amendments in Items 81-84 make the technical changes of language that follow from the substantive change effected pursuant to Item 80. In addition to it making a change of language in line with the change made by Item 80, Item 85 makes the substantive change in new section 64, to remove the previous section's requirement of the Human Rights and Equal Opportunity Commission to sell action plans. The proposed new section instead, requires that the action plan submitted to the Commission be made available to the public (for example, by providing a copy on the Internet). Item 86 is a savings and transitional provision to preserve existing action plans and providing for them to operate pursuant to the amended Part following its commencement.

Item 87: Subsection 67(2)

116. This item alters the reference to 'section 45' in subsection 67(2) to a reference to 'subsection 45(1)' as a consequence of the amendment made by Item 71.

Item 90: Subsection 132(2)

117. This item omits the reference to section 31 in subsection 132(2) of the Disability Discrimination Act.

118. Subsection 132(2) currently provides that the Governor-General must take into account any comments made by a State or Territory Minister before making 'regulations' under section 31 or 47. However, section 31 gives the Minister, not the Governor-General, the power to make disability standards (which are the 'regulations' referred to in subsection 132(2)).

119. This amendment rectifies this error by removing the requirement that the Governor-General take account of State and Territory comments for the purposes of section 31, ie when disability standards are being made.

Human Rights and Equal Opportunity Commission Act 1986

Item 91: Paragraph 11(1)(a)

120. This item inserts a reference to the Disability Discrimination Act in paragraph 11(1)(a) of the *Human Rights and Equal Opportunity Act 1986*. Section 11 of the Human Rights and Equal Opportunity Act lists the functions of the Commission. Paragraph 11(1)(a) refers to 'such functions as are conferred on the Commission by the Age Discrimination Act, the Race Discrimination Act and the Sex Discrimination Act, and any other enactment'. This insertion means that the Disability Discrimination Act is specifically referred to along with other anti-discrimination legislation.

Item 92: At the end of paragraphs 11(1)(a) to (n)

121. This is a technical change to bring the provision into line with modern drafting practice. The item adds ‘and’ at the end of each paragraph which improves the clarity of the subsection.

Inspector-General of Intelligence and Security Act 1986

Items 93, 95, 96, 98 and 99

122. These items make a technical change to various paragraphs and subparagraphs of section 8 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to make the provision accord with modern drafting practice. These items add an ‘and’ or ‘or’ to the end of each paragraph or subparagraph, which improves clarity.

Items 94, 97 and 100

123. Section 8 of the IGIS Act establishes the inquiry functions of the Inspector-General in relation to certain intelligence agencies. That section empowers the Inspector-General to inquire into any matter that relates to an act or practice of one of the intelligence agencies mentioned therein that is, or may be, inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the Age Discrimination Act, the Race Discrimination Act or the Sex Discrimination Act, when such a matter is referred to the Inspector-General by the Human Rights and Equal Opportunity Commission.

124. These items insert references to the Disability Discrimination Act in the relevant subparagraphs of section 8 of the IGIS Act where all other Commonwealth anti-discrimination legislation appears. This aligns with the policy intention underpinning that section and provides consistency with respect to the functions of the Inspector-General in inquiring into discrimination complaints.

Part 2—Other amendments

Disability Discrimination Act 1992

Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No.1)

Items 101, 102 and 106

125. These items reinstate the ‘order of a court’ exemption (former paragraph 47(1)(b)), which was inadvertently deleted when amendments were made to section 47 by the *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No.1)*. The items rectify that error by repealing the amendment made by those Regulations, thereby reversing the effect of deleting the former paragraph 47(1)(b), and then reinserting the Workplace Relations provision in the correct paragraph.

126. These amendments apply retrospectively to ensure that the ‘order of a court’ exemption applies to any acts done in direct compliance with an order of a court since the unintentional removal of former paragraph 47(1)(b).

Item 103: Subsections 55(1A) to (1D)

127. This item repeals subsections 55(1A)-(1D) and is consequential upon the amendment made by Item 62.

128. Currently, subsections 55(1A)-(1D) of the Disability Discrimination Act provide for the granting of exemptions from disability standards that deal with public transport. This item repeals those subsections because the amendments in Item 62 will allow for each disability standard to itself provide for the granting of exemptions from that standard. As the Disability Standards for Accessible Public Transport does not currently contain provisions on the granting of exemptions, this item will commence at a later date (on proclamation) to allow for the amendment of that Transport Standard before subsections 55(1A)-(1D) are repealed.

Item 104: Subsections 55(2) and (3)

129. This item omits the words ‘or (1A)’ from subsections 55(2) and (3). These omissions are consequential to the repeal of subsection 55(1A) (Item 105).

Item 105: Section 58

130. This item ensures that the power to grant exemptions from the Disability Standard on Accessible Public Transport is not rendered inoperable between the 28th day after Royal Assent and the date of proclamation of Item 103 (among other items).

131. This item is included to retain the operation of exemptions made under subsections 55(1A)-(1D) pending their repeal (by Item 103). Those provisions are in new Division 2A. Item 79 provides for section 58 to refer to Division 2A. Item 79 commences on Royal Assent. This item removes the reference to Division 2A in section 58 at the same time as the repeal of subsections 55(1A)-(1D) by Item 103 commences.

132. The later commencement of Item 103 is to allow time for the exemptions to be included in the Transport Standards themselves—in line with changes made generally to the standard-making power in section 31 (see Item 62).

Schedule 3 – Australian Human Rights Commission

Part 1 – Name of the Commission

133. Part 1 of Schedule 3 amends the legal name of the Human Rights and Equal Opportunity Commission to the ‘Australian Human Rights Commission’ and makes consequential changes to laws that refer to the name of the Commission. On 4 September 2008, the Commission announced that it had decided to change its corporate identity (but not its legal name) so that it would be known as the Australian Human Rights Commission. The Commission has stated that the change in corporate identity will assist in “ensuring that all Australian audiences know that Australia has an independent national institution with the responsibility to protect and promote human rights in Australia”. The Commission has requested that the Human Rights and Equal Opportunity Commission Act be amended to give effect to its new corporate identity.

Division 1 – Amendments commencing 28 days after Royal Assent

Items 1-33, 39-53, 55-57, 60-63, 65, 67, 68, 70-80, 82, 84, 86, 87, 89, 90, 92-98, 100, 103 and 105-116

134. These items amend provisions in other Acts to replace references to the Human Rights and Equal Opportunity Act and to the Human Rights and Equal Opportunity Commission with references to the retitled Act and the renamed Commission, consequential on the amendments made by Items 34 and 38 in Schedule 3 which amend the title of the Human Rights and Equal Opportunity Act and the name of the Commission.

135. The following provisions are amended:

- *Age Discrimination Act 2004*—sections 4 and 5, Paragraphs 10(7)(a) and (b), subsections 12(4) subsection 50(1) (note), subparagraphs 51(1)(e)(i) to (vi), subsection 51(1) (note), subsection 51(2) (note), Part 6 (heading), subsection 53(1)(note), 53(2) (definition of ‘enactment’ and definition of ‘proposed enactment’), and paragraph 60(3)(b)
- *Australian Crime Commission Act 2002*—subsection 19A(8)
- *Civil Aviation Act 1988*—subsection 98(6C)
- *Commonwealth Electoral Act 1918*—subsection 7A(1F) (note)
- *Crimes (Torture) Act 1988*—subsection 3(1) (definition of ‘act of torture’)
- *Criminal Code Act 1995*—Dictionary in the Criminal Code (definition of ‘Covenant’)
- *Defence Act 1903*—subsection 58HA(1), paragraph 58HB(1)(a), subsection 58HB(2) (paragraph (a) of the definition of ‘discriminatory determination’)
- *Disability Discrimination Act 1992* – subsection 4(1) (definitions of the ‘Commission’, ‘Covenant on Civil and Political Rights’, ‘enactment’ and ‘proposed enactment’), subsection 13(4), paragraphs 42(2)(a) to (f), Part 4 (heading); subsection 67(1) (note), and paragraph 127(3)(b).
- *Evidence Act 1995*—subsection 138(3) (note)
- *Housing Assistance Act 1996*—Preamble
- *Human Rights (Sexual Conduct) Act 1994*—subsection 4(1) (note)
- *Inspector-General of Intelligence and Security Act 1986*—subsection 3(1) (definitions of ‘discrimination’ and ‘human rights’), subparagraphs 8(1)(a)(v), (2)(a)(iv) and (3)(b)(i)
- *Migration Act 1958*—paragraph 193(3)(a)
- *Native Title Act 1993*—Preamble
- *Privacy Act 1988*—Preamble, subsection 50(1) subsection 50(1) (definition of ‘Human Rights and Equal Opportunity Commission’), subparagraph 50(2)(a)(i),

subparagraph 50(2)(a)(i), subsection 50(2), paragraph 50(2)(c), paragraph 50(2)(e), subparagraph 50(3)(a)(i)

- *Privacy Amendment (Office of the Privacy Commissioner) Act 2000* – clause 15 of Schedule 1 (note)
- *Racial Discrimination Act 1975*—subsection 3(1) (definition of ‘Commission’), subsection 6A(2), subsection 18C(1) (note), section 20, section 20 (note), paragraph 27(2)(e), paragraphs 27(2)(f) and (g), paragraph 27F(3)(b)
- *Remuneration Tribunal Act 1973*—subsection 8B(1), paragraph 8C(1)(a), subsection 8C(2) (paragraph (a) of the definition of ‘discriminatory determination’)
- *Sex Discrimination Act 1984*—subsection 4(1) (definitions of ‘Commission’, ‘enactment’ and ‘proposed enactment’), subsection 10(4) and 11(4), subsection 48(1) (note), subsection 92(1), paragraphs 92(1)(ab) and (b), paragraph 92(2)(b), paragraphs 94(2)(a) to (f), paragraph 112(3)(b)
- *Supported Accommodation Assistance Act 1994*—Preamble, and
- *Workplace Relations Act 1996*—subsection 4(1) (paragraph (c) of definition of ‘Anti-Discrimination Conventions’), paragraph 120(1)(e), subsection 554(2), subsection 554(7) (definition of discriminatory award), paragraph 659(1)(a), paragraph 672(4)(a), paragraph 674(4)(a), subclause 30(2) of Schedule 6, subclause 30(7) of Schedule 6 (definition of ‘discriminatory award’), subclause 18(1) of Schedule 8, paragraph 18(4)(a) of Schedule 8, subclause 41(1) of Schedule 8 and paragraph 41(4)(a) of Schedule 8.

Items 34-38

136. These items amend provisions in the *Human Rights and Equal Opportunity Commission Act 1986* that establish the Commission. Item 34 amends the long title of the Human Rights and Equal Opportunity Act by omitting the words ‘*Human Rights and Equal Opportunity Commission*’ and substituting ‘*Australian Human Rights Commission*’. After this amendment, the Human Rights and Equal Opportunity Act will be known as the ‘*Australian Human Rights Commission Act 1986*’.

137. Item 35 amends the short title of the Human Rights and Equal Opportunity Act, consequential on the amendment to the long title of the Act. This item also makes it clear that if another amendment of the Act is described by reference to the Act’s previous short title, that other amendment has effect after the commencement of this item as an amendment of the Act under the amended short title.

138. Item 36 amends the definition of ‘*Commission*’ in subsection 3(1) by omitting ‘*Human Rights and Equal Opportunity Commission*’ and substituting ‘*Australian Human Rights Commission*’. Item 37 amends the heading in Part II of that Act.

139. Item 38 amends subsection 7(1) of the Human Rights and Equal Opportunity Act to rename the Commission the ‘*Australian Human Rights Commission*’. The heading to section 7 of the Human Rights and Equal Opportunity Act is also altered accordingly.

Items 54, 66, 69, 81, 83, 85, 88 and 91

140. These items are technical drafting amendments to various Acts being amended by the Bill to bring the provisions into line with modern drafting practice. These items add ‘and’ or ‘or’, where appropriate, at the end of each paragraph to improve the clarity of the provisions.

Items 58 and 59

141. Item 58 adds a second note, at the end of clause 15 of Schedule 1 of the *Privacy Amendment (Office of the Privacy Commissioner) Act 2000*, to explain the retitling of the Human Rights and Equal Opportunity Act and Item 59 rennumbers the first note accordingly.

Item 64: Section 20

142. This item omits (1) from section 20 of the Racial Discrimination Act as no subsections follow section 20.

Items 99, 101, 102 and 104

143. These items omit reference to ‘HREOC’ and ‘HREOC complaints’ in the *Workplace Relations Act 1996*. It is not necessary to include the descriptor ‘HREOC’ or ‘HREOC complaints’ as the Workplace Relations Act only refers to complaints in the context of the Commission. The amendments are made to the following provisions of the *Workplace Relations Act 1996*: subsection 672(4), paragraphs 672(5)(a) and (b), subsection 674(4) and paragraphs 673(5)(a) and (b).

Division 2 – Other amendments

144. Division 2 of Schedule 3 of the Bill amends provisions in the *Fair Work Act 2008* (which at the time this Bill was introduced was before the Parliament) and the Sex Discrimination Act (as amended by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* – which at the time of this Bill was introduced had not commenced) to come into effect once the amendments to those laws have been made.

145. The items amend provisions to replace references to the Human Rights and Equal Opportunity Act and to the Human Rights and Equal Opportunity Commission with references to the retitled Act and the renamed Commission, consequential on the amendments made by Items 34 and 38 in Schedule 3.

The following provisions are amended:

- Fair Work Act—paragraph 135(10)(b), subsection 161(1), subsection 218(1), and subsection 732(3).
- Sex Discrimination Act—paragraphs 9(10A)(a) and (c), subsection 11A(4).

Part 2 – Other amendments

Items 117, 119, 149, 175 and 179

146. These items amend the Human Rights and Equal Opportunity Act, Disability Discrimination Act, Sex Discrimination Act and Racial Discrimination Act to clarify that before

the Governor-General makes an appointment to the Commission, the Minister must be satisfied that the person has the appropriate qualifications. This is consistent with Office of Parliamentary Council Drafting Direction No 3.4 (revised 1 May 2006), which states that certain statutory provisions that require the Governor-General to form an opinion should be replaced with provisions expressed to require the Minister or other appropriate authority to form an opinion.

147. The following provisions are amended:

- Human Rights and Equal Opportunity Act—subsection 8B(2) and subsection 46B(2)
- Disability Discrimination Act—subsection 113(2)
- Sex Discrimination Act—subsection 96(2)
- Racial Discrimination Act—subsection 29(2)

Item 118: Subsection 126(1)

148. This item repeals the subsection and substitutes a new subsection 126(1) of the Disability Discrimination Act. Section 126 currently protects the Commission and certain other people who act on behalf of the Commission from civil actions. The item aligns new subsection 126(1) with section 48 of the Human Rights and Equal Opportunity Commission Act (as amended by Item 159). The item also makes it clear that the protection from civil actions applies to a person acting under the direction or authority of the Commission or a Commissioner.

Items 120, 124, 126, 128, 134, 138, 142, 144, 146 and 162

149. These items are technical drafting amendments to bring the provisions into line with modern drafting practice. These items add ‘or’ at the end of each paragraph or subparagraph which improves the clarity of the provisions.

Items 121, 133, 135, 136, 139, 160, 161 and 164-166

150. These items insert the phrase ‘for or’ after ‘person acting’ in specific provisions of the Human Rights and Equal Opportunity Act. The effect of these items is to clarify that the relevant sections apply in respect of persons acting ‘for’ the Commission, including contractors providing services to the Commission or a member of the Commission, where the legislation currently only specifies persons acting on behalf of the Commission.

Items 122, 131, 137 140, 141 and 163

151. These items omit the monetary figures in the penalties specified in the Human Rights and Equal Opportunity Act and substitute penalty units in accordance with modern drafting practice. The penalty units are calculated in accordance with section 4AB of the *Crimes Act 1914* (Cth). ‘Penalty unit’ is defined in section 4AA of that Act.

Item 123: Section 17

152. This item repeals section 17 of the Human Rights and Equal Opportunity Act which provides for the establishment of advisory committees to advise the Commission on the performance of its functions and, when requested by the Minister, to report on Australia’s compliance with certain human rights standards. No advisory committee currently exists. The

provision is not strictly necessary as the Commission retains the power under section 15 of the Act to consult appropriate persons, governmental organisations and non-governmental organisations in performing its functions.

Item 125: At the end of subsection 20(1)(b)

153. Existing subsection 46P(2) of the Human Rights and Equal Opportunity Act requires that complaints of unlawful discrimination be made by or on behalf of a person aggrieved. However, there is no equivalent requirement for complaints alleging a breach of human rights under paragraph 20(1)(b). A situation could arise in which a complaint alleging a breach of human rights is made about the treatment of a person or persons without their knowledge or consent.

154. This item adds a requirement in paragraph 20(1)(b) of the Human Rights and Equal Opportunity Act that complaints alleging a breach of human rights be made by or on behalf of one or more persons aggrieved. This will address the issue of complaints being made on behalf of people without their knowledge and thereby enable the Commission to more effectively manage representative complaints about breaches of human rights.

Item 127: Paragraph 20(2)(b)

155. This item omits ‘desire that the inquiry be held or continued’ from paragraph 20(2)(b) of the Human Rights and Equal Opportunity Act and substitutes ‘want the commission to inquire, or to continue to inquire, into the act or practice.’ This is a technical amendment to bring the provision into line with modern drafting practice and to make the provision consistent with new section 46PF of the Act (as amended by Item 152).

Items 129: at the end of paragraph 20(2)(c)

156. This item inserts a new subparagraph in paragraph 20(2)(c) of the Human Rights and Equal Opportunity Act. New subparagraph 20(2)(c)(vii) enables the President of the Commission to decide not to inquire, or not to continue to inquire into a complaint alleging a breach of human rights if he or she is satisfied that the complaint has been settled or resolved. This will allow the Commission to close complaints that have been resolved and avoid the need for the complainant to withdraw a complaint after it has been resolved by agreement.

Item 130: Application

157. This item provides that subparagraph 20(2)(c)(vii) of the HROEC Act as added by this Part applies in relation to complaints made to the Commission before, on or after the commencement of this Part.

Item 132: Subsection 23(2)

158. This item is a technical drafting amendment which repeals the subsection and substitutes a new subsection 23(2) of the Human Rights and Equal Opportunity Act. This item is intended to bring the provisions into line with modern drafting practice.

159. The item also substitutes penalty units for the penalty imposed. The penalty units are calculated in accordance with section 4AB of the *Crimes Act 1914* (Cth). ‘Penalty unit’ is defined in section 4AA of that Act.

Item 143: Paragraph 32(1)(b)

160. Existing subsection 46P(2) of the Human Rights and Equal Opportunity Act requires that complaints of unlawful discrimination be made by or on behalf of a person aggrieved. However, there is no equivalent requirement for complaints alleging discrimination in employment (relating to equal opportunity) under paragraph 32(1)(b). A situation could arise in which such a complaint is made about the treatment of a person or persons without their knowledge or consent.

161. This item adds a requirement in paragraph 32(1)(b) of the Act that complaints alleging discrimination in employment (relating to equal opportunity) be made by or on behalf of one or more persons a person aggrieved. This will address the issue of complaints being made on behalf of people without their knowledge and thereby enable the Commission to more effectively manage representative complaints about discrimination in employment (relating to equal opportunity).

Item 145: Paragraph 32(3)(b)

162. This item omits 'desire that the inquiry be held or continued' from paragraph 32(3)(b) of the Human Rights and Equal Opportunity Act and substitutes 'want the commission to inquire, or to continue to inquire, into the act or practice.' This is a technical amendment to bring the provision into line with modern drafting practice and to make the provision consistent with new section 46PF of the Act (as amended by Item 152).

Item 147: At the end of subparagraphs 32(3)(c)

163. This item inserts a new subparagraph in paragraph 32(3)(c). The new subparagraph 30(3)(c)(vii) will enable the President of the Commission to decide not to inquire, or not to continue to inquire into a complaint if he or she is satisfied that the complaint has been settled or resolved. This will allow the Commission to close complaints that have been resolved and avoid the need for the complainant to withdraw a complaint after it has been resolved by agreement.

Item 148: Application

164. This item provides that the amendments made to paragraph 32(3)(c) by Item 147 applies in relation to complaints made before, on or after the commencement of this Part.

Item 150: At the end of subsection 46C(1)

165. This item adds a note at the end of subsection 46C(1) of the Act to alert the reader to the functions conferred on the Commission by section 209 of the *Native Title Act 1993*. These functions are to prepare and submit to the Commonwealth Minister a report on the operation of the that Act, the effect of the that Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders and to report on any matters relating to the previous functions mentioned when directed to do so by the Commonwealth Minister.

Item 151: Subsection 46PF(1)

166. This item, which makes subsection 46PF(1) subject to subsection 46PF(5), is a technical amendment consequential on the amendment made by the Item 152.

Item 152: At the end of section 46PF

167. Prior to the enactment of the *Human Rights Legislation Amendment Act (No 1) 1999*, a provision existed for complaints to be declined if the relevant Commissioner considered that no person(s) aggrieved by the allegedly unlawful act desired that the inquiry be made or continue.

168. There is currently no provision in the Human Rights and Equal Opportunity Act under which the President may decline to investigate a complaint or conclude a complaint on the basis that the President considers that the aggrieved person or persons does or do not wish to proceed with the complaint. This may happen when, for example, the aggrieved person has changed their contact details without informing the Commission, or the aggrieved person has ceased to respond to the Commission's correspondence.

169. This item inserts new paragraph 46PF(5)(a). New paragraph 46PF(5)(a) provides that the President may decide not to inquire or not to continue to inquire into the complaint if the President is satisfied that the complainant does not want the President to inquire or continue to inquire into the complaint. This will enable the Commission to discontinue complaints where the complainant has ceased to respond to the Commission's requests for information and thereby assist the Commission to function effectively and efficiently perform its complaint-handling function.

170. This item also inserts new paragraph 46PF(5)(b) in the Human Rights and Equal Opportunity Act. The new paragraph enables the President of the Commission to decide not to inquire, or not to continue to inquire into a complaint if he or she is satisfied that the complaint has been settled or resolved. This will allow the Commission to close complaints that have been resolved and avoid the need for the complainant to withdraw a complaint after it has been resolved by agreement.

Item 153: Application

171. This item provides that new subsection 46PF(5) of the Human Rights and Equal Opportunity Act applies in relation to complaints referred to the President before, on or after the commencement of this Part.

Item 154: Subsection 46PO(2)

172. This item extends the period within which an application to the Federal Court or the Federal Magistrates Court must be made after the date of issue of the notice of termination of a complaint of unlawful discrimination from 28 days to 60 days.

173. This item implements Productivity Commission Recommendation 13.2 that the Human Rights and Equal Opportunity Act be amended to increase the period of time within which complainants may lodge an application with the court from 28 days to 60 days.

Item 155: Application

174. This item provides that the amendments to subsection 46PO(2) of the HROEC Act made by this Part apply in relation to a notice of termination issued under subsection 46PH(2) of the Human Rights and Equal Opportunity Act within 28 days before the commencement of this Part; or on or after the commencement of this Part.

Items 156 and 157: Subsections 47(1) to 47(4)

175. Currently, subsection 47(1) provides that the Minister may, by writing, declare an international instrument to be an international instrument relating to human rights and freedoms for the purposes of the Human Rights and Equal Opportunity Act. Subsection 47(2) requires the declaration to be published in the Gazette along with a copy of the international instrument, and other associated documents. The declaration has effect from the date it was published in the Gazette.

176. These items amend section 47 of the Human Rights and Equal Opportunity Act by providing that the Minister may make such declarations by legislative instrument, and that a declaration must include a copy of the instrument itself and associated documents.

177. The requirement for *Gazettal* is removed. By providing that declarations made by the Minister are to be made by legislative instrument, the Legislative Instruments Act will apply to declarations made under section 47. This will have the effect of making it a requirement that a declaration be registered as a legislative instrument on the Federal Register of Legislative Instruments and allow the declaration to specify the day and/or day and time of its commencement (if no day is specified, the declaration will commence on the day it is registered).

178. The new subsection 47(3) exempts section 47 declarations from the sunseting regime in Part 6 of the Legislative Instruments Act.

179. Part 6 of the Legislative Instruments Act provides that a legislative instrument to which it applies ceases to be in force ten years after its commencement, unless the House of Representatives resolves that it should continue to operate. The purpose of that Part is ‘to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed’ (section 49, Legislative Instruments Act). Section 47 declarations are being exempted from the sunseting regime as it is unlikely that a declaration under section 47 will require amendment over time. This is because it is unlikely that Australia, having ratified the declared international instrument, will cease to be a party to that instrument or that the instrument will change, and that rights that have been recognised as human rights in Australia will cease to carry such status.

Item 158: Application

180. Sub-item (1) of this item provides that the new subsection 47(2) of the Human Rights and Equal Opportunity Act will apply only to declarations made after the commencement of that new subsection. This avoids the new subsection 47(2) applying retrospectively.

181. Sub-item (2) provides that the new subsection 47(3) will apply to declarations made before, on or after the commencement of that new subsection. This clarifies that declarations already made under section 47 are also exempt from the sunseting provisions in Legislative Instruments Act for the reasons outlined above in relation to Items 156 and 157.

Item 159: Subsection 48(1)

182. This item substitutes, in subsection 48(1) of the Human Rights and Equal Opportunity Act, the phrase ‘for or on behalf of the Commission or a member’ for the phrase ‘on behalf of the Commission’. This is to ensure that persons acting for or on behalf of a member of the Commission, as well as those acting for or on behalf of the Commission itself, are protected against civil action.

183. The effect of this item is to clarify the uncertainty surrounding the protection the section offers to contractors. There is some doubt, arising from the language of the existing section, as to whether contractors providing services to the Commission or a member are protected from civil action. This item will clarify that contractors acting both on behalf of the Commission or a member (for example, contractors delivering a public anti-discrimination education campaign developed by the Commission) and for the Commission or a member (for example, contractors providing support or administrative services to the Commission itself) are protected by the section.

Racial Discrimination Act 1975

Item 167-171

184. These items repeal definitions of ‘Chair’, ‘conciliation committee’, ‘Council’, ‘Deputy Chairman’ and ‘member’ consequential on the amendment made by Item 172 which repeals Part V (relating to the establishment and functions of the Community Relations Council) of the Racial Discrimination Act.

Item 172: Part V (heading)

185. This item repeals Part V of the Racial Discrimination Act which provides for the establishment and functions of the Community Relations Council. The effect of the amendment is to remove the Community Relations Council.

186. No members have ever been appointed to the Community Relations Council, although some of its functions (for example, providing advice to the Commissioner for Community Relations on the promotion of understanding, tolerance and friendship among racial and ethnic groups) were in the past performed by voluntary committees established on an *ad hoc* basis by the Commissioner. The new Commission will retain the power - currently in section 15 of the Human Rights and Equal Opportunity Act—to work with and consult appropriate persons, governmental organisations and non-governmental organisations.

Item 173-174

187. These items repeal the heading of Part VI and the heading of Division 1 of Part VI of the Racial Discrimination Act consequential upon the repeal of Division 2 of Part VI (relating to the appointment, terms and conditions and administration of the Community Relations Council) of the Racial Discrimination Act by Item 176

Item 176: Division 2 of Part VI

188. This item repeals Division 2 Part VI of the Racial Discrimination Act which provides for the appointment, and terms and conditions, of the members of the Community Relations Council, as well as administrative provisions relating to it. This amendment is consequential upon the repeal of Part V (relating to the establishment and functions of the Community Relations Council) by Item 172.

Item 177: Subsection 45(1)

189. This item repeals the subsection and substitutes a new subsection 45(1) of the Racial Discrimination Act. Section 45 currently protects the Commission and certain other

people who act on behalf of the Commission from civil actions. The item aligns new subsection 126(1) with section 48 of the Human Rights and Equal Opportunity Commission Act (as amended by Item 159). The item also makes it clear that the protection from civil actions applies to a person acting under the direction or authority of the Commission or a Commissioner.

Item 178: Section 47

190. This item omits reference in section 47 to the power of the Governor-General to make regulations prescribing how a member (being a member of a Community Relations Council) may resign. This item is consequential on the amendment made item 172 which repeals Part V (relating to the establishment and functions of the Community Relations Council) of the Racial Discrimination Act.

191. The item also omits reference in section 47 to the power of the Governor-General to make regulations prescribing fees and allowances payable to members of conciliation committees. The substantive provisions which provided for the establishment of conciliation committees were repealed by an earlier Act, and the failure to repeal this reference was an omission.

Sex Discrimination Act 1984

Item 180: Subsection 111(1)

192. This item repeals the subsection and substitutes a new subsection 111(1) of the Sex Discrimination Act. Section 111 currently protects the Commission and certain other people who act on behalf of the Commission from civil actions. The item aligns new subsection 126(1) with section 48 of the Human Rights and Equal Opportunity Commission Act (as amended by Item 159). The item also makes it clear that the protection from civil actions applies to a person acting under the direction or authority of the Commission or a Commissioner.

Schedule 4 – Other amendments

Racial Discrimination Act 1975

Sex Discrimination Act 1984

Items 1-3, 5, 7-12 and 14

193. These items are technical amendments that omit the monetary figures in the penalties specified in the Racial Discrimination Act and Sex Discrimination Act and substitute penalty units in accordance with modern drafting practice. The penalty units have been calculated in accordance with section 4AB of the *Crimes Act 1914* (Cth). ‘Penalty unit’ is defined in section 4AA of that Act.

194. The changes are made in the following provisions:

- Racial Discrimination Act—subsection 27(1), subsection 27(2) paragraphs (a) and (b) of the penalty, subsection 27F(1)
- Sex Discrimination Act—subsection 86(1), subsection 87(1), subsection 92(1), subsection 94(1) paragraphs (a) and (b) of the penalty, subsection 95(1), subsection 112(1)

Items 4 and 13

195. These items make a technical change to accord with modern drafting practice. These items add an ‘or’ to the end of each paragraph being amended to improve clarity.

196. The changes are made in the following provisions:

- Racial Discrimination Act—paragraph 27F(1)(a)
- Sex Discrimination Act—paragraph 112(1)(a)

Item 6: Section 40A

197. This item repeals the section 40A of the Sex Discrimination Act. The section provides for the review of subsections 40(2) and 40(3) before 1 June 1996. As that period has now expired, the provision is redundant.