

Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?

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Abstract

Service dogs can be used to alleviate the negative effect of various disabilities. The most common form of service dogs are guide dogs for the blind or deaf. However, the role of service dogs is much broader with assistance dogs aiding people with disabilities including diabetes, epilepsy and various forms of disabilities associated with social interactions. This paper will analyse in detail the legal status of guide and assistance dogs under the *Convention on the Rights of Persons with Disabilities*, the *Disability Discrimination Act 1992* (Cth) (as amended in 2009) and under Australian state and territory laws. The operation of direct and indirect discrimination under the *Disability Discrimination Act* will be analysed by this paper, and recommendations for reform will be made.

I INTRODUCTION

Service dogs play a crucial role in enabling persons with disabilities to alleviate the negative impact of their disability. Guide dogs assist people who cannot see to navigate safely and alert people with hearing problems to noises such as fire alarms, telephones and the like. Assistance dogs assist people with a range of disabilities to avoid seizures, manage cognitive diseases and perform various other crucial services. There is occasionally a tension between persons with disabilities, who often require their service dogs to enable them to exercise their human rights, and some members of the public who hold prejudices against the presence of service dogs. Australian anti-discrimination laws empower persons with disabilities to be accompanied by their assistance dogs in most circumstances. This paper will demonstrate the extent to which Australian laws protects

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and denies persons with disabilities their right to be accompanied by their assistance dog.

Recent international and domestic developments render it timely to analyse of the protection afforded to persons with disabilities using guide and assistance dogs. The Australian government has demonstrated substantial commitment to ensuring the rights of persons with disabilities. In the lead up to the 2007 federal election the then opposition announced a social inclusion agenda which aimed to improve, inter alia, the lives of persons with disabilities.¹ Once the Australian Labor Party won the election there were two major moves made by the federal Labor government to ensure the rights of persons with disabilities. The first move consisted of domestic law reform which, inter alia, specifically addressed the rights of guide and assistance dog users. The second move by the new federal government involved Australia ratifying the *Convention on the Rights of Persons with Disabilities* ('CRPD') in July 2008.²

The first part of this paper defines and explains the role of guide and assistance dogs and the tension created by the use of service dogs. While guide and assistance dogs may greatly empower persons with disabilities, the use of dogs may create tensions between persons with disabilities and members of the public who object to dogs or have other grounds for wanting to exclude any animals. The second part of this paper explores the human rights nature of the CRPD and the nature of Australia's obligations under this convention. Thirdly, this paper analyses in detail Australian domestic laws. This part briefly analyses if state and territory laws protect both guide or assistance dogs before analysing the operation of the *Disability Discrimination Act 1992* (Cth) ('DDA') in detail. In 2008 the DDA was reviewed and in 2009 the DDA was amended with the intention to improve the protection of persons with disabilities who use guide and assistance dogs. This part will analyse the limitations of these reforms and recommend regulatory interventions to ensure persons with disabilities who use guide and assistance dogs have the opportunity to exercise their human rights free from discrimination.

¹ Julia Gillard MP and Senator Penny Wong, *An Australian Social Inclusion Agenda* (2007).

² *Convention on the Rights of Persons with Disabilities* (Adopted by General Assembly resolution A/RES/61/611 in 2006) ATS 2008 ATS 12 (Entered into force generally 3 May 2008; Ratified by Australia 17 July 2008; Entry into force for Australia 16 August 2008) ('CRPD').

II POSITING THE ISSUE

A *The Critical Role of Service Dogs for Persons with Disabilities*

Service dogs can play a critical role in assisting persons with disabilities to manage the negative aspects of their disabilities. Perhaps the most well known and visible service dog is the guide dog which assists persons with vision or hearing impairments.³ Persons with vision impairments or blindness have limited ability or no ability to use vision to navigate. Guide dogs for the blind fill this void and significantly increase the mobility of persons with vision impairments.⁴ A person who works with a guide dog holds a harness which is attached to the dog. By holding the harness the guide dog is able to transmit various signals to the guide dog user. For example, guide dogs can guide a person around obstacles, such as bus shelters or posts, find doors or steps by stopping at the target and can generally guide a person with vision impairment through most situations.⁵

Guide dogs for the deaf (also referred to as hearing dogs) notify their handlers of various noises. Guide dogs for the deaf will draw their handlers' attention to the sound of a person knocking at the door, alarm clocks, telephones, cooking timers, baby crying and the sound of fire sirens (both in the home and in public places).⁶

Service dogs are not just limited to assisting people who have vision or hearing impairments. Service dogs are now increasingly being used to alleviate the negative aspects of a large number of disabilities including diabetes, epilepsy and various forms of disabilities associated with social interactions.⁷ Dogs that assist persons in these groups are

³ Sandra D Dawson, 'Protecting a Special Class of Animal: An Examination of and Recommendations for Enacting Dog Guide Protection Statutes' (2004) 37 *Connecticut Law Review* 569, 572.

⁴ Rod Michalko, *The Two-in-One: Walking with Smokie, Walking with Blindness: Animals, Culture and Society Series* (University Press, 1998) 41.

⁵ In the author's experience, getting a guide dog is like getting his eyesight back. In 1994 the author lost his eye sight when he was involved in a train accident and was matched with his first guide dog, Weston. Both Weston and Chester, his second guide dog, were trained and supplied free of charge by Guide Dogs Queensland.

⁶ Paul Bass, 'Dog Does the Listening for Deaf Owner' *New York Times* (New York) 30 March 1986, 2; Arthur E Dell Orto and Robert P Marinelli, *Encyclopedia of Disability and Rehabilitation* (MacMillan Publishing, 1995) 62; Claire M Guest, Glyn M Collis and June McNicholas, 'Hearing Dogs: A Longitudinal Study of Social and Psychological Effects on Deaf and Hard-of-Hearing Recipients' (2006) 11 *Journal of Deaf Studies* 252; Winnie Hu, 'State Says Deaf Student May Take Service Dog to School' *New York Times* (New York) 11 March 2008, 8.

⁷ Beth Barba, 'The Positive Influence of Animals: Animal-Assisted Therapy in Acute Care' (1995) 9 *Clinical Nurse Specialist* 4, 199; Alison Hornsby, *Helping Hounds:*

often referred to as assistance dogs. The nature of these disabilities and the critical assistance these dogs provide is often less apparent when compared with guide dogs. This paper will now explore the different roles of assistance dogs and provide concrete examples of the assistance provided by these dogs.

There are two types of diabetes. Assistance dogs can be used to assist persons with type 1 diabetes. Type 1 diabetes occurs when the pancreas does not produce enough insulin to effectively control blood sugar levels. Everyone has insulin in their bodies. Insulin reduces blood sugar through allowing sugar to leave the blood stream and enter cells. If a person does not have sufficient insulin in their body then the sugar (which is in the form of glucose) may build up in the blood. If there is a build up of glucose then the body will turn to other energy sources to use as fuel. Fats are one of the first energy sources utilized by the body. The use of fats can result in ketoacidosis which can be fatal. Ketoacidosis occurs when fats are broken down and ketones acids build up in the blood and urine. If there is a large build up of ketones acids then this can develop into ketoacidosis which is poisonous.⁸

Often ketoacidosis develops over an extended period of time but in other cases a person suffering type 1 diabetes may not realise they are at risk of serious ketoacidosis. Assistance dogs can utilize their acute smell to identify when a person is at risk of ketoacidosis and can alert their master. Once alerted the person can self-test, administer insulin and seek urgent medical treatment.⁹

The Story of Assistance Dogs (Ringpress Books, 2000) 17; K Natrass, B Davis, S Brien, G Patronek and M MacCollin, 'In puppy love: how an assistance dog can enhance the life of a child with a disability' (2004) 21(1) *Contemporary Pediatrics*, 57; Laurel Rabschutz, *The Effect of Partnering With An Assistance Dog on Self-Esteem and Social Connectedness Among Persons With Disabilities* (Ph.D., University of Connecticut, 2007).

⁸ Ketan Dhatariya, 'People with type 1 diabetes using short acting analogue insulin are less dehydrated than those with using human soluble insulin prior to onset of diabetic ketoacidosis' (2008) 71 *Medical Hypotheses* 5, 706; Rick Keays, 'Diabetes' (2007) 18 *Current Anaesthesia & Critical Care* 2, 69; Andrew J Krentz et al, 'Withdrawal in Patients with Insulin-Dependent Diabetes' (1994) 8 *Journal of Diabetes and its Complications* 2, 105; Deborah J Dalziel et al, 'Alert Dogs: A Review and Preliminary Study' (2003) 12 *Seizure* 2, 115; Val Strong et al, 'Alert Dogs - Fact or Fiction?' (1999) 8 *Seizure* 62.

⁹ See for discussion Deborah L Wells et al, 'Canine Responses to Hypoglycaemia in Patients with Type 1 Diabetes' (2008) 14 *Journal of Alternative and Complementary Medicine* 10, 1235; This study surveyed 212 people who had type 1 diabetes and dogs as pets. The dogs in this research were not trained assistance dogs but simple pets. This survey found that 138 or 65.1% respondents reported that their dog had shown a behavioural reaction to at least one of their hypoglycaemic episodes. Based upon this result and other similar results, this research found that dogs generally were able to detect hypoglycaemic incidents;

There are a number of syndromes which can be defined as epilepsy.¹⁰ One common feature of all forms of epilepsy syndromes are paroxysmal transient disturbances of a person's brain function. This paroxysmal transient disturbance causes electrical disturbances in the brain function of people resulting in abnormal motor phenomena, psychic or sensory disturbances, or perturbation of the autonomic nervous system or episodic impairment or loss of consciousness.¹¹ If a person suffering an epileptic fit does not receive appropriate assistance then there is a high probability of the person suffering potentially serious injuries or even death.¹²

The onset of an epileptic fit can partially be controlled with drugs but the risk of seizure remains a constant risk. Assistance dogs, which have appropriate training, can enable people suffering epilepsy to accurately predict the onset of a seizure and take preventative steps.

The ability of assistance dogs to identify alterations in their masters' physical state and the psychological benefits in working with a dog has resulted in the emergence of animal assisted therapy. Animal assisted therapy is treatment which utilizes interaction with patients and animals to improve patients' physical, social, emotional or cognitive functioning. The concept of animals assisting as an aid to medical treatment has been recorded as early as 1919, where in St Elizabeth's Hospital in Washington, D C animals were used in a therapeutic setting.¹³ Animal assisted therapy can provide significant benefits for people who have disabilities which reduce their ability to successfully interact in society. Meta-analysis reviews of research found that animal assisted therapy had a moderate effect in improving outcomes in autism-spectrum symptoms, medical difficulties, behavioural problems, and emotional well-being.¹⁴ The benefits from animal assisted therapy to people with social interaction disabilities can be

See also Deborah L Wells, 'The Effects of Animals on Human Health and Well-Being' (2009) 65 *Journal of Social Issues* 3, 523.

¹⁰ These syndromes include absence epilepsy, focal epilepsy, generalised epilepsy, grand mal epilepsy, Jacksonian epilepsy, juvenile myoclonic epilepsy, Lafora's myoclonic epilepsy, myoclonic epilepsy, petit mal epilepsy and posttraumatic epilepsy.

¹¹ Epileptic fits are commonly labelled seizures.

¹² Kimball A Prentiss et al, *Emergency Management of the Pediatric Patient: Cases, Algorithms, Evidence* (Lippincott Williams and Watkins, 2007) 61-68; Richard Lechtenberg, *Seizure recognition and treatment* (Churchill Livingstone, 1986) 6.

¹³ Liana Urchuk and Dennis Anderson, *Improving Mental Health Through Animal-Assisted Therapy* (The Chimo Project, 2003) 19.

¹⁴ Susan L Filan and Robert H Llewellyn-Jones, 'Animal-Assisted Therapy for Dementia: A Review of the Literature' (2006) 18 *International Psychogeriatrics* 597; Michele L Morrison, 'Health Benefits of Animal-Assisted Interventions' (2005) 12 *Complementary Health Practice Review* 1, 51; Janelle Nimer and Brad Lundahl, 'Animal-Assisted Therapy: A Meta-Analysis' (2007) 20 *Animals* 3, 22.

both physical and psychological. Results of research demonstrate a positive link between the impact of animal assistance therapy on the health of people with schizophrenia and autism.

The term schizophrenia describes several psychotic disorders characterized by distortions of reality and disturbances of cognitive processes. These disturbances are generally caused by increased dopamine activity in the mesolimbic pathway of a person's brain. Anhedonia is a core phenomenon in schizophrenia and is largely resistant to treatment. Research has found that animal assisted therapy can reduce the level of anhedonia in people suffering schizophrenia.¹⁵ As a consequence, people with schizophrenia who use assistance dogs can have an increased ability to manage their disability and avoid sudden emotional extremes.

Autism incorporates a spectrum of neuropsychiatric disorders which are characterised by deficits in social interaction and communication.¹⁶ Animal assisted therapy has been used successfully with autistic children to glean a positive psychological outcome by encouraging patients to interact.¹⁷ The interaction of the animals with children suffering autism has significantly improved their responses to treatment.¹⁸

The role of dogs in alleviating the negative impact of a person's disability has a long history which is supported by substantial research. While the social and medical benefits of guide or assistance dogs has general acceptance in the scientific literature, in practice there is often a conflict between a person with a disability who desires to use a guide dog or an assistance dog to manage the potentially fatal consequences of their disability and the desire by some groups in society to exclude dogs.

¹⁵ Inbar Nathans-Barela et al, 'Animal-Assisted Therapy Ameliorates Anhedonia in Schizophrenia: A Controlled Pilot Study' (2005) 74 *Innovations* 1.

¹⁶ Uta Frith, *Autism: Explaining the Enigma* (Wiley-Blackwell, 2002) chapter 2.

¹⁷ Kathryn Heimlich, 'Animal-Assisted Therapy and the Severely Disabled Child: A Quantitative Study' (2001) 67 *The Journal of Rehabilitation* 4, 48.

¹⁸ Animal assisted therapy has resulted in similar positive responses with other social interaction disabilities. See for example: Eric Altschuler, 'Pet-Facilitated Therapy For Posttraumatic Stress Disorder' (1999) 11 *Annals of Clinical Psychiatry* 1, 29; Jamie Hundley, 'Pet Project: The Use of Pet Facilitated Therapy Among the Chronically Mentally Ill' (1991) 29 *Journal of Psychosocial Nursing* 6, 23; Boris Levinson, 'Pet Psychotherapy: Use of Household Pets in the Treatment of Behaviour Disorder in Childhood' (1965) 17 *Psychological Reports* 695; Rosanne Wille, 'Therapeutic Use of Companion Pets for Neurologically Impaired Patients' (1984) 16 *Journal of Neurosurgical Nursing* 6, 323.

B *The Exclusion of Dogs*

Before analysing the protection afforded by anti-discrimination laws in protecting persons with disabilities right to be accompanied by their guide or assistance dogs, it is useful to understand the legal tension confronting members of the public around the use of service dogs. As will be discussed in Part 3 of this paper below, the *DDA* provides formal protection to persons who are accompanied by guide dogs or assistance dogs. The protection afforded by the *DDA* (and by associated state and other legislation) manifests by rendering guide or assistance dogs to be an exception to laws which generally exclude all dogs. The interaction between the exclusion and inclusion laws requires members of the public to determine whether the dog is an exception to the rule or not. If the member of the public reaches the wrong conclusion they could be either sued under anti-discrimination laws or prosecuted under food hygiene or occupational health and safety laws.

If a member of the public incorrectly determines a dog is a guide dog or an assistance dog, then that person may be subject to penalties. For example, occupational health and safety (OHS) laws require the presence of dogs at the workplace to either be managed or dogs excluded. All jurisdictions in Australia require employers,¹⁹ people conducting a business or undertaking²⁰ and controllers of workplaces²¹ to ensure the safety of workers, customers and other parties who come onto workplaces. These OHS duties require employers and controllers to engage in the risk management process.²²

¹⁹ *Occupational Health and Safety Act 1989* (ACT) s 27; *Occupational Health and Safety Act 2000* (NSW) s 8; *Occupational Health and Safety Act 2004* (Vic) s 20-23; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Occupational Health and Safety Act 1984* (WA) s 19; *Workplace Health and Safety Act 1995* (Qld) s 28; *Workplace Health and Safety Act 1995* (Tas) s 9; *Workplace Health and Safety Act 2007* (NT) s 55.

²⁰ *Workplace Health and Safety Act 1995* (Qld) ss 28 and 29; Other jurisdictions word this duty differently.

²¹ *Occupational Health and Safety Act 1989* (ACT) s 29; *Occupational Health and Safety Act 2000* (NSW) s 10; *Occupational Health and Safety Act 2004* (Vic) s 26; *Occupational Health and Safety Act 1984* (WA) s 22; *Occupational Health, Safety and Welfare Act 1986* (SA) s 23; *Workplace Health and Safety Act 1995* (Qld) s 30; *Workplace Health and Safety Act 1995* (Tas) s 13; *Workplace Health and Safety Act 2007* (NT) s 56(2)(a).

²² 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; 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.

Dogs can represent a risk to health and safety. If dogs are not appropriately handled then a dog may bite people or may create a risk to safety by running around the workplace tripping people up or interfering with the safe use of equipment. If employers or controllers permit a dog onto the workplace then they are required to incorporate strategies to reduce or remove the risk created by the dog. If an employer or controller does not effectively develop, enforce and review such policies then they will have breached their OHS duties. Due to the structure of OHS laws a person who has an OHS duty imposed upon them breaches that duty even if there has been no workplace accident.²³ This means an employer or controller of work premises is required to either exclude all dogs or to follow the risk management process when permitting a dog onto the premises. Considering that OHS laws are enforced by the state and breaches of OHS laws can attract fines or even imprisonment,²⁴ then there is considerable pressure upon employers and people who control workplaces to exclude all dogs.

OHS laws have particularly wide application due to the wide definition of what is included in a workplace. Some courts have adopted extremely wide readings of employers' duties and what constitutes a workplace.²⁵ For example, the *Workplace Health and Safety Act 1995* (Tas) s 3(1) defines workplace to mean 'any premises or place (including any mine, aircraft, vessel or vehicle) where an employee, contractor or self-employed person is or was employed or engaged in industry.' This wide definition of 'workplace' is intended to minimise safety risks in society caused by any commercial activity.²⁶

²³ *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149, 15.

²⁴ Paul Harpur, 'Occupational Health and Safety Issues and the Boardroom: Company Directors Face Jail and Fines For Their Companies' Lack of Safety' (2008) 10 *Bond University Corporate Governance E-Journal* <<http://epublications.bond.edu.au/cgej/10/>>; 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* (ICFAI, 2008); Note however fines or alternative punitive sanctions are more common. See Richard Johnstone and Michelle King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280.

²⁵ See for discussion of how OHS duties are being imposed across corporate entities and workplaces: Paul Harpur, 'Workers' Rights as Labour Rights: Workers' Safety at Work in Australian Based Supply Chains' (PhD Thesis, Queensland University of Technology, 2009); Phil James, Richard Johnstone, Michael Quinlan and David Walters, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal* 163; Caroline Scott, 'Recent Cases: Extending Employers' Duties for the Workplace Safety of Contractors' (2005) 18 *Australian Journal of Labour Law* 6.

²⁶ The purposes of the OHS Acts indicate they are intended to maximise safety: *Occupational Health and Safety Act 1989* (ACT) s 2; *Occupational Health and Safety Act 2000* (NSW) s 3; *Workplace Health and Safety Act 1995* (Qld) s 7;

If employers or controllers of work premises decided to discharge their OHS duties by excluding all dogs then this would result prima facie in service dogs being excluded. To avoid such a discriminatory outcome it is essential that anti-discrimination statutes limit the circumstances where service dogs can be excluded. If anti-discrimination statutes are read narrowly, persons with disabilities who use service dogs could find their access to workplaces, public buildings, universities, hospitals and the like limited by anti-dog policies.

The potential conflict between controllers of workplaces and persons who use guide or assistance dogs can be evinced by the litigation concerning Che Forest and his assistance dogs.²⁷ In *Forest* a person with a disability (Forest) was refused access to Queensland Health premises several times while he was accompanied by his assistance dogs. At the relevant time Forest suffered from a psychiatric condition which he used two assistance dogs to manage (although he was only accompanied by one dog at a time). Sections 23 and 24 of the *DDA* provide that it is unlawful to discriminate against a person on the grounds of disability through limiting access to premises and in the provision of goods and services. The conduct of this case and the decision of the Full Federal Court will be discussed later in this paper. For the purposes of this section it is relevant to analyse Queensland Health's conduct as a practical example of the tension between permitting and excluding guide and assistance dogs.

The policies of Queensland Health provide a practical example of the tension between permitting dogs onto premises to assist persons with disabilities and excluding dogs due to safety concerns. While Queensland Health permitted guide dogs which accompanied persons with vision or hearing disabilities as a matter of course, when a person was seeking to bring an assistance dog onto premises then Queensland health required the person with a disability to comply with strict conditions. In *Forest* the executive director of medical services at the Cairns Base Hospital explained that:

[W]hile guide dogs and hearing dogs, which are regulated by Queensland legislation, are recognised by the hospital and are allowed into the hospital's premises, assistance dogs are not regulated in the same way and each request for access by an assistance dog must be separately assessed to ensure that the standards applicable to guide dogs and hearing dogs are met.²⁸

Occupational Health, Safety and Welfare Act 1986 (SA) s 3; *Occupational Health and Safety Act 2004* (Vic) s 2; *Occupational Health and Safety Act 1984* (WA) s 5; *Workplace Health and Safety Act 2007* (NT) s 3.

²⁷ This matter ended up in the Full Court of the Federal Court in *Queensland Health v Forest* (2008) 249 ALR 145.

²⁸ (2008) 249 ALR 145, 160.

While the evidence was that guide dogs were not excluded, the Queensland Health policy relied upon in *Forest* applied equally to guide and assistance dogs. In *Forest* the Queensland Health policy was entitled 'Dogs in Hospital Procedure'.²⁹ This policy explained that the patient was responsible for the behaviour of the animal and that the animal must not disturb other patients.

In 2005 Queensland Health published another policy regulating the use of dogs on premises that they controlled. The 'Integrated (HR/IR) Resource Manual' contained a part on managing animals in health facilities. Prior to permitting an animal onto premises the work area was required to:

- Conduct a risk assessment that includes the areas of consideration outlined in an attachment to the manual;
- Develop a proposed care plan for the animal; and
- Receive endorsement from the senior executive officer of the facility.³⁰

Where there is a conflict between a person with a disability's right to be accompanied by their guide or assistance dog and the convenience of other parties, arguably the attachment to the Resource Manual subrogates the rights of persons with disabilities to other interests. First, a person with a disability was required to prove their guide or assistance dog provided them a 'clinical or therapeutic benefit'.³¹ As there was no explanation how this test should be satisfied it raised the possibility of inconsistent application across Queensland Health institutions. The policy raised some valid concerns such as how clients and staff with dog allergies will be separated from the dog, what 'control measures will be in place to prevent the dog from entering prohibited areas', how will the dog's food be stored in a way which does not attract vermin, 'has the animal either had obedience training or is the animal a low risk to humans' and 'is the animal located in an area with ventilation and positioned away from any inherent workplace, health and safety risks'?³²

Not all of the policy's concerns appear relevant to deciding whether or not to deny the person with disability access. For example, the policy asked if 'the health care facility would be able to cover any associated veterinary expenses in the event of illness or injury to the animal?' As the responsibility for the care of the guide or assistance dog is that of the patient all veterinary expenses of the dog would be the responsibility of the patient. The veterinary costs of the dog would only arise where the health care facility was negligent and

²⁹ Ibid.

³⁰ Ibid.

³¹ (2006) 249 ALR 145, 160-161.

³² Ibid.

caused an injury to the dog. It seems unfair to consider excluding a person with a disability because of a fear of negligence.

The policy then asked if there are likely to be ‘people who object to or have phobias of the animal and, if so, how severe and what control measures will be introduced to prevent contact’? It appears extremely curious to factor in a mere objection when deciding whether or not to deny a person with a disability their right to be accompanied by their guide or assistance dog. Considering an ‘objection’ could be founded on an unjustified prejudice it is arguably unfair to consider such objections when deciding whether or not to remove another persons’ right. After all, would Queensland Health extend such a principle to other protected groups? For example, would Queensland Health exclude all Aboriginals if a staff member objected strongly to racial diversity in the hospital? Clearly such a policy would be racist and abhorrent.³³ Equally persons with guide or assistance dogs should not be excluded because of objections or phobias.

This section has demonstrated that there is often a conflict between a person with a disability who requires their guide or assistance dog to accompany them and other parties. The remainder of this paper will analyse whether being accompanied by a guide or an assistance dog is a right or privilege under international and domestic laws and how such protection is enforced.

II DEVELOPMENTS IN THE PROTECTION OF THE RIGHTS OF PERSONS WITH DISABILITIES UNDER THE CONVENTION ON PERSONS WITH DISABILITIES

Does the CRPD protect the right of persons who use guide and assistance dogs from discrimination? To answer this question this part will commence with a detailed analysis of the CRPD. The CRPD is a relatively new convention having come into force internationally in May 2008 and entered into force for Australia in August 2008.³⁴ To date, the literature has not considered how the CRPD operates in an Australian context. This section will attempt to fill this gap.

The CRPD is the first general human rights convention which expressly protect the human rights of people with disabilities. The rights based nature of the CRPD is explained in the first two introductory articles of the convention. Article 1 states the purpose of the CRPD is ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all

³³ For a discussion of how society and laws perceive disability discrimination when compared to sexism and racism see 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.

³⁴ CRPD.

persons with disabilities, and to promote respect for their inherent dignity'. The United Nations Department of Economic and Social Affairs has observed:

The [CRPD] is a human rights instrument with an explicit social development dimension. It reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms on an equal basis with others. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights, where their rights have been violated, and where protection of rights must be reinforced.³⁵

The CRPD provides a wide definition of the physical and mental conditions which qualify for protection. Article 1 defines persons with disabilities to 'include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The people protected by the CRPD can be distilled into three key elements being 'a non-exclusive list of impairments, the inclusion of at least physical, mental, intellectual, and sensory impairments and a low threshold for the impairment to be legally protected'.³⁶

Article 2 then defines discrimination on the basis of disability to mean:

[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Under the CRPD disability discrimination will occur whenever a person receives less favourable treatment because of an attribute of their disability.

There will be circumstances where a state cannot prevent disability discrimination. For this reason the CRPD is structured to define disability discrimination widely and then later in the convention include exceptions. For example the general obligations in Article 4(2) explain that:

³⁵ United Nations Department of Economic and Social Affairs, 'Relationship between Development and Human Rights' <<http://www.un.org/disabilities/default.asp?id=33>> at 20 July 2009.

³⁶ Ulrike Buschbacher, 'Disability Rights in Cambodia: Using the Convention on the Rights of People With Disabilities to Expose Human Rights Violations' (2009) 18 *Pacific Rim Law & Policy Journal* 123, 131.

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the [CRPD] that are immediately applicable according to international law.

How the exceptions to the CRPD operate can be further evinced by Article 28. Article 28 only requires states to ensure an 'adequate standard of living and social protection' and not an absolute protection. While this may result in some disability discrimination, the CRPD defines what is an 'adequate' standard. For example, states must 'ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs'.³⁷

As a human rights instrument the CRPD provides persons with disabilities who use guide and assistance dogs extensive rights. As a human rights convention, the CRPD is a 'comprehensive rights catalog' which 'allows direct invocation of social rights claims, eliminating the need to fit such claims within the framework of more established civil or political rights.'³⁸ Persons with disabilities are protected by rights found in Articles 3 to 9, which enshrine universal rights, and Articles 10 to 30, which enshrine substantive rights. The rights included in the CRPD can be divided into existing rights and mechanical rights, which ensure persons with disabilities can exercise the rights they already have under other general human rights conventions. For example, the right to equality and non-discrimination is well established.³⁹ To realise this right the CRPD includes rights to access buildings, schools, programs and public transport,⁴⁰ live independently and to be included in the community,⁴¹ personal mobility,⁴² freedom of expression and opinion, and access to information,⁴³ privacy,⁴⁴ participate in political life⁴⁵ and participate in cultural life, recreation, leisure and sport.⁴⁶ Finally CRPD Articles 31

³⁷ CRPD Article 28(2)(a).

³⁸ Janet E Lord and Michael Ashley Stein, 'Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play' (2009) 27 *Boston University International Law Journal* 249, 251.

³⁹ CRPD Article 5.

⁴⁰ *Ibid*, Article 9.

⁴¹ *Ibid*, Article 19.

⁴² *Ibid*, Article 20.

⁴³ *Ibid*, Article 21.

⁴⁴ *Ibid*, Article 22.

⁴⁵ *Ibid*, Article 29.

⁴⁶ *Ibid*, Article 30.

to 40 establish implementation and monitoring schemes and Articles 41 to 50 provide rules governing the operation of the CRPD.

The CRPD does not include anything specific on the rights of persons using guide or assistance dogs. Nor does the CRPD provide details on wheelchair accessibility or details of other essential functional aids. This is because the CRPD does not provide specific steps for implementation with specific standards. The CRPD focuses on providing overarching principles and rights which must be protected and does not provide detailed standards.

The people who drafted the CRPD adopted overarching objectives rather than specific standards:

[p]recisely to ensure that the Convention's text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development.⁴⁷

The process by which specific standards must be drawn from the overarching principles in the CRPD can be evinced by accessibility rights. Article 9(1) of the CRPD provides:

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

CRPD Article 9 does not provide an exhaustive list of how accessibility rights are to be realised. CRPD Article 9(2) provides a non-exhaustive list of steps states should ensure. These include Braille and easy to read signage,⁴⁸ live assistance and intermediaries, including guides, readers and professional sign language interpreters⁴⁹ and the adoption of universally design principles.⁵⁰ To achieve accessibility Article 9 anticipates states taking what steps are necessary within each jurisdiction to achieve accessibility. To this end Article 9(2)(a) provides that state parties should take steps to 'develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'. The standards necessary to ensure the

⁴⁷ Tara J Melish, 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: the UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify' (2007) 14 *Human Rights Brief* 43, 453.

⁴⁸ CRPD Article 9(2)(d).

⁴⁹ Ibid, Article 9(2)(e).

⁵⁰ Ibid, Article 9(2)(h).

accessibility of persons using guide and assistance dogs will depend upon each jurisdiction. In Australia domestic animals are not generally taken into public places. Due to this fact anti-discrimination laws must enshrine persons with disabilities right to take their guide and assistance dogs into public venues. In contrast some jurisdictions regularly permit domestic animals on public transport in public places.⁵¹ In these jurisdictions laws may focus on ensuring other accessibility issues, such as rails on steps or talking lifts.

Even in the absence of specific standards the CRPD's overarching principles do provide a benchmark which states can be judged against. First, the CRPD requires states to ensure persons with disabilities are not discriminated against in everyday life. This means that if a state signatory's laws do not achieve this result, then the state may be in breach of the CRPD's overarching principles. This paper will focus on the simple question of whether Australia protects persons with disabilities who use guide and assistance dogs from discrimination as envisaged by the CRPD. To protect the right of persons with a disability to be accompanied by a guide dog or an assistance dog the CRPD Article 4 requires Australia to:

- a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRPD];
- b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

Essentially the CRPD requires Australia to adopt a regulatory framework which protects persons with disabilities who use guide and assistance dogs from being denied their human rights (such as the right to access, privacy or health) because they are accompanied by their dog.

At the time of ratifying the CRPD in 2008, Australia protected the rights of persons with disabilities federally through the *DDA*. To discharge its obligations under the CRPD the Australian Government amended the *DDA* through enacting the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (*'Amendment Act'*). These amendments were motivated in part by the CRPD. First, Schedule 2(20) of the *Amendment Act* amended the *DDA* to include the CRPD in the lists of conventions in *DDA* s 12(8). This included the CRPD as one of the constitutional grounds that the Commonwealth can rely upon to legislate for the rights of persons

⁵¹ For example dogs have more freedom of movement in public spaces in France: Lonely Planet, 'France Travel Information and Travel Guide' (2009) <<http://www.lonelyplanet.com/france>>.

with disabilities.⁵² Secondly, a number of amendments in the *Amending Act* were expressly made to discharge Australia's obligations under the CRPD.⁵³ On the basis Australia has ratified the CRPD and has introduced legislative amendments to uphold the rights found in the CRPD. This paper will analyse whether the reforms to the *DDA* have ensured a regulatory framework exists that protects the right of persons with disabilities to be accompanied by their guide dog or assistance dog.

III DO AUSTRALIAN LAWS PROTECT PEOPLE FROM BEING DISCRIMINATED AGAINST BECAUSE THEY ARE ACCOMPANIED BY A GUIDE DOG OR ASSISTANCE DOG?

A *Do State and Territory Anti-Discrimination Laws Protect Persons Who Use Guide Dogs and Assistant Dogs*

While this paper is focusing upon the *DDA* and the recent amendments to that statute, it is relevant to briefly analyse if state and territory laws provide any protection to persons using guide dogs or assistance dogs. Due to the operation of s 109 *Commonwealth of Australia Constitution Act* states and territories can continue to regulate on anti-discrimination unless the Commonwealth Parliament passes laws which are inconsistent with the continued operation of relevant state or territory laws. This means that even if the *DDA* does not protect persons using guide or assistance dogs, if state and territory anti-discrimination laws are constitutionally valid and protect these rights, then any failure of the *DDA* will not result in any practical loss of rights.

The *DDA* s 13(3) does not exclude the operation of any state or territory laws which can operate concurrently with the *DDA*. Similarly the *Fair Work Act 2009* (Cth) s 26(1A) provides that state and territory anti-discrimination laws continue to bind national system employers and the *DDA* s 13 permits state and territory laws to operate concurrently with the *DDA*. As a consequence a complainant generally has the choice to agitate their grievance under either the *DDA* or relevant state or territory laws. Due to the continued operation of state and territory laws, this section will briefly analyse the protection afforded to persons with disabilities under state and territory laws before moving onto an analysis of the *DDA*.

⁵² The external affairs power of the Commonwealth is found in *Commonwealth of Australia Constitution Act* s 51(XXIX).

⁵³ For example the explanatory memorandum to the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) [29] explains that the definition of 'reasonable accommodation' in the *DDA* was amended to reflect the definition found in CRPD Article 2.

The first step in any anti-discrimination claim is establishing that a person is being discriminated against because of their attribute (such as a disability or impairment).⁵⁴ If the relevant attribute is a person's disability, then discriminating against a person because they use an essential disability aid is held to constitute disability discrimination in all jurisdictions. The reason these laws operate to ensure persons with disabilities can use essential disability aids acknowledges that persons with disabilities can often not function without the disability aid. For example, a person with spina bifida may require a wheel chair for extended mobility,⁵⁵ a person who uses a guide dog often has limited skills at using a cane or other mobilisation strategies. Using a cane requires special technique and extremely different orientation strategies from a person who uses a guide dog.⁵⁶ This is why many guide dog users confront substantial mobility difficulties if they are forced to use a cane if their guide dog is sick or they are between dogs.⁵⁷

In relation to the use of guide or assistance dogs, the Australian Capital Territory's *Discrimination Act 1991* (ACT) s 9 and the Queensland *Anti-Discrimination Act 1991* (Qld) s 85 recognises the essential function dogs can play in enabling persons with various disabilities to reduce the impact of their situation. This legislation enables a person with a sight, hearing or any other disability to be accompanied by either a guide dog or an assistance dog. The other state and territory jurisdictions provide persons using assistance dogs far less protection by limiting what disabilities are entitled to anti-discrimination protection.

⁵⁴ *State of New South Wales v Amery* (2006) 230 CLR 174, 193 (Gummow, Hayne and Crennan JJ).

⁵⁵ Spina bifida is a congenital defect where a vertebra is malformed. This creates mobility problems for people with this condition: B E Dicianno, 'Mobility, Assistive Technology Use, and Social Integration Among Adults with Spina Bifida' (2009) 88 *American Journal of Physical Medicine & Rehabilitation* 7, 533; Scott Grosse et al, 'Impact of Spina Bifida on Parental Caregivers: Findings from a Survey of Arkansas Families' (2009) 18 *Journal of Child & Family Studies* 5, 574; M Peny-Dahlstrand et al, 'Quality of performance of everyday activities in children with spina bifida: a population-based study' (2009) 98 *Acta Paediatrica* 10, 1674; Adrian Sandler, *Living with Spina Bifida: a Guide for Families* (University of North Carolina Press, 2004).

⁵⁶ For how people with blindness can be mobilized generally see: William Henry Jacobson, *Art and Science of Teaching Orientation and Mobility to Persons with Visual Impairments* (AFB Press, 1993); Natalie Isaak, *Teaching Orientation and Mobility in the Schools: An Instructor's Companion* (AFB Press, 2002); Rose-Marie Swallow and Kathleen Mary, *How to Thrive, Not Just Survive: A Guide to Developing Independent Life Skills for Blind and Visually Impaired Children and Youths* (AFB Press, 1995).

⁵⁷ The author has personal experience of this problem when he was between guide dogs.

The *Anti-Discrimination Act 1992* (NT) s 21, *Anti-Discrimination Act 1977* (NSW) s 49B and the *Equal Opportunity Act 1995* (Vic) s 52 protect persons with vision, hearing and mobility disabilities who use a guide dog or an assistance dog from discrimination because they are accompanied by their dog. The enactments in the Northern Territory, New South Wales and Victoria do not regard excluding assistance dogs as discrimination where those assistance dogs are accompanying persons with disabilities which are not primarily related to mobility problems, such as diabetes, autism or mental health disabilities. The situation in South Australia, Western Australia and Tasmania is even more concerning. The *Equal Opportunity Act 1984* (SA) s 66, the *Equal Opportunity Act 1984* (WA) s 66A and the *Guide Dogs and Hearing Dogs Act 1967* (Tas) s 3 only protect persons with vision or hearing disabilities who are accompanied by guide dogs. According to the provisions of the South Australian, Western Australian and Tasmanian enactments it is not unlawful to discriminate against a person because they are accompanied by an assistance dog which alleviates the impact of any disability which is not related to vision loss or hearing.

With the exclusion of the Australian Capital Territory and Queensland statutes, the operation of the anti-discrimination statutes in all Australian state and territory jurisdictions provide limited or no protection for persons with disabilities who use an assistance dog to alleviate the impact of their disability. As state and territory anti-discrimination laws provide assistance dog users limited protection, when assistance dog users confront discrimination they are more likely to turn the Commonwealth anti-discrimination regime.

B *Are Users of Guide and Assistance Dogs Protected from
Discrimination by the DDA*

The *DDA* intends ‘to eliminate, as far as possible, discrimination against persons on the ground of disability in’ areas including work, accommodation, education, access to premises, clubs, sport, provision of goods, facilities, services and before the law.⁵⁸ The *DDA* seeks to achieve its stated objectives by rendering it unlawful to discriminate against people with disabilities in a number of prescribed relationships. The relationships in which the *DDA* prohibits discrimination are defined in part 2. Part 2 Division 1 prohibits discrimination in the employment relationship and Division 2 prohibits discrimination in other relationships such as education,⁵⁹ access⁶⁰ to premises,⁶¹ goods, services and facilities,⁶²

⁵⁸ *DDA* s 3.

⁵⁹ *Ibid*, s 22.

⁶⁰ *Ibid*, s 23.

⁶¹ *Ibid*, s 23.

⁶² *Ibid*, s 24.

accommodation,⁶³ clubs and incorporated associations,⁶⁴ sport⁶⁵ and in administration of Commonwealth laws and programs.⁶⁶ The *DDA* protects persons with disabilities against discrimination based upon their disability by rendering discrimination based upon a person's disability unlawful.⁶⁷

The *DDA* ex facie protects people from being discriminated because they have a disability, but does discriminating against a person because they have a guide or assistance dog constitute disability discrimination? The *Amendment Act* has reversed the approach of the Full Federal Court to discrimination based upon being accompanied with an 'assistance animal'.⁶⁸

The post reform *DDA* s 9 does not distinguish between guide dogs, hearing dogs or assistance dogs or vary the level of protection afforded to persons with disabilities based upon their disability. Section 9(2) defines an 'assistance animal' to mean an animal that has been:

- a. accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons with a disability to alleviate the effect of the disability; or
- b. accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- c. trained:
 - i. to assist a person with a disability to alleviate the effect of the disability; and
 - ii. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The amendments to the *DDA* mean that persons who use any form of animal (such as a dog, cat, bird or any other animal) will come within the *DDA*, providing that animal is used to alleviate their disability or is accredited as an assistance animal.⁶⁹ Due to the continuing use of

⁶³ Ibid, s 25.

⁶⁴ Ibid, s 27.

⁶⁵ Ibid, s 28.

⁶⁶ Ibid, s 28.

⁶⁷ Ibid, ss 5 and 6.

⁶⁸ See the discussion associated with Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) Explanatory Memorandum Schedule 2 Item 17.

⁶⁹ While this paper is only focusing upon the protection afforded to persons with disabilities who are accompanied by guide or assistance dogs it is important to note that various other animals have been used as assistance animals, such as birds, cats, rats etc: Denise Gasalberti, 'Alternative Therapies for Children and Youth With Special Health Care Needs' (2006) 20 *Journal of Pediatric Health Care* 2, 133;

the terms guide and assistance dog domestically and internationally this paper will continue to use these terms.

C *How Does the DDA Protect Persons Who Use Assistance Animals Against Discrimination?*

Under *DDA* s 8 it is unlawful to discriminate against a person because they use an assistance animal as defined in s 9. To successfully prosecute a claim under ss 8 and 9 it is necessary to prove that the complainant has suffered discrimination as defined by the *DDA*. The *DDA* protects people from discrimination by prohibiting direct and indirect discrimination. Direct discrimination exists where a discriminator treats, or proposes to treat a person with a disability less favourably than people without the disability because of an attribute of the person's disability.⁷⁰ Indirect discrimination occurs where a policy that appears on its face not to discriminate (a facially neutral policy) contains a conditions or requirement that a person with a disability cannot satisfy because of that person's disability.⁷¹ Therefore, to prosecute a claim under *DDA* s 9 a complainant must prove that they have experienced either direct or indirect discrimination. This paper will now analyse the operation of direct and indirect discrimination in detail to ascertain the level of protection afforded to people using guide and assistance dogs following the 2009 amendments to the *DDA*.

1 *Direct Discrimination*

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 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)*.⁷²

Lynette Hart, 'Methods, Standards, Guidelines, and Considerations in Selecting Animals for Animal-Assisted Therapy: Part A: Understanding Animal Behaviour, Species, and Temperament as Applied to Interactions with Specific Populations' in Lynette Hart, *Handbook on Animal-Assisted Therapy: Theoretical Foundations and Guidelines for Practice* (Academic Press, 2000) 81-97.

⁷⁰ *DDA* s 5.

⁷¹ *Ibid*, s 6.

⁷² (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

To determine if direct discrimination is made out on the facts the tribunal compares how a person would have treated a person if they did not have 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.⁷³ 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.⁷⁴ 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 who use guide or assistance dogs. 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.

Education Provisions of the *Disability Discrimination Act 1992* (Cth) and the Formulation of Disability Standards For Education' (2005) 24 *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) 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.

⁷³ (2003) 217 CLR 92, [11] (Gleeson CJ), [224] (Gummow, Hayne and Heydon JJ); for an interesting discussion of this issue see Campbell, 'A Hard Case Making Bad Law', above n 72, 113-115.

⁷⁴ (2003) 217 CLR 92, [11] (Gleeson CJ), [224] (Gummow, Hayne and Heydon JJ).

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. 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.⁷⁵

Similar to 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.⁷⁶

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

⁷⁵ (2008) 249 ALR 145, 168.

⁷⁶ (2008) 249 ALR 145, 154.

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 actually no 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 *Amendment Act* 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.⁷⁷ Despite this evidence the Standing Committee decided not to recommend the removal of the comparator test and proposed the continuation of the status quo.⁷⁸ This paper 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 paper 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.

⁷⁷ Standing Committee on Legal and Constitutional Affairs, 'Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008' (Final report, 2009) 43.

⁷⁸ *Ibid.*

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:

- a. the animal is an assistance animal; or
- b. 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 paper 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.

1 *Indirect Discrimination*

Indirect discrimination protects people with disabilities against the application of facially non-discriminatory policies which do not have the intent of discriminating but have a discriminatory effect in practice.⁷⁹ The difference between indirect discrimination and direct discrimination was explained by Dawson and Toohey JJ in *Waters v Public Transport Corporation*:

Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such 'equal' treatment is that the former is in fact treated less favourably than the latter. ... Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.⁸⁰

The test for indirect discrimination in ss 4, 6 and 11 were amended in the 2009 reforms. To prove indirect discrimination has occurred under s 6 of the *DDA*, a complainant must first prove that the alleged discriminator 'requires, or proposes to require' them to comply with a requirement or condition. Secondly due to the complainant's disability they would only be able to comply with this requirement or condition 'if the discriminator made reasonable adjustments for the person... [and] the discriminator does not do so or proposes not to do so'. Finally the complainant must prove that the failure to make the reasonable adjustments 'has, or is likely to have, the effect of disadvantaging persons with the disability.'

Section 9 of the *DDA* is structured so the complainant proves the elements in s 9(2) and then the onus of proof shifts to the alleged discriminator to prove their conduct was reasonable. If an alleged discriminator can prove the requirement or condition that they imposed was 'reasonable ... having regard to the circumstances of the case' then the tribunal will find the requirement or condition did not amount to indirect discrimination.⁸¹ On paper the new approach to

⁷⁹ See for discussion of the potential social justice potential of indirect discrimination: M Loenen, 'Indirect Discrimination as a Vehicle for Change' (2000) 6 *Australian Journal of Human Rights* 2, 77.

⁸⁰ (1991) 173 CLR 349, 392.

⁸¹ *DDA* ss 6(3) and 6(4); It is arguable that the person who is introducing the requirement or condition is in the best position to justify the reasonableness of their conduct. See Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 Explanatory Memorandum for a similar argument; This

indirect discrimination reflects the approach in the CRPD to defining disability discrimination widely and then permitting exceptions to discrimination. In practice *DDA* s 6 may not achieve the intended protection.

When will a requirement or condition be reasonable under *DDA* s 6? If courts operated on the basis that people with disabilities are not the norm and cannot expect to have the same requirements and conditions imposed upon them as the rest of society, then it could be very difficult for a person who uses an guide or assistance dog to surmount the idea that the discrimination is reasonable. If on the other hand courts adopted an approach which treated disability as something natural within a diverse society and that people with disabilities should have the same rights of persons without disabilities, then it is submitted the reasonableness test would result in a diverse and inclusive outcome.

The reasonableness test in s 6 is arguably unclear and could create confusion. Section 6(2)(b) requires the complainant to prove the alleged discriminator has not made a 'reasonable adjustment'. If the complainant can prove this then the onus shifts to the defendant to prove the requirement or condition was reasonable. An adjustment is defined in *DDA* s 4 to be a 'reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.' Section 11 explains that to determine if an unjustifiable hardship exists 'all relevant circumstances of the particular case must be taken into account'. Section 11(1) provides that the factors which must be considered include:

- a. the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- b. the effect of the disability of any person concerned;
- c. the financial circumstances, and the estimated amount of expenditure required to be made, by the ... [alleged discriminator]; [and]
- d. the availability of financial and other assistance to the ... [alleged discriminator].

The onus is upon the alleged discriminator to prove that they would suffer unjustifiable hardship.⁸² While the new ss 6 and 11 have increased the onus upon the alleged discriminator ultimately the crucial element is whether or not the courts regard the alleged discriminator's act as reasonable or not.

position also reflects the position in other anti-discrimination laws in Australia such as the *Sex Discrimination Act 1984* (Cth) ss 7B and 7C; the *Age Discrimination Act 2004* (Cth) s 15.

⁸² *DDA* s 11(2).

The Standing Committee Report acknowledged numerous concerns about the reasonableness tests.⁸³ In particular the Human Rights Resource Centre argued concerns that ‘the wording of the definition of reasonable adjustment contains an assumption that the adjustments are reasonable unless they impose an unjustifiable hardship’.⁸⁴ The Standing Committee agreed ‘that the arrangements put forward in the Bill are complex, and considers that new ss 5 and 6 could benefit from simplification’.⁸⁵ Despite these concerns the Standing Committee unfortunately missed the opportunity to recommend the definition be simplified or the approach in *Forest* be reversed.

Officers from the Attorney-General’s Department argued to the Standing Committee that the test of reasonableness should be changed as little as possible to enable parties to use previous case law to guide the approach to reasonableness.⁸⁶ As the amendments to the *DDA* have not clearly rebutted the approach of previous courts then it is possible that future courts will apply the approach adopted by courts interpreting of reasonableness under the old *DDA* s 6.

The issue of what is reasonable discrimination was considered by the Full Court of the Federal Court in *Forest*. In this case Spender and Emmett JJ held the Queensland Health policy of requiring an assistance dog user to provide proof that their assistance dog was trained and safe did not breach s 6 of the *DDA*.⁸⁷ The approach of requesting evidence that a dog has training and safe has been provided support through the adoption by Parliament of existing case law when amending *DDA* s 6. On paper it appears reasonable to require a person with a disability to prove their guide or assistance dog has training, in practice in the *Forest* case this resulted in a curious outcome.

Despite providing substantial evidence of training the Full Court of the Federal Court did not accept that Forest’s dogs came within the ss 6 and 9 *DDA* protection. In the Federal Court judgment there was considerable evidence about the training and role of Forest’s assistance dogs. In the Federal Court judgment Collier J noted:

I note that over four days of hearing ... [Forest] was in the witness box for much of two of those days, accompanied by his dog Knuckles. I formed the view at that time that Knuckles was extremely well-behaved, responsive to ... [Forest] and his commands, and at all times under [his] the control From viewing Knuckles, and evidence given by witnesses who are familiar with both of ... [Forest]’s dogs including Ms Coop, ...

⁸³ Standing Committee on Legal and Constitutional Affairs, above n 77, 25 and 26.

⁸⁴ *Ibid*, 25.

⁸⁵ *Ibid*, 27.

⁸⁶ *Ibid*.

⁸⁷ (2008) 249 ALR 145, 166.

[Forest]'s general practitioner, Dr David Cuming ... I am satisfied that ...
[Forest]'s dogs Buddy and Knuckles are suitable for public access.⁸⁸

Regarding the training and role of Forest's assistance dogs a representative from Assistance Dogs Australia explained that in Forest's particular case the assistance dogs were trained to interact with him and other people to assist Forest to manage his disability when his condition caused conduct to become socially unacceptable.⁸⁹ For example, the dogs would act in a certain way to indicate to Forest to move away or to draw the attention to the dog rather than Forest. An occupational therapist specialising in mental health gave evidence that assistance dogs can provide valuable support to people with mental disabilities to manage their condition. This witness attested that Forest's dogs 'perform[ed] a therapeutic role for' him.⁹⁰ This evidence was accepted by Collier J and not challenged on appeal.⁹¹

Based upon the decision of the Full Court of the Federal Court the evidence of a Federal Court judge over four days and various experts testifying under oath are not adequate to entitle Forest to use his assistance dogs in Queensland Health facilities in the future. The court could have found Queensland Health had not discriminated in the past but could have suggested in obiter dicta that Queensland Health permit Forest's dogs in the future as their training and safety has now been established. This was not done so presumably the court was not satisfied on the evidence that Forest's dogs were trained or safe. This begs the question as to what level of evidence will be required to prove a guide or assistance dog is trained and safe? This is critical as if an alleged discriminator has reasonable grounds to believe a guide or assistance dog is unsafe or untrained then it is lawful under ss 11 and 54A to exclude that dog.

This paper argues that the confusion over what constitutes acceptable training and safety should be addressed by regulatory intervention by the Commonwealth Government. One of the main problems which has been identified is how can parties quickly and reliably distinguish between an assistance dog within the meaning of s 9 of the *DDA* and a mere pet? It is submitted that ss 8 and 9 of the *DDA* would benefit from an increased focus on the practical application of anti-discrimination laws. While these sections protect any person accompanying an assistance animal how does the individual in question prove they are entitled to this protection? The decision whether to permit or exclude an assistance animal in practice occurs in retail stores, cafés, taxi ranks and in other common situations where there is no time to provide extensive evidence. How would a person

⁸⁸ *Forest v Queensland Health* [2007] FCA 936, [113].

⁸⁹ *Ibid*, [113].

⁹⁰ *Ibid*, [115].

⁹¹ *Ibid*, [118]-[124].

demonstrate their rights? Would people carry on their person a copy of the regulations and a certificate from the training institution certifying the dog? If the person carried a card from the training institution certifying the person and the assistance animal how would members of the public be certain the training institution and the card were legitimate? As there are numerous guide and assistance dog training institutions or programs it is submitted the government needs to provide additional regulation to increase the creditability and reliability of training.

This article recommends the federal government increase the formal recognition of training institutions and individuals who have been trained with guide or assistance dogs. It is argued that if the safety and training of guide and assistance dogs could be assured by a government license then it is likely that people would have reduced grounds to directly discriminate against dogs on the basis the dogs are unsafe or indirectly discriminate beyond asking the person to provide evidence assuring the dogs training. The federal government could introduce regulations under *DDA* s 132(1) (b) to provide a regulatory framework to implement such a scheme. This section states that the Governor-General has the power to promulgate regulations where it is necessary or convenient to be prescribed for carrying out or giving effect to the *DDA*. These proposed regulations could establish a scheme that first accredited certain institutions to train assistance dogs. These accredited institutions would then have the responsibility of accrediting assistance dogs and handlers to be fully trained and safe. If the institution can provide the government with medical evidence that a particular person has the disability for which that dog is trained and that that dog has a sufficient level of training to determine the dog is safe,⁹² then a government body would be able to provide that person with an identification card stating the dog is an assistance dog and protected by *DDA* s 8 and s 9 and which institutions certified the dog. Providing these institutions were required to regularly check dogs' conduct, then the issuing of a photographic identification card by a government agency would enable persons with disabilities and the public to quickly determine whether or not the dog was protected by the *DDA*.

If this proposed regulatory framework existed in Forest's circumstances, then Forest's dog would have been certified by a prescribed institution and the Hospital would arguably have been able to easily identify the importance of the dogs. If the Hospital became concerned with the dog's conduct then the Hospital could have

⁹² While guide dog institutions are not required by law to perform such functions at the moment, most institutions perform such functions to ensure the safety of their clients and the guide dogs and to maintain their corporate image. See for example: Guide Dogs Queensland, 'Guide Dog Mobility' (2009) <http://www.guidedogsqld.com.au/page/Services_for_blind_and_vision_impaired/Guide_Dog_Mobility/>.

contacted the agency which certified the dog to seek assistance. This may have resulted in the Hospital's concerns being settled without impinging unnecessarily upon Forest's rights or costing Queensland Health tens of thousands in legal fees.

An identification card scheme already exists in Queensland. The *Guide, Hearing and Assistance Dogs Act 2009* (Qld) devotes part 3 to clarifying the role of trainers and training institutions. Part 3 Division 1 explores the approval process and suitability criteria for trainers of guide, hearing and assistance dogs. Part 3 division 3 provides a framework for the suspension, cancellation and voluntary surrender of approvals to train guide and assistance dogs. This part enables prescribed institutions to certify a dog is trained and provides the Queensland Government to issue people with disabilities who use assistance dogs an identification card to confirm their dog's status and the person's rights.

The *Guide, Hearing and Assistance Dogs Act 2009* (Qld) has introduced a process which respects people with disabilities' right to privacy while ensuring the public that they are dealing with an guide or assistance dog which has statutory protection. This paper argues that the Queensland reform is an amendment which should be adopted by the federal government for guide and assistance dogs protected under the *DDA*.

IV CONCLUSION

Guide and assistance dogs empower persons with disabilities through reducing the negative aspects of their handlers' disabilities. Empirical research demonstrates the potentially life saving function of these dogs. Recent reforms in Australia recognise the importance of all assistance animals. This paper firstly reviewed the role of guide and assistance dogs. While guide and assistance dogs can improve the lives of persons with disabilities the presence of dogs in public places can create tensions. Some people have cultural objections to dogs, some people have allergies and there are occasionally other managerial considerations. The second and third parts of this paper analysed the extent to which laws forced people to permit persons with disabilities to be accompanied by their guide or assistance dogs.

The CRPD is a rights based instrument which provides a human rights framework to protect persons with disabilities. The CRPD ensures these rights through containing overarching principles that states parties should maintain regulatory frameworks which ensure people are not discriminated against because of an attribute of their disabilities. The CRPD requires state parties to develop specific standards to achieve the convention's overarching principles. This means states such as Australia must develop standards to ensure attribute of a person's disability, such as using a guide or assistance dog, wheelchair, walking frame, hearing aid etc, does not result in

them being treated less favourably than people who do not use that attribute.

The third part of this paper analysed Australian domestic laws to ascertain whether persons who use guide and assistance dogs are able to exercise their human rights while accompanied by their service dogs. Despite the recognition of the role of guide and assistance dogs Australian laws fail to ensure persons with disabilities are not discriminated against because they are accompanied by their guide or assistance dogs. State and territory laws generally fail to ensure the protection of assistance dogs while the 2009 reforms to the *DDA* have failed to address serious concerns with direct and indirect discrimination.

The major concern with the *DDA* is the continuing use of the comparator test. The comparator test has already received substantial criticism in academic commentary and in submissions to the Standing Committee which was considering the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth). Despite this evidence the comparator test remains. Based upon the Full Court of the Federal Court judgment in *Forest*, the continuation of the comparator test means that people who use guide or assistance dogs may be lawfully discriminated against because their guide or assistance dog does not appear safe or adequately trained in the opinion of the discriminator.

The paper finally analysed the operation of indirect discrimination. While the amendments to indirect discrimination addressed other concerns with the operation of *DDA* s 6, the amendments did not clarify the reasonableness test. Essentially, discriminatory policies are lawful providing they are reasonable. What is reasonable is debatable. In *Forest* the Full Court of the Federal Court held observations of a Federal Court judge over four days and several experts giving evidence under oath were not sufficient to demonstrate dogs were trained and safe. To avoid future disputes over guide or assistance dogs' training and safety this paper recommends the federal government urgently implement regulations to enable guide and assistance dog training institutions to work with the government to issue persons with disabilities identification cards. These cards would enable the public to quickly identify that the guide or assistance dog was trained, safe and was protected by *DDA* s 9.

The role of guide and assistance dogs cannot be under-estimated. They empower persons with disabilities and can change their lives. This paper calls upon the federal government to introduce regulatory reforms to increase clarity for members of the public and to reduce the instances of disability discrimination.