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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DISABILITY DISCRIMINATION BILL 1992**

EXPLANATORY MEMORANDUM

(circulated by authority of the  
Minister for Health Housing and Community Services  
the Honourable Brian Howe MP and  
the Attorney-General the Honourable Michael Duffy MP)



DISABILITY DISCRIMINATION BILL 1992Outline

This Bill provides for national, uniform legislation to make unlawful discrimination against people with disabilities in certain circumstances.

1. The Bill makes unlawful discrimination on the grounds of disability in the areas of employment, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the activities of clubs, sport, the administration of Commonwealth laws and programs and in requests for certain information. Harassment of a person on the grounds of disability is also made unlawful.
2. Disability is broadly defined and will include the concepts of physical, sensory, intellectual and psychiatric disability. It includes past, present, future and imputed disability.
3. Discrimination is defined to include direct and indirect discrimination, discrimination to relatives and associates, discrimination on the basis of the possession of certain devices such as wheelchairs and canes and discrimination on the basis that a person needs assistance from either humans or in some cases animals, for example guide dogs.
4. The legislation is complaints based and there is established the office of Disability Discrimination Commissioner who will be part of the Human Rights and Equal Opportunity Commission (HREOC). The Commissioner's main function will be to attempt to conciliate complaints. Where that process is unsuccessful HREOC will be able to inquire into complaints and may make determinations. These determinations are not of themselves binding on the parties but will be enforceable in the Federal Court.
5. The Bill also provides that only reasonable accommodation needs to be made for people with disabilities, and persons against whom complaints are made will be able to argue that the accommodation necessary to be made will involve unjustifiable hardship on that person. In relation to employment an employer will be able to argue that a person with a disability is unable to carry out the inherent requirements of the job.
6. The Bill makes provision for the introduction of disability standards in the future should it be decided by Government, in consultation with relevant parties, that such standards are necessary. Disability Standards are described in clause 31 of the Bill.
7. Provision is also made for service providers to lodge 'Action Plans' with HREOC. These plans will outline long term strategies to overcome perceived discriminatory practices and will be taken into account by HREOC when determining unjustifiable hardship.

### Financial Impact Statement

The establishment of the office of the Disability Discrimination Commissioner and the funding of necessary public education campaigns, the funding of support agencies required to assist people with disabilities enforce their rights under the legislation, minor additional public service staffing and an amount for additional resources for legal aid is expected to amount to approximately \$5.5m in the first year.

Impacts on Government agencies from the legislation are difficult to predict and based on existing experiences in States which have legislation of this sort are not expected to be significant and should occur over a lengthy period of time.

## Notes on Clauses

### Part I

#### Preliminary

This part sets out the introductory sections of the Bill and deals with a number of what are basically machinery provisions. The first two clauses deal with what the legislation will be called and when it is to take effect.

This part also sets out the objects of the Bill which state what it is hoped the legislation will achieve (Clause 3). There is a major provision which defines, in detail, a number of terms used later in the Bill (Clause 4).

This part also sets out just what is meant by both direct and indirect discrimination (Clauses 5&6). The term unjustifiable hardship is also defined in this part (Clause 11).

There is also a major provision which sets out how certain provisions apply and is intended to make it clear that the Commonwealth is relying on all possible powers under the Constitution to support this legislation (Clause 12).

There are provisions which deal with how State and Territory laws in this area are intended to operate after this legislation is in force (Clause 13) and a provision which sets out how the Act is intended to affect Governments at Federal, State and Territory level (Clause 14). Details of the provisions are set out below.

(Note: the summaries of the various Parts of the Bill are only intended to show how the Parts work and fit into the overall scheme of the Bill. They do not mention every clause and the details of the provisions should always be referred to when a particular clause is being examined.)

#### Clause 1 - Short Title

1. This legislation is to be called the Disability Discrimination Act 1992.

#### Clause 2 - Commencement

The legislation, except for clauses 1&2 which come into effect on Royal Assent, is to come into operation on a day or days that will be set by the Governor-General by a proclamation which is to be published in the Commonwealth Gazette.

It is intended that Part 1 and clauses 66, 67 and 68 of Part 4 and Part 6 of the Act will come into force earlier than the rest of the Act. This will allow the Disability Discrimination Commissioner to conduct an awareness and education campaign concerning the Act before the complaints mechanism actually comes into force

#### Clause 3

This clause sets out what the legislation hopes to achieve. The clause indicates that the Act is designed to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas set out in Part 2. It is also designed to ensure that people with disabilities have, as far as possible, the same rights as other citizens.

All the other provisions of the Act are to be read as being designed to carry out these objects as far as is possible.

#### Clause 4 - Interpretation

This clause defines many of the terms that are used elsewhere in the Act. Some of the more significant ones are:

##### *“disability”*

The term is broadly defined and is intended to include physical, sensory, intellectual and psychiatric impairment, mental illness or disorder, and provisions relating to the presence in the body of organisms causing or capable of causing disease. These provisions have broad application, for example, they are intended to ensure that persons with HIV/AIDS come within the definition of disability for the purposes of this Bill.

The definition also includes a disability which presently exists, that existed in the past and one that may exist in the future. This is designed to include persons whose disability is not yet apparent but which may occur at some time in the future. The definition will also include a disability that is imputed to someone, even though they do not in fact have that disability.

##### *“Employment”*

This definition is not meant to set out all that is meant by the term employment, for example, employment in the private sector is covered although it is not set out in the definition.

The definition is designed to ensure that certain special kinds of employment, like part-time and temporary, are included for the purposes of this Act.

##### *“Services”*

This definition again is not meant to include all possible services expressly but to ensure that certain services are contained within the definition. This provision is designed to set out what services are included when considering discrimination on the grounds of disability in the provision of goods, services and facilities in Clause 24 of the Act.

#### Clause 5: Disability discrimination

This provision defines what is meant by direct discrimination against a person on the grounds of a person's disability. Direct discrimination occurs when a person is treated less favourably on the basis of their disability in circumstances that are the same or not materially different than a person without the disability.

*Example: A refuses to employ B in a job that involves the cleaning of premises on the basis that B has an intellectual disability and cannot read. Being able to read is not an inherent requirement of the job. A discriminates against B directly on the basis of B's disability.*

The clause also states that circumstances will not be regarded as being materially different because the discriminator has to provide different accommodation or services to the aggrieved person. Whether, in fact, the discriminator will be required

to provide the different accommodation will be determined when the issue of unjustifiable hardship is dealt with.

#### Clause 6 - Indirect disability discrimination

This provision covers discrimination which occurs because a condition or requirement is imposed which unfairly impacts on people with disabilities even if that was not its actual intention.

*Example - A service provider provides a service on the first floor of a building where the only access is by a flight of stairs. Such a 'requirement' - to use the stairs to access the service - could be indirect discrimination under this Bill against a person with a mobility disability.*

#### Clause 7 - Disability discrimination palliative and therapeutic devices and auxiliary aids

This clause provides that a person is discriminated against on the grounds of disability if a person treats them less favourably on the basis that the person with a disability has a palliative, therapeutic or auxiliary aid. Such aids include wheelchairs, canes, hearing assistance devices, brailers and the like.

#### Clause 8 - Disability discrimination interpreters, readers and assistants

Similarly to Clause 7 this provision states that a person is discriminated against on the basis of disability if a person treats the person with a disability less favourably and does so on the basis that the person is accompanied by another person, who in some way is required to help the person with a disability.

*Example - If a doctor refuses to allow a person who signs for a person with a hearing disability into the consulting room when the doctor is treating the person with the hearing disability and that person requests the person who signs for them to be present.*

#### Clause 9 - Disability discrimination - guide dogs, hearing assistance dogs and trained animals

This clause is similar to Clauses 7 and 8 but in this case deals with the situation where a person with a disability requires the assistance of a trained animal. This will most usually be a trained dog.

*Example - where a taxi driver refuses to transport a blind person because the person has a guide dog.*

#### Clause 10 - Act done because of disability and for other reason

This clause provides that where an act is done for a number of reasons and one of those reasons is the person's disability then for the purposes of this legislation, the act is taken to be done for the reason of the person's disability.

In relation to direct discrimination the reason that someone has done a particular discriminatory act is very important. It would be very difficult in some cases to show that one reason for doing something was more important than another. This provision overcomes the need to make that distinction.

### Clause 11 - Unjustifiable hardship

When determining whether or not a person should be required to make a reasonable accommodation for a person with a disability, if the person making the accommodation provides some evidence that the provision of such accommodation will cause unjustifiable hardship, HREOC and if required the Federal Court will have to decide whether or not requiring a person to make the accommodation will involve that person in unjustifiable hardship.

Unjustifiable hardship is to be determined on the basis of a number of factors listed in this clause.

Firstly, the nature of the benefit or detriment likely to be accrued or suffered by any person concerned (sub paragraph 11(a)).

*Example - the provision of ramps in a supermarket will have benefits for people other than those in wheelchairs. People such as those using baby strollers or shopping trolleys may also benefit from the provision of such ramps.*

Secondly, the effect of the disability of a person concerned. An accommodation will not need to be provided that the person with a disability cannot use (sub paragraph 11(b)).

Thirdly, the actual financial circumstances and the costs of providing the reasonable accommodation will need to be taken into account. Clearly the larger the company the more it can usually afford. In some cases relatively minor alterations will be beyond the capacity of some small businesses. Costs to a government will also have to be taken into account when the complaint is against the government (sub paragraph 11(c)).

Finally where a service provider has made an action plan as provided for in Part 3 of the Act that action plan will need to be taken into account (sub paragraph 11(d)).

*Example - an action plan may indicate that the particular discriminatory practice complained of would have been dealt with by the service provider in the near future anyway. HREOC may decide to allow the service provider to rectify the practice in line with its plan.*

### Clause 12 - Application of Act

This clause provides that the legislation is to apply throughout Australia. The provision is also designed to ensure that all possible Commonwealth Constitutional power is relied upon to support the various provisions of the Act.

In particular sub-clause (8) of this clause indicates that certain provisions of the legislation have effect in relation to discrimination against people with disabilities to the extent that the provisions implement Australian responsibilities under certain international instruments. Most notably these are the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the International Labour Organisations Convention Number 111 entitled Convention concerning Discrimination in Respect of Employment and Occupation.

In relation to ILO 111 Australia determined in 1988 that disability would be regarded as a distinction, exclusion or preference for the purposes of Article 1 (b) of

that Convention. In 1989 Australia gave limited legislative effect to that determination when it enacted regulations under the HREOC Act giving HREOC authority to investigate complaints in relation to discrimination on the basis of disability in employment.

It is also clear from a number of lesser international instruments that discrimination against people with a disability is a matter of concern to the international community generally. The limited application provisions apply to the extent of that international concern. The Declaration on the Rights of Disabled Persons, The Declaration on the Rights of Mentally Retarded Persons and The Declaration on the Rights of the Child are just some of the instruments which further indicate how discrimination against people with disabilities is a matter of international concern.

#### Clause 13 - Operation of State and Territory Laws

This provision is designed to ensure that State and Territory legislation operating in this area can continue to operate concurrently with this legislation after it becomes law.

Essentially the way this is done is set out in sub clauses (4) and (5) whereby, under sub clause (4), if a person has made, for example, a complaint under State or Territory law about a particular matter they will not be able to make a complaint under this Act about the same matter. A person will have to make a choice between State /Territory law and Commonwealth law.

Sub clause (5) provides that if a person is prosecuted under a State or Territory law for a particular matter then they cannot be prosecuted again under this Act for the same matter.

#### Clause 14 - Extent to which Act binds the Crown

This provision sets out that this Act is intended to bind the governments of the Commonwealth, of each of the States and of the Territories.

This means for example that State and Territory government employees will be able to make complaints under this legislation concerning discrimination by State and Territory employers including government departments.

### Part 2

#### Prohibition of Disability Discrimination

This Part of the Bill, amongst other things, sets out those areas of discrimination which are to be covered by this legislation.

This Part is the major part of the Act that makes unlawful discrimination against people with disabilities. Under the provisions of Clause 68 complaints may be made that acts have occurred which are unlawful under Part 2. These provisions jointly provide the mechanism by which discrimination against people with disabilities can actually be complained of and suitable remedies obtained.

This Part covers discrimination in employment, education, access to premises, the provisions of goods, services and facilities, accommodation, the disposal of land, clubs and incorporated associations, sport, the administration of Commonwealth

laws and programs and requests for information. Harassment in employment, education and the provision of goods and services is also covered. Not all areas of possible discrimination are dealt with by this Bill, for example, discrimination in private homes is not dealt with. Only those areas set out in this Part are covered. Consultation with people with disabilities and the broader community have indicated that these are the major areas of concern.

This Part also contains provisions which relate to the possible setting, in the future, of minimum standards in relation to certain areas of discrimination provided for in this Part. This Bill does not establish any standards. These standards may cover such areas as employment, education, accommodation, the provision of public transport services and facilities and the administration of Commonwealth laws and programs.

Such standards will be subject to further consideration by the Government and further consultation with all interested parties. Under the provision of Clause 131 it will be necessary before any standards are made to take account of any comments that may be made by State and Territory governments about any proposed standards.

This Part also makes provision for certain offences such as victimisation of a person who takes action under this Act. Actions which may be offences can also be the subject of a complaint under the provisions of Clause 68.

This Part also contains a number of exemptions which set out areas where discrimination will be permitted to continue, notwithstanding this Act.

The most important of these exemptions relates to special measures. Essentially these are measures, often taken by government, but also by others, which are intended to either create equal opportunities for people with disabilities or to assist people with disabilities to meet their special needs. Clearly, these positive measures should be allowed to continue. The provision of exemptions is intended to provide a balance between the right of people with disabilities to have the same rights as other citizens and other competing interests such as the need to maintain very high standard of fitness in the defence forces. The exemptions are set out in Division 5.

This legislation is designed to give people with disabilities a fair go. It is not designed to interfere with eligibility for pensions and other allowances. One of the exemptions makes it clear that pensions and allowances under certain Acts are not interfered with by this Bill (Clause 51).

## **Division 1 - Discrimination in work**

### **Clause 15 - Discrimination in employment**

This provision states that it is to be unlawful for an employer or person acting on behalf of an employer to discriminate against a person with a disability or a person's relatives or associates in relation to employment. The areas of employment that are covered include those relating to recruitment or other means of offering employment to a person and also include the actual terms and conditions of employment with the employer, access to promotion and training, dismissal of the employee, or the subjecting of an employee to any other detriment.

There are two exemptions created by subclauses 3 and 4. Subclause 3 exempts employment basically in private households where the person against whom a complaint might be made actually lives.

Subclause 4 provides a more important exemption. This clause essentially provides that a person with a disability cannot, by the provisions of this Bill, make a complaint alleging that they were not given a job which they in fact cannot do. The Bill talks about a person not being able to carry out the inherent requirements of a particular job. There is also a further exemption given where an employer can show that to provide the services or facilities that might be necessary to employ a person with a disability would impose on that employer an unjustifiable hardship.

*Example: A refuses to employ B in a position involving basic clerical duties on the basis that B is in a wheelchair. B is able to perform all of the requirements of the job and the costs to A to provide access to the workplace for B are minimal. In this case A discriminates unlawfully against B.*

#### Clause 16 - Discrimination against commission agents

This provision sets out that it is unlawful to discriminate against a person who is a commission agent on a similar basis to that established for employment generally under clause 15.

Again subclause 3 provides the person who engages a commission agent with similar exemptions in relation to the ability to carry out the inherent requirements of a commission agent and the imposition of unjustifiable hardship as are established in clause 15.

#### Clause 17 - Discrimination against contract workers

This provision is designed to make it unlawful to discriminate against a contract worker on the ground of that worker's disability. A contract worker is essentially a person who works under a specific contract rather than, for example, under a more general industrial award.

Subclause 2 of this clause also provides exemptions relating to the inherent requirements of a contract worker and the imposition of unjustifiable hardship on the person who is a principal in the contract with that worker.

#### Clause 18 - Partnerships

This clause deals with discrimination against people with disabilities in relation to partnerships where there are more than two partners. It is made unlawful to discriminate against a person on the grounds of a person's disability or to discriminate against a person's relatives or associates on the ground of a person's disability in relation to who can become a partner and the terms and conditions upon which that partnership is offered. The provision also covers the denial of access to benefits, expulsion of a partner or the subjecting of a partner to any other detriment.

As with Clause 15, 16 and 17, there are exemptions to allow partners to argue that the complainant cannot carry out the inherent requirements of the job of a partner or

that the services and facilities that are necessary to allow that partner to carry out those functions would impose unjustifiable hardship on the other partners.

#### Clause 19 - Qualifying bodies

This clause makes it unlawful for an authority or body which has authority in relation to the giving of certain authorizations or qualifications needed for carrying on certain occupations or facilitates practice of a profession or trade or occupation to discriminate against a person or the person's relatives or associates on the basis of his/her disability.

There is an exemption contained in subclause 2 which basically provides that the particular authorizing body does not discriminate against a person with a disability unlawfully if that person is unable to carry out the inherent requirements of the particular profession, trade or occupation.

*Example: A jockey club authorized to provide licences to the trainers of race horses refuses to provide A with a licence to train horses on the basis that A has a hearing impairment. Notwithstanding this impairment A is able to carry out the inherent requirements of the training of horses. In this case the jockey club would unlawfully discriminate against A.*

#### Clause 20 - Registered organisations under the Industrial Relations Act

This clause provides that it is unlawful for an organisation registered under the Industrial Relations Act, such as a union, to discriminate against a person or their relatives or associates on the basis of the person's disability.

Subclause 2 indicates that the denial or limiting of access to benefits provided by the organisation or any of the terms of membership or subjecting a person to other detriment is also unlawful.

This clause contains no exemption relating to inherent requirements of the job as membership of such an organisation would be dependent on the person already being able to carry out the inherent requirements of the job.

#### Clause 21 - Employment agencies

This clause makes it unlawful for an agency which organises employment for persons to discriminate against a person or their relatives or associates on the grounds of the person's disability by either refusing to provide services or by the terms and conditions or the manner in which the services are provided.

Subclause 2 provides an exemption for an employment agency where the person concerned is unable to carry out the inherent requirements of the job that that person might be seeking.

### Division 2 - Discrimination in Other Areas

#### Clause 22 - Education

This clause makes it unlawful for an educational authority to discriminate against a person or their relatives or associates on the grounds of a person's disability in refusing or failing to accept the person's application for admission or in the terms and conditions upon which the authority is prepared to accept the person as a

student. Unlawful behaviour also includes the denial of access or limiting of access, expulsion of the student or the subjecting of the student to any other detriment on the basis of their disability.

There are two exemptions to this provision. Subclause 3 provides that it is not unlawful to discriminate against a person where an educational institution is established for persons with a particular disability. For example certain institutions catering for persons who are deaf where the person concerned does not have that particular disability.

Subclause 4 provides the educational authority with an ability to argue that it would be an unjustifiable hardship on that authority if it were required to provide the services or the facilities necessary to accommodate the student concerned.

#### Clause 23 - Access to premises

This provision makes it unlawful to discriminate against people with disabilities or their relatives or associates in relation to the provision of access, or the terms and conditions on which access is provided, to premises that the public or a section of the public is entitled to enter or use.

Premises are defined in Clause 4 to include buildings, aircraft, vehicles or vessels, places and parts of premises. The provision also makes it unlawful to discriminate by not allowing the person to use certain facilities or on the terms and conditions on which those facilities are made available to people with disabilities.

Subclause 2 contains an exemption for premises that are designed or constructed in such a way that they are not accessible for people with disabilities or where the alterations that will be necessary to provide access would impose unjustifiable hardship on the person who has to provide the access.

*Example, A is the owner of a major shopping complex and has not provided facilities necessary to provide access to B who has a mobility disability. Those facilities e.g. the provision of ramps can be provided without substantial cost to A. It is also clear that others such as those using child strollers or shopping trolleys will benefit from the provision of these facilities. A by failing to provide these facilities discriminates unlawfully against B and B could bring a complaint against A.*

#### Clause 24 - Goods, services and facilities

This provision makes it unlawful for someone who provides goods, services and facilities to discriminate against a person or their relatives or associates on the basis of the person's disability by refusing to provide the goods and services or facilities or by the terms and conditions on which those goods, services and facilities are offered.

Services are defined in Clause 4 and include services relating to banking, insurance, grants, loans, credit or finance, entertainment, recreation or refreshment, transport, travel, telecommunications or services provided by a profession or trade or services provided by a Government, government authority or local government body.

The provision also contains an exemption where in making the facilities available or by providing the goods and services in the manner necessary would impose unjustifiable hardship on the person making that provision.

#### Clause 25 - Accommodation

This provision is designed to make unlawful discrimination against people with disabilities or their relatives or associates in relation to the application for, or terms and conditions on which, accommodation is offered to someone or to the giving of a lower priority to a person with a disability in lists of applicants for accommodation.

Subclause 2 contains provisions relating to making unlawful discrimination in relation to the denial of access or the limiting of access to benefits associated with the accommodation or by evicting the person or by subjecting the person to any other detriment. Subparagraph 2(d) contains a special provision to allow the person with a disability a right to make alterations to accommodation so as to make that accommodation more accessible to the person with disability. That person is able to make these alterations at their own expense and are able to restore the premises to their former condition if and when the person with disability were to leave those premises.

Subclause 3 provides a number of exemptions in relation to this provision.

Accommodation is not covered;

- a) Where accommodation is provided by a person who lives on the premises or whose near relative lives on the premises and where accommodation is offered for no more than three other persons;
- b) The accommodation is provided by a charitable or voluntary organisation for people with disabilities;
- c) The accommodation is provided by such bodies to people who have a particular disability and the person concerned doesn't have that particular disability.
- d) Where to provide the accommodation to a person with a disability would impose unjustifiable hardship on the person providing the accommodation.

#### Clause 26 - Land

This provision provides that it will be unlawful to discriminate against a person with a disability or any of that person's relatives or associates in relation to the selling or other dealings in land. This will include the terms and conditions on which dealings in land are offered to the person with a disability.

The only exception to this provision is provided in subclause 2 which provides that it is not unlawful to discriminate against a person with a disability in relation to the actual giving of land or distribution of land under a will.

#### Clause 27 - Clubs and incorporated associations

This clause makes it unlawful for a club or an incorporated association to discriminate against people with disabilities in relation to accepting people as members, by the terms and conditions of the membership offered to a person who

isn't a member of the club on the basis of the person's disability, by refusing to accept the person's application of membership or by the terms and conditions on which the membership is offered.

It is also unlawful to deny access to the member or limit the member's access to certain benefits or to deprive the member of any other terms of membership.

The term 'club' is defined in Clause 41 of the Bill to mean an association of persons, which is either incorporated or not, which has come together for social, recreational, cultural, political, sporting, athletic or any other lawful purpose. The club must maintain its facilities at least in part from its own funds.

Subclause 3 provides the only exemption in this section. It essentially provides that the club or incorporated association is not required to provide benefits and the like in a special manner to a person with disability where that would impose on the club an unjustifiable hardship.

#### Clause 28 - Sport

The clause provides that it is unlawful for a person to discriminate against a person with a disability or their relatives or associates by excluding them from sporting activities. Sporting activities include administration and coaching.

Subclause 3 sets out three exemptions in relation to this provision. First, it is not unlawful to discriminate where someone is not reasonably capable of performing the actions that are necessary for the sport.

Second, where persons are chosen, (essentially on their ability to do the sport) to participate in a sport by means which are reasonable and third, where a sport is conducted solely for people with a particular disability and the person concerned does not have that disability.

*Example, A, which is a sporting association refuses to allow B to participate in a sporting competition such as archery. This is on the basis that B has a mobility disability. B does however have full use of the upper part of the body and can undertake all aspects of this particular sport. In this case A discriminates against B unlawfully.*

#### Clause 29 - Administration of Commonwealth laws and programs

This provision sets out that anyone who carries out functions or performs duties under Commonwealth laws or under Commonwealth programs or in any way administers those programs or laws, must not discriminate against a person on the basis of that person's disability. The clause also relates to discrimination against a person's relatives or associates.

#### Clause 30 - Request for Information

This provision makes it unlawful for a person to ask a person with a disability questions which would not normally be asked of a person who is in similar circumstances but does not have that disability.

Clause 31 - Disability Standards

This provision is designed to provide a power for the Government in the future to enact certain standards in relation to, for example, the delivery of certain services for people with disabilities. It is intended that the provision of the standards would not occur without considerable consultation and in accordance with Clause 132, the comments of relevant State and Territory Government Ministers would have to be taken into account before regulations were passed setting up standards.

This clause also sets out the areas in which disability standards could be enacted. They relate to the employment of persons with disabilities, their education, their accommodation, the provision of public transportation services and facilities by the persons as set out in paragraph (d) and in the administration of Commonwealth programs in respect of persons with disabilities.

Clause 32 - Unlawful to contravene disability standards

This clause provides that it is unlawful for a person not to abide by a disability standard established under Clause 31 and by making it unlawful this provides for a person to lodge a complaint under Clause 69 of this Act.

Clause 33 - Division 5 not to apply to disability standards

It is intended that disability standards will be abided by notwithstanding any exemptions that might exist as set out in Division 5 of this Part.

Clause 34 - This Part not to apply if persons act in accordance with disability standards.

Disability standards are intended to be a standard which if abided by would protect a person from any other action under this Bill relating to action covered by those standards.. It will not therefore be possible for a person to lodge a complaint alleging that someone has done an act where that person has done that act in accordance with a disability standard.

Division 3 - Discrimination involving harassmentClause 35 - Harassment in Employment

This provision makes it unlawful for a person to harass another person in relation to that person's disability in areas of employment that will include employees, commission agents, and contract workers. Harassment is not separately defined and would be determined on a case by case basis. The provision is not intended to cover the odd unfeeling comment or joke.

Clause 36 - Harassment in Employment: Relatives and Associates with Disabilities

This clause relates to harassment against persons who are the relatives and associates of people with disabilities in relation to employment. It covers similar ground to that covered in Clause 35. As with Clause 35 this provision is intended to cover harassment in the areas of employment that are covered in Clauses 15, 16 and 17.

**Clause 37 - Harassment in Education**

This clause makes it unlawful for a member of the staff of an educational institution to harass a person on the basis of their disability where that person is either a student or is seeking admission to that institution.

**Clause 38 - Harassment in Education : Relatives and Associates with Disabilities**

This provision is similar to Clause 37. However, in this case the provision makes harassment unlawful in relation to relatives and associates of a person with a disability in relation to education.

**Clause 39 - Harassment in Relation to the Provision of Goods and Services**

This provision makes it unlawful for someone to harass a person who has a disability and who wants to acquire goods or services or to make use of the facilities provided.

**Clause 40 - Harassment in Relation to Provision of Goods and Services: Relatives and Associates with Disabilities**

This provision essentially is the same provision as Clause 39 although as with previous clauses in this division it provides that it is unlawful to discriminate in relation to the provision of goods and services on the basis that a person is a relative or an associate of a person with a disability.

**Division 4 - Offences****Clause 41 - Unlawful act not offence unless expressly so provided**

This provision makes it clear that unless this legislation expressly says so, none of the acts which are made unlawful by this Part are offences. So although the provisions of Divisions 1, 2 and 3 of Part 2 make certain actions unlawful, those actions are not to be regarded as offences of a criminal nature.

**Clause 42 - Victimization**

This provision provides that it is an offence for a person to victimize someone where they have either taken some form of action under this Bill or have indicated that they propose to take some form of action.

Subclause 2 generally defines what it is to victimize another person and, basically it is where another person either treats someone unfavourably or threatens to treat them unfavourably as a result of either the bringing of an action or proposing to bring an action. Subclause 2 sets out just what is meant by the taking of action or the proposing of taking an action under the Bill. Essentially it relates to the bringing of a complaint or the lodging of proceedings of any sort.

It also covers the giving of information, attending a conference, attending as a witness, the assertion of any rights given under this Act, or the making of an allegation that a person has done an act unlawful under this Part. It also includes victimisation where a person proposes to take such action.

*Example: A dismisses B from employment on the basis that B has made a complaint against A under this Act alleging that B was discriminated against. It does not matter whether or not B's complaint could be proven. The dismissal of B by A in the circumstances would be an offence under this provision.*

#### Clause 43 - Offence to incite doing of unlawful acts through offences

This clause provides for it to be a criminal offence where someone actively encourages someone else to do something which is made unlawful by this Part or that is actually made an offence by this Part. The provision also covers the giving of assistance to someone or promoting the doing of acts generally. This can be by either financial assistance or by any other form of assistance.

#### Clause 44 - Advertisements

This provision makes it unlawful for someone to advertise that they had the intention of doing an act that is unlawful under this Part.

'Advertisement' includes almost any form of advertisement or notice, whether public or not, and this is set out in subclause 2.

*Example: A advertises for a person to work in a shop selling clothes. A indicates that persons who are HIV positive need not apply. In the circumstances A is guilty of an offence under this clause.*

#### Division 5 - Exemptions

##### Clause 45 - Special Measures

This clause is designed to provide an exemption for someone who does an act which might be otherwise unlawful under this Part where that action is designed to either assist people who have a disability to obtain greater equality of opportunity or is designed to give people with disabilities access to facilities, services or opportunities or to provide them grants or benefits to meet their special needs.

The provision is designed to allow for a person to rely on the exemption in relation to providing for the special needs of people with disabilities in the areas of employment, education, accommodation, clubs, sport, the provision of goods, services, facilities or land, the administration of Commonwealth laws and programs and where that action is designed to meet the special needs of people with disabilities in relation to their capacity to live independently.

This provision would exempt for example, a government program which was designed to assist certain people with disabilities to either gain or to return to employment or to assist them to live more independently.

##### Clause 46 - Superannuation and insurance

This clause recognizes that superannuation and insurance are provided on the basis of an assessment of if and when a payment is likely to be made by the insurance and superannuation provider to the person who seeks insurance and superannuation. In many cases it is likely that for persons with disabilities payments in relation to, for example, life insurance, might well be made sooner than to members of the general community who do not have that particular disability.

This section therefore provides that it is not unlawful to discriminate against a person on the basis of that person's disability in relation to the offer to that person of a form of insurance or superannuation which is set out in this clause. That discrimination is only permitted where it is based on either actuarial or statistical data which, in all the circumstances, it is reasonable to rely on, and the discrimination is reasonable having regard to all other relevant factors as well.

Where there is no such data available and it cannot reasonably be obtained, discrimination will not be unlawful if it is reasonable to discriminate having regard to all other relevant factors.

Subclause 2 of this clause is similar to subclause 1 but in this case relates to the actual terms and conditions of the insurance or superannuation offered.

#### Clause 47 - Acts done under statutory authority

This section is designed to allow for certain actions which are done in reliance on existing law to not be unlawful even when they might otherwise discriminate against a person with a disability.

Subclause 1 of this clause indicates that it is not unlawful to discriminate against a person with a disability where that is necessary to comply with a determination or decision of HREOC, an order of a court or an order or award of an industrial tribunal but only where that order or award relates to the payment of wages or salary for a person who would otherwise be eligible for a disability support pension under the Social Security Act 1991 where those wages are determined by a person's capacity to work.

Subclause 2 recognizes that there will be some laws which will continue to discriminate against people with disabilities notwithstanding the provisions of this Bill. In particular it is not intended that this Bill would override the provisions of State legislation in certain areas, for example mental health. This subclause allows for regulations to be made setting out legislation that will be exempted from the operations of this Bill.

So as to allow for laws which do discriminate to be modified, subclause 3 provides that where someone operates in accordance with an existing law this Part does not make that action unlawful. This provision lasts for only 3 years from the day that Clause 47 comes into force.

#### Clause 48 - Infectious diseases

It is not intended that this Act will interfere with the operation of public health laws which relate to the control of infectious diseases. Where it is reasonably necessary to discriminate against a person with a disability so as to protect public health then this clause does not make such discrimination unlawful.

#### Clause 49 - Exemption for charities

This exemption makes it clear that it is not unlawful to discriminate against people with disabilities in an instrument that is intended to confer charitable benefits on people who have a disability or a particular disability. A charitable instrument is defined to include a will or other document.

### Clause 50 - Telecommunications

This clause is designed to provide a time limited exemption for a carrier or a supplier of a service under the Telecommunications Act 1991. It essentially means that the Telecommunications Act 1991 insofar as it relates to the provision of additional services to people with disabilities is not affected by the provisions of this legislation for a period of three years.

This provision is designed to allow for current reforms presently underway in the telecommunications industry to take place without this legislation having effect on those reforms. At the end of the three year period those service providers will be covered by the legislation in the same way as other service providers.

### Clause 51 - Pensions and allowances

This clause is designed to ensure that in relation to pensions and allowances a person's entitlement is as set out in the legislation which provides for those pensions and allowances and that entitlement is not affected by the coming in to force of this Bill.

The clause sets out Commonwealth laws under which pensions and allowances are paid and makes it clear that where there are discriminatory provisions in those Acts, this legislation does not affect those provisions.

### Clause 52 - Migration

This clause is designed to ensure that the operations of the Migration Act 1958 or the regulations made under that Act are not affected by the coming into force of this Bill.

### Clause 53 - Combat duties and peace keeping services

This provision is designed to exempt the Australian Defence Forces (ADF) from the provisions of this Act in relation to the employment, engagement or appointment by the ADF of people where they may be engaged in what are called combat duties, combat related duties or peace keeping services or where they might be in particular support roles for forces engaged in such duties or service. There is also a provision to allow for combat duties and combat related duties to be set out in regulations. Those duties are not at this stage defined by this Act.

### Clause 54 - Peace keeping services by the AFP

This provision is designed to exempt the Australian Federal Police (AFP) from the provisions of this Act where the AFP is selecting someone to perform peace keeping duties such as those presently being undertaken by the AFP in Cambodia.

### Clause 55 - Commission may grant exemptions

This clause provides a means for the Human Rights and Equal Opportunity Commission to grant a temporary administrative exemption from the operations of this Part where an application for such an exemption is made. This might be necessary in some areas where considerable adjustment may need to be made as a result of this Act. The Commission is able to grant the exemptions on such terms and conditions as it sees fit.

The exemptions are to be granted for a period not exceeding five years. The Commission is able to grant a further exemption on an application being made.

#### Clause 56 - Review by the Administrative Appeals Tribunal

This provision provides an opportunity for a person affected by a decision of the Commission in relation to temporary exemptions to seek a review of those decisions by the Administrative Appeals Tribunal.

#### Clause 57 - Notice of decisions to be published

So as to allow the community at large to be aware of temporary exemptions the Commission is required by this clause to publish in the Commonwealth Government Gazette a notice of the making of a decision under Clause 55.

That notice must set out the findings of the Commission and refer to evidence on which those findings were based and give the reason for making those decisions. It will also be necessary for the notice to indicate that an application to the Administrative Appeals Tribunal may be made for review of such a decision.

#### Clause 58 - Effective exemptions

This clause makes it clear that actions taken in accordance with exemptions granted by the Commission are not unlawful under other provisions of this Act.

### Part 3

#### Action Plans

Concerns were expressed by certain service providers that this legislation would have the affect of imposing considerable additional upfront costs to those providers. Whilst this has not been the experience of other jurisdictions, such as the States, with legislation of this sort, it was thought appropriate to allow service providers an opportunity to put in place longer term plans which would indicate how that service provider intended to overcome perceived discriminatory practices.

This Part sets out the provisions which relates to these plans.

A service provider is basically defined as anyone who provides goods or services or makes facilities available (Clause 58). The plans are entirely voluntary and no penalty is provided for a service provider which does not prepare such a plan (Clause 59).

If a service provider does prepare such a plan, however, it must contain certain measures which are set out in Clause 60. The service provider is not limited to those provisions and may include other matters in the plan if it choses to do so (Clause 61). A plan can also be amended at any time (Clause 62). If the service provider wishes to have the plan considered by HREOC when it is making a determination then it will need to be provided to HREOC (Clause 63).

HREOC will consider such a plan when it makes a determination in relation to unjustifiable hardship as set out in Clause 11. So as to allow for the public to be aware of the action plans there is provision to require HREOC to sell copies of the plans to the public (Clause 64).

Clause 59 - Interpretation

Action plans are able to be lodged by service providers and this clause sets out just what is meant by a service provider.

Clause 60 - Action plans

This clause is self-explanatory.

Clause 61 - Provisions of action plans

Whilst it is not compulsory for a service provider to draw up and implement an action plan, if in fact a plan is drawn up there are a number of things that it must contain. These are set out in this clause. They include the devising of policies and programs which are designed to achieve the objects of this Act set out in Clause 3, communication of those policies and programs to people working within the service provider, the review of practices so as to eliminate discriminatory practices and a number of other matters set out in that clause.

Clause 62 - Action plans may have other provisions

This clause simply states that whilst action plans must have provisions which are set out in Clause 61 they may have other provisions within them provided they are not inconsistent with the objects set out in clause 3.

Clause 63 - Amendment of action plans

This Clause is self-explanatory.

Clause 64 - Copy of action plan to be given to Commission

This provision gives a service provider a discretion to provide a copy of the action plan to the Commission. Whilst the provision does not oblige the service provider to give the Commission a copy of the plan the action plans are able to be taken into account by the Commission when considering the issue of unjustifiable hardship as defined in Clause 11 of this Act. If the plan is not given to the Commission then it cannot be considered by the Commission.

Clause 65 - Commission to sell action plans to public

So as to make publicly available information about action plans this provision requires the Commission to sell action plans that it gets under Clause 64.

Part 4Inquiries and Civil Proceedings

This Part sets out the mechanism by which complaints may be made under the Bill and how those complaints are to be dealt with by HREOC. The part also sets out in detail the functions under this Bill of both HREOC and the Disability Discrimination Commissioner established under Part 6.

The mechanism established under this part is based on similar provisions in the *Sex Discrimination Act 1984*.

The process essentially requires the Disability Discrimination Commissioner acting on behalf of HREOC to attempt to conciliate a complaint (Clause 67 and 70). Where such conciliation between the parties is not possible the complaint is referred to HREOC which must then hold an inquiry and make a determination or other decision as set out in Clause 102.

HREOC has broad functions under this legislation which are set out in Clause 66. The Commissioner is primarily required to carry out the function of the Commission in relation to the initial investigation and conciliation of complaints.

A complaint is made to the Commission under Clause 68 and may be made in relation to any matter made unlawful under Part 2 and by means of Clause 65 may also include complaints alleging action which could be an offence under Clauses 42, 43 and 44.

This Part also sets out how an inquiry by the Commissioner is to be carried out and provides the Commissioner with the necessary powers to investigate and to try and conciliate complaints. These powers are set out in Division 2.

If the Commissioner is unable to settle the matter by conciliation then the Commissioner must then refer the matter for a more formal inquiry by HREOC. (Clause 76)

The Bill then goes on to set out how inquiries before HREOC will be carried out.

The primary focus for the resolution of disputes under this legislation is by the processes of conciliation. There is power in this Part for the Commission to again attempt to resolve a complaint by conciliation and to attempt an amicable settlement notwithstanding that the Commissioner may already have been unable to achieve conciliation in the earlier inquiry.

The hearing and taking of evidence before the Commission does not have to be done in the same way as before a court and the Commission has a broad discretion about the way it receives evidence and how it conducts the inquiry but it must conduct the inquiry with as little formality as possible (Clause 98).

The Bill makes provision for a person who wants to rely on one of the exceptions appearing in Part 2, (for example that they will suffer unjustifiable hardship if a particular accommodation is required), to bring to the Commission evidence which, if not contradicted by other evidence, might lead the Commission to a decision that the exemption should apply. This is consistent with the usual principles that a person who is in the best position to have knowledge of, for example that person's financial circumstances, has an obligation to bring that evidence to the court before the exemption can be considered. The overall legal burden of proof, however, will remain with the person who actually makes the complaint. (Clause 99)

Once the Commission has held its inquiry then it has a number of options as to what it does in relation to the complaint. These options are set out in Clause 103.

The Commission is unable to make determinations which are binding on the parties concerned. This is because the Commission is an administrative body rather than a court and under the Constitution it is not possible to give a body that is not a court the powers of a court such as the powers to make binding determinations on people.

The only way that a determination of the Commission can be enforced is for the Commission or the complainant to go the Federal Court to seek to have that court make a binding order on the parties. (Clause 104)

### Division 1 - Preliminary

#### Clause 66 - Interpretation

This clause makes it clear that in relation to this Part and only this Part, where there is mention of an act that is unlawful that is meant to include a reference to an act that is an offence under Division 4 of Part 2. This provision has the effect of allowing for a person who is the victim of actions which might be offences under Division 4, for example, in relation to victimization to also bring a complaint against the person who may have been doing the victimization. This does not affect any proceedings which may be taken in the criminal courts in relation to that action which may be an offence.

Clause 69 of the Act provides a right to make a complaint in relation to any matter that is unlawful.

#### Clause 67 - Functions of Human Rights and Equal Opportunity Commission

This clause sets out the functions that are conferred on HREOC by this Bill. Two of the functions are:

- (1). To inquire into complaints relating to matters in Part 2 and to try and conciliate those complaints;
- (2). To inquire into and make determinations on matters the Minister or the Commissioner might refer to the Commission. There are also a number of other functions similar to those provided for the Commission in relation to other Commonwealth Anti-Discrimination legislation.

There are a number of special provisions in this Bill, in particular, to a function conferred on the Commission in relation to the development of disability standards and the monitoring of the implementation and operation of those standards.

Paragraph 1(f) authorizes the Commission to receive action plans that are made in accordance with Part 3. The Commission has broad powers to examine laws or proposed laws which might be inconsistent with this Bill or to investigate and report on matters and on action that should be taken by the Commonwealth on matters relating to discrimination on the ground of disability generally.

Subclause 3 makes it clear that the Commissioner is not able to participate in an inquiry by the Commission under this part. This is because the Commissioner will have already been involved in the attempt to conciliate the complaint.

#### Clause 68 - Functions of Commissioner

This clause makes it clear that the Commissioner's main function is to inquire into complaints lodged under Part 2 and to attempt to conciliate those complaints.

### Clause 69 - Complaints

This clause provides how and in what form a complaint alleging that some action that is unlawful under Part 2 has taken place can be lodged with the Commission. Essentially it can be lodged by a person, or by a person aggrieved, or by a person on behalf of others who might be aggrieved. These provisions permit complaints, for example by trade unions, representative or advocacy organisations.

Subclause 2 requires the Commission to provide assistance to someone who wants to make a complaint under this clause. This is designed to put an obligation on the Commission to help a person to make a complaint where that person is unable to actually make a complaint, for example because of their disability.

### Clause 70 - Commissioner taken to be a complainant

This provision provides that where the Commissioner refers something to the Commission not arising in the course of dealing with a complaint then the Commissioner becomes the complainant for the purposes of determining just who is a party to inquiry under Clause 84 of this Act.

The clause also refers to a number of technical details relating to matters which are referred to the Commissioner by the Minister under Clause 78.

## Division 2 - Inquiries by the Commissioner

### Clause 71 - Inquiries by Commissioner

This provision essentially sets out that the Commissioner must inquire, at least initially, into matters that are referred to the Commissioner by the Commission. These would normally be complaints but they may also be matters that the Commission itself refers to the Commissioner whether there was a complaint or not.

The Commissioner may decide not to further inquire into a complaint for a number of reasons set out in subclause 2 of this clause . They include;

- (a) that the actions are unlawful under this Act;
- (b) that the complainant or the person aggrieved does not desire the action to continue;
- (c) that a complaint is more than 12 months old;
- (d) that a complaint is trivial, vexatious, etc.;
- (e) that the matters have been adequately dealt with elsewhere;
- (f) that there is some other remedy which would be more suitable;
- (g) that the actual subject matter of the complaint had been dealt with by the Commission or by other statutory authority; or
- (h) that the Commissioner thinks that there is another authority which could deal with the matter more effectively.

Where the Commissioner decides not to inquire into a complaint this clause contains provisions requiring the Commissioner to give notice to all the complainants indicating that they have a right to seek to have the complaint referred for further consideration by the President of the Commission under Clause 101.

#### Clause 72 - Application for interim determination under Section 102

This clause gives the Commissioner power to apply to the Commission for interim determination under Clause 102 where is necessary to do so, so as to preserve the positions of the parties pending the completion of the inquiry by the Commissioner into the complaint.

#### Clause 73 - Power to obtain information or documents

The Commissioner, by this clause, is given broad powers to seek and obtain all information or documents which might be relevant to an inquiry that he or she is undertaking.

The Commissioner is able to give written notice to a person to require them to attend and produce such relevant information and documents as the notice sets out.

Subclause 2 sets out what the Commissioner is able to do in relation to those documents once he or she has got them - including taking extracts from them and keeping them for such period as is necessary for the inquiry.

Paragraph 2(c) provides a right for a person to inspect the documents, who would otherwise have a right to look at the documents if the Commissioner did not have them, during all reasonable times notwithstanding that the Commissioner now has possession of them.

#### Clause 74 - Direction to persons to attend compulsory conference

This clause provides the Commissioner with power to call a compulsory conference and to direct that certain people actually attend that conference.

Subclause 2 indicates that the person who has made the complaint and the person who is actually alleged to have done the act must receive a notice to attend and the Commissioner can require any other persons who he or she believes may be able to assist in the conciliation of the matter to also attend. There is also provision for a person to be paid by the Commonwealth for their attendance at a conference.

In the notice the Commissioner sends he or she may also require a person to produce any documents that he or she believes might be of assistance at the conference.

#### Clause 75 - Compulsory conference

This provision deals with a number of minor matters that relate to the conduct of a conference. In keeping with the primary purpose of trying to conciliate complaints this clause requires that conferences should be held in private.

Subclause 4 of this clause indicates that normally a person would not be represented by another person, for example a lawyer, at a conference. The person who presides at a conference has the power to allow people to be represented if he or she thinks it is necessary. The provision allows for a person with a disability to be represented.

**Clause 76 - Reference of matters to the Commission**

Where the Commissioner is unable to settle the matter by conciliation after he or she has made an effort to do so, then the Commissioner under this clause must send the matter back to the Commission together with a report on inquiries the Commissioner has made.

To make sure that people feel free to be open with what they say in a conference or in conciliation proceedings generally, subclause 2 indicates that the report of the Commissioner is not to have anything in it which records what was actually said or was actually done by the parties in the course of the conciliation process.

Subclause 3 makes it clear that evidence of anything said or done (like a transcript or notes) cannot be used in other proceedings under the Act in relation to the complaint.

**Division 3 - Inquiries by Human Rights and Equal Opportunity Commission****Clause 77 - Minister may appoint persons to participate in inquiries**

This provision provides the Minister with the power to appoint people to assist the Commission in carrying out inquiries under this Act.

Under subclause 2 a person who is appointed by the Minister to help assist the Commission can participate in the actual holding of an inquiry at the request of the Commission.

The clause indicates that the person who is appointed shall hold the appointment for a period of up to 5 years but can be reappointed.

The clause does not set out any particular qualifications that a person must have before they can be appointed under this clause.

Subclause 5 indicates that the Minister can enter into whatever agreement might be necessary with a Minister of a State so that a person who is a judge or magistrate or holds some form of office of that sort in a State or a Territory can participate in an inquiry in accordance with this clause.

Subclause 7 in this part indicates that a person who is appointed under this clause and holds some other office in the Commonwealth retains that office and any other benefits that may go with that office even though the person is appointed to HREOC under this clause.

**Clause 78 Reference of matter to the Commission by the Minister.**

Under this clause the Minister is given broad power to refer matters to the Commission which he or she believes should be inquired into as a complaint.

**Clause 79 -Inquiries into complaints**

This clause requires that the Commission, once matters are referred either by the Commissioner or by the Minister, must actually hold an inquiry into the complaint.

Subclause 2 makes a qualification to that requirement by indicating that the Commission must not hold an inquiry into a complaint or will have to discontinue an inquiry they have already started, if the complainant or the person aggrieved indicates that they no longer want to go ahead with the complaint or where the Minister says to the Commission that he or she no longer wishes a matter that was referred to the Commission under clause 78 to be investigated.

#### Clause 80 - Exercise of inquiry powers by Commission

This clause provides that for the purposes of holding an inquiry into the complaint or a matter referred to the Commission, the inquiry can either be carried out by a single person if that person is legally qualified or by two or more members of the Commission providing that at least one of them is legally qualified. There must be a legally qualified person who actually presides over the inquiry.

Subclause 3 defines what is meant by a legally qualified person.

#### Clause 81 - Single Inquiry in relation to several complaints

Where two or any number of complaints arise that involve the same set of circumstances the Commission may decide to hold only one inquiry into all of those complaints.

#### Clause 82 - Joinder of parties by Commission

This clause provides the Commission with the power to bring another party into the proceedings if at any time during those proceedings it becomes clear to the Commission that the party would assist the Commission in its inquiry.

#### Clause 83 - Notice of inquiry and rights of parties

This clause requires that the Commission must give a notice of an inquiry to all those who are party to an inquiry. This would normally be the person who makes the complaint and the person against whom the complaint is made. The notice must set out the time and place at which the inquiry is to be held.

While the Commission is not actually bound by the strict rules of evidence observed by a court this clause makes it clear that the Commission must give each of the parties a fair opportunity to call or hear evidence and to be able to question witnesses on the evidence that has been given to the Commission.

Subclause 2 provides that if a party does not appear after being given a notice then the Commission can hold an inquiry without them.

#### Clause 84 - Parties to an inquiry

This clause sets out just who are regarded as the parties to an inquiry. This would usually be the person who makes the complaint and the person against whom the complaint is made but there may also be persons who the Commission has joined as a party under Clause 82 or someone who wishes to be heard at an inquiry and to whom the Commission gives permission to appear.

### Clause 85 - Right of appearance and representation

Normally it would be expected that a party to an inquiry would actually appear personally at an inquiry. However, in relation to some people with disabilities this would not be possible and as a result this clause sets out that a person with a disability may be represented by an agent. The clause also provides that where one of the parties is, for example a company, then someone who is an officer or employee of the company or an agent can appear on behalf of that company.

Subclause 2 provides that a person can be represented by a lawyer or an agent where the Commission gives permission for that to happen or has made an arrangement under Clause 88 for a lawyer to appear at an inquiry to help the Commission.

Subclause 3 of clause 85 indicates that only lawyers are entitled to be paid any fee for representing a party at an inquiry.

### Clause 86 - Inquiries may be held in private

This clause in subclause 1, indicates that in general it is expected that inquiries by the Commission under this Bill would be held in public.

Subclause 2 however, gives the Commission power (where it is appropriate) to actually hold an inquiry in private.

### Clause 87 - Commission may prohibit publication of evidence

This clause provides the Commission with the power to make orders that stop or restrict the releasing of either evidence or documents or information given to the Commission.

This is to provide a power to protect particularly confidential information that might be given to the Commission whilst it is holding an inquiry.

### Clause 88 - Counsel assisting Commission

This clause provides that the Commission may make arrangements for legal counsel to appear at an inquiry to help the Commission. In this case the legal counsel is actually under the control of the Commission and does not appear for any of the parties. Depending on the circumstances, legal counsel may be asked by the Commission to help any of the parties to the Commission as necessary in the course of an inquiry.

### Clause 89 - Determination of representative complaints

This clause requires that where it looks to the Commission that a complaint could be regarded as a representative complaint then the Commission must decide before an inquiry goes any further whether that complaint is a representative complaint.

### Clause 90 - Matters to be considered in determination of representative complaints

This clause sets out the factors that the Commission has to take into account when it decides whether a complaint should be regarded as a representative complaint.

Under subclause 1 the Commission first has to determine that the complaint was made in good faith.

Under subclause 2 the matters which the Commission has to take into account when determining whether in fact the complaint was made on behalf of others in good faith are set out. They basically are (as set out in paragraph (2) (a) )

- (i) that the complainant is actually a member of the class of persons who could be affected by the conduct of the person they are complaining about;
- (ii) that the complainant has in fact been affected by that conduct;
- (iii) that there are so many people who might be affected that it would not be possible to join them all as parties to the inquiry;
- (iv) that there are issues of law or fact which affect all members of the class of persons;
- (v) that the complaint is typical of complaints that could be made by other members of the class if they all made those complaints;
- (vi) that if there were lots of complaints and they were dealt with one by one then it would be possible that there might be different results for different individuals notwithstanding that they were all similarly affected;
- (vii) that the actual person complained of (called the respondent) has acted on grounds which actually affect or apply to the class as a whole and not just to one or two individuals.

Under paragraph 2(b) of this clause there is provided a power for the Commission to treat a complaint as a representative complaint where the Commission believes the overall justice of the matter means that a matter should be dealt with as a representative complaint even if all the requirements set out in paragraph (2) (a) have not been actually met.

This clause provides the Commission with a procedure to deal with a matter which might affect a lot of people by a single inquiry and without actually having to call upon each of those people to attend or be involved in the proceedings.

#### Clause 91 - Amendment of representative complaint

This clause provides that the Commission may amend a complaint to make it into a representative complaint if it becomes clear that it would be better for the complaint to be so dealt with. The Commission is able, under this clause, to increase or reduce, or otherwise alter, the class of persons that the complaint is lodged on behalf of.

Subclause 2 also provides that the Commission may amend a complaint which has been wrongly made as a representative complaint by basically taking out the description of the class of people or the names of people if those names have been put in the complaint.

Clause 92 - Ordinary complaints not precluded by representative complaints

This clause gives a person who might otherwise be a member of the class about which a representative complaint has been lodged to also make an individual complaint.

Clause 93 - Resolution of complaint by conciliation

The primary mechanism of this legislation for the resolution of disputes between parties is by conciliation, that is by trying to reach an amicable settlement between the parties. This clause gives the Commission power to try to resolve a complaint by conciliation even if the Commissioner has already failed to do that. Under paragraph 93(b) the Commission is obliged to try and reach an amicable settlement of a complaint even when a formal inquiry is underway.

Clause 94 - Evidence and findings in other proceedings

This clause gives the Commission power to take evidence from other courts or tribunals that the Commission thinks might be helpful to its inquiries. Paragraph (c) gives the Commission power to take in evidence the report of the Commissioner providing that that report has been made available to all the other parties to the inquiry.

Clause 95 - Powers of the Commission to take evidence

This clause gives the Commission similar powers to a court to take evidence and summon witnesses, etc. The Commission is given power to take evidence on oath or affirmation and the power to order people to actually appear before the Commission to give evidence and to produce documents.

Subclause 3 gives a person who is a party to proceedings the right to call a witness and under subclause 4 that witness can be examined, cross-examined and re-examined.

Clause 96 - Fees for witnesses

This clause gives a person a right to be paid for that person's attendance at a hearing where that person has been summoned by the Commission. The fees are to be set out in regulations.

Where a person is summoned to appear at the request of one of the parties that party must make payment of the fees and allowances, but where the Commission summons the person or, in any other case the person is summonsed to appear, the Commonwealth pays.

Subclause 3 gives the Commission discretion to have the Commonwealth pay the fees even where a person is summonsed to appeared at the request of a particular party.

Clause 97 - Retention and copying of documents

This clause self-explanatory.

Clause 98 - Applications of rules of evidence

This clause makes it clear that the Commission is to operate as informally as is possible, consistent with the need to determine the matters that it has before it.

For these reasons the Commission is not bound by the usual rules of evidence that bind courts and is able to inform itself on any matter that arises before the Commission in the manner it sees fit.

Under paragraph 98(1)(c) the Commission is able to give directions concerning the procedures which have to be followed at an inquiry that would help to reduce the cost and delay of an inquiry.

Subclause 98(2) provides the legally qualified member who presides at an inquiry with the power to decide on any questions which may arise concerning whether evidence should be heard by the Commission and also any other questions of law or procedure that might arise during the inquiry.

Clause 99 - Consideration of exceptions and exemptions

This clause provides that before the Commission is required to consider if the exemptions or exceptions that are set out in the legislation apply when it is deciding on whether or not certain action is unlawful under this Bill, the person who seeks to rely on this exception or exemption must produce some credible evidence that the exception or exemption may in fact apply in the particular case.

*Example: A has made a complaint against B alleging that B has discriminated against A on the basis that B would not provide a ramp to allow A access to B's retail store. If B wishes to rely on the exemption set out in Clause 11 concerning imposing unjustifiable hardship then B will be required to provide evidence as to its financial circumstances and the estimate of expenditure required before the Commission would have to take account of the unjustifiable hardship provisions.*

Clause 100 - Commission may dismiss trivial, etc. complaints

This clause gives the Commission the power to not proceed with a complaint if that complaint is

- (a) trivial, vexatious, etc.;
- (b) the action complained of is not unlawful under Part 2;
- (c) if some other remedy has been sought and the Commission decides the matter has been satisfactorily dealt with;
- (d) the Commission thinks some other remedies more appropriate;
- (e) the complaint has already been dealt with by the Commissioner or by some other statutory authority;

- (f) the Commission thinks that the complaint could be better dealt with by some other statutory authority.

Clause 101 - President may dismiss trivial, etc. complaints referred under Subsection 71(5)

Under subclause 71(5) where a Commissioner has dismissed a complaint on the basis that it was not appropriate for the Commissioner to further inquire into the complaint for the reasons set out in subclause 71(2) then the complainant may ask that the matter be referred to the President for further consideration.

Under paragraph 101(1)(b) the President may also dismiss a complaint referred to him or her under provisions of Clause 71(5) for similar reasons as those by which the Commission may dismiss a complaint under Clause 100.

There is provision in paragraph 101(1)(b) for the President to dismiss a complaint that is described as stale and subclause 2 of this clause indicates that a complaint is stale where more than 12 months has elapsed since the act that is being complained of was actually done.

Where the President does not dismiss the complaint he or she refers it back to the Commissioner for further inquiry.

Clause 102 - Making interim determination

This clause gives the Commission power either by application by a party to an inquiry, or by the Commissioner under Clause 72, to make what are called interim determinations.

These determinations are basically designed to stop things happening whilst the complaint is being dealt with which might actually make the alleged damage to the complainant worse.

Subclause 2 indicates that as with any determination of the Commission, these determinations are not binding on the parties.

*Example: A has made a complaint against B alleging that B has discriminated against A in relation to B's proposed transfer of A to some other employment. The Commission may either on the application of the Commissioner where he or she is attempting to consider a complaint or on the application of A where an inquiry is underway by the Commission make a determination calling on B not to transfer A until the complaint has been dealt with.*

Clause 103 - Determination or other decision of the Commission

Where the Commission has held its inquiry then this clause sets out the options that the Commission has in relation to finally dealing with a complaint. First, the complaint might actually be dismissed.

Under paragraph 103(1)(b) where the Commission actually finds the complaint is a valid complaint then the Commission has a number of options as to what it might determine .

They are:

- (i) to declare that the person against whom the complaint has been made did an action that was unlawful under the Act and that person should not do the action again or if it is ongoing, should stop;
- (ii) declare that the person against whom the complaint was made should actually do something to address the loss or damage that the action has caused the person making the complaint;
- (iii) declare that the person against whom the complaint has been made should either employ or re-employ the person; or
- (iv) declare that money should be paid by way of compensation - (this option is not available if the complaint was a representative complaint);
- (v) declare that the person against whom the complaint has been made should give the person a promotion;
- (vi) declare that the termination of a contract or an agreement should be varied so as to compensate the person who made the complaint for loss of damage they may have suffered; or
- (vii) declare that notwithstanding that the complaint was a valid complaint and had been made out that it was not appropriate for any further action to be taken.

Subclause 2 of this clause indicates that the determinations of the Commission made in accordance with this clause are not binding. Subclause 3 gives the Commission power to set out any findings on facts that are used to make the determination. The Commission is not obliged to do this. Subclause 4 makes it clear that damages can include damages for injury to a complainant's feelings or for humiliation that the person might suffer.

Subclause 5 defines what is meant by complainant for the purposes of the clause.

#### Clause 104 - Proceedings in the Federal Court

Because the determinations of the Commission are not binding on the parties there needs to be provided a means for those determinations to be enforced. This clause provides that means.

Under this clause either the Commission or the person making the complaint can go to the Federal Court to ask that court for an order to force a person against whom the determination has been made to carry out that determination.

Subclause 2 of this clause makes it clear that the Federal Court must be satisfied that the person against whom the complaint has been made has actually done something which is unlawful under the Act.

The clause provides that the Federal Court can make such orders as it otherwise has power to make.

Clause 105 - Assistance in proceedings before Commission

This clause provides that the Commission may ask the Attorney-General to give someone who makes a complaint or someone against whom a complaint has been made assistance in relation to the costs the person might have to bear as a result of an inquiry.

Subclause 2 of this clause gives the Attorney-General power to order that the Commonwealth, under whatever conditions the Attorney-General thinks are appropriate, provide financial assistance to those persons the Commission has asked that assistance be provided for.

Clause 106 - Assistance in proceedings of the Federal Court

This clause is similar to Clause 105 but authorizes a person who wants to go to the Federal Court under Clause 104 to enforce the determination of the Commission, or a person who is a person against whom a determination has been made, to apply to the Attorney-General for the provision of legal or financial assistance in connection with the proceedings.

Subclause 2 provides the Attorney-General with the power to order that assistance where he considers it appropriate.

Part 5Other offences

This Part sets out a number of offences which are basically designed to force parties to proceedings to abide by orders made by the Commission or by the Commissioner in the course of inquiries. Without these offences it would be difficult for the Commission and the Commissioner to actually run inquiries under this Act. It would be possible for people against whom complaints are made to, for example, simply to ignore requests for information by the Commission without these provisions.

Clause 107 - Failure to provide actuarial data or statistical data

Under Clause 46 it is unlawful to discriminate against people with disabilities in relation to the provision of superannuation or insurance unless one of the exceptions set out under that clause applies. One of those exceptions is where that discrimination is based on actuarial data or statistical data on which it is reasonable to rely. For the Commission to be able to determine whether it is reasonable to rely on the actuarial data or statistical data it must have that data before it. This clause gives the Commission the power, by giving a notice in writing, to require someone to present that data to the Commission. Where that data is not presented and there is no reasonable excuse for not presenting it then this clause provides that the person is guilty of a criminal offence.

Subclause 2 indicates that subsection 4K(2) of the Commonwealth Crimes Act does not apply to this section. That subsection essentially creates a separate offence for each day that a person does not comply with a notice of a sort the Commission can give under this clause. This would mean that for every day a person does not comply they could be charged with a separate offence. By making it clear that S 4K

(1) does not apply there will be only one offence rather than a series of offences for each day an order is not complied with.

#### Clause 108 - Failure to attend

This clause makes it an offence not to attend a conference where a person has been directed to do so by the Commissioner under Clause 74. The clause provides that a person will not be guilty of an offence if they have a reasonable excuse for not attending.

#### Clause 109 - Failure to give information and produce documents

Similarly to Clause 108, this clause provides an offence for failing to or refusing to give information or produce documents without reasonable excuse when the Commissioner requires it under Clauses 73, 74, 75. Subclause 2 makes it clear that again subsection 4K(2) Commonwealth Crimes Act does not apply. The effect of this provision is explained in Clause 107 above.

#### Clause 110 - Offences in relation to Commission

For the Commission to be able to carry out its work effectively there needs to be provided appropriate sanctions against persons who either do not carry out summonses of the Commission to appear or in other ways do not cooperate with the carrying out of an inquiry by the Commission. This clause sets out those sanctions.

Subclause 110(1) makes it an offence for a person, without reasonable excuse, to fail to attend or appear in response to a summons from the Commission. Subclause 110(2) makes it an offence for a person, without reasonable excuse, to fail to be sworn in or make affirmation as a witness or to answer any questions or refuse to produce a document.

Subclause 110(3) deals with the actual conduct of an inquiry and makes it an offence for a person to interrupt the inquiry or use insulting language towards a member of the Commission. This subclause also contains a provision which makes it an offence to publish evidence which goes against the direction that the Commission may have given in accordance with Clause 87 or as a general offence create a disturbance in or near where an inquiry is being held by the Commission or that the Commission might be meeting for other reasons.

#### Clause 111 - Self-incrimination

To allow for the Commissioner to carry out his or her function of attempting to conciliate a complaint to the fullest extent possible this provision makes it clear that a person is not able to refuse or fail to give or produce information or documents on the grounds that that might incriminate them. However, the provision also makes it clear that any information or document which is so produced or given is not admissible against the person in any other proceedings whether civil or criminal before any court. The only exception is in relation to proceedings for offences under Clause 112 which relates to the giving of false or misleading information.

The conduct of an inquiry by the Commission is usually done in public and is a more formal process than that of the inquiries only taken by the Commissioner. As a result, subclause 2 of this clause makes it clear that it is a reasonable excuse for a

person who might refuse to give information or produce documents required under Clause 110 to refuse to do that on the basis that the giving of that information or the production of a document will in fact tend to incriminate the person.

#### Clause 112 - False or misleading information

The clause makes it an offence for a person to give false or misleading information to any person who exercises powers or performs functions under this Act where that person giving the information knows that it is actually false or misleading.

### **Part 6 - Disability Discrimination Commissioner**

This Part sets out the provisions which relate to the office of Disability Discrimination Commissioner whose primary function is to conciliate complaints on behalf of the Commission that are laid under this Act. Essentially the Commissioner will be appointed by the Governor-General. There are provisions which relate to the payment of salary and allowances to the Commissioner, how much leave the Commissioner may get and how the Commissioner is to resign. There are also provisions relating to the grounds on which a person's appointment as the Commissioner might be terminated, provisions relating to not obtaining outside employment and provisions for an Acting Commissioner when the Commissioner is unable to perform his or her duties.

#### Clause 113 - Disability Discrimination Commissioner

This clause creates the office of Disability Discrimination Commissioner and indicates that the Commissioner is to be appointed by the Governor-General.

#### Clause 114 - Terms and conditions of appointment

This clause provides that the Commissioner can hold office for up to 7 years and is also eligible for reappointment. The Commissioner is to hold office on such terms and conditions as are set out in the Bill but if they are not set out they can be determined by the Governor-General.

#### Clause 115 - Remuneration of Commissioner

This clause provides that the Commissioner is to be paid the amount that is determined by the Remuneration Tribunal and where in fact the Remuneration Tribunal does not make such a determination the amount can be set out in regulations. In relation to allowances for the Commissioner, these will be set out in the regulations.

#### Clause 116 - Leave of absence

This clause provides that the Remuneration Tribunal shall determine the recreation leave entitlements of the Commissioner.

Subclause 2 provides that the Commissioner can be given other leave by the Minister.

Clause 117 - Outside employment

Unless the Minister consents the Commissioner is not able to engage in paid employment outside that of the Office of the Commissioner.

Clause 118 - Resignation

This clause is self-explanatory.

Clause 119 - Termination of appointment

This clause sets out the reasons why the Governor-General may, or in some cases must, terminate the appointment of the Commissioner.

Subclause 119(1) gives the Governor-General a discretion to dismiss the Commissioner where the Commissioner has engaged in such misbehaviour that it is necessary to terminate his or her appointment or the Commissioner has a disability which makes it impossible for the Commissioner to perform the inherent requirements of the office.

Subclause 119(2) provides three reasons for which Governor-General must terminate the appointment of the Commissioner;

- (a) where the Commissioner becomes bankrupt or otherwise enters into agreements with his or her creditors as set out in that subclause; or
- (b) is absent from his or her office unless he or she is on leave for 14 days out of 28 in any twelve month period; or
- (c) he or she engages in other paid employment without the Ministers approval.

Clause 120 - Acting Commissioner

This clause provides that the Minister can appoint a person to act as a Commissioner when there is either a vacancy or the Commissioner is going to be away from Australia or is otherwise unable to carry out his or her duties. Subclause 2 of this clause makes it clear that the validity of something that a person might do when acting cannot be called in to question because of a technical defect in the acting appointment.

Part 7 - Miscellaneous

This part brings together a number of provisions that are necessary for the general operation of the legislation.

For example, there are provisions which are designed to assist the Commission in its day to day operations such as the power of delegation (Clause 121) and the protecting of the Commission from civil actions (Clause 126). There are also provisions which essentially make a body corporate, for example a company, liable for the actions of certain people who act on behalf of the company (Clause 123). There is also a provision to protect information given to the Commission which should not be disclosed and a provision to allow regulations to provide for things

necessary for the operation of the legislation but which are not set out in the Bill like the disability standards under Clause 31 (Clause 132).

#### Clause 121 - Delegation

This clause provides the Commission with a broad power to delegate to the persons set out in that clause. The only exception on delegation of powers under this clause by the Commission relates to the powers necessary to perform the functions that the Commissioner carries out on behalf of the Commission.

Subclause 2 also provides the Commissioner with a broad power of delegation. The only difference is that the Commissioner cannot delegate his or her functions to a member of the Commission.

#### Clause 122 - Liability of persons involved in unlawful acts or offences

This provision makes it clear that a person who aids another person in anyway or induces or assists them to do an act which is unlawful under provisions set out in Part 2 is taken also to have done the act for the purposes of this Act. That would mean a complaint could be made against such a person in Clause 69.

#### Clause 123 - Conduct by directors, servants and agents

This provision establishes that in relation to a body corporate (for example a company) where conduct is engaged in by someone who has authority to represent that body such as a director or a servant or an agent, and that person has a particular state of mind, then that will be regarded as the state of mind of the body corporate.

Subclause 2 is in similar terms in relation to conduct engaged in by someone acting on behalf of the body corporate and states that unless the body corporate takes reasonable steps to stop the conduct then the body corporate will be liable for the action as well as the individual.

Subclause 3 is similar to subclause 1 but in this case deals with the state of mind of a person who acts on behalf of persons other than a body corporate, for example, an individual or group of individuals..

Subclause 4 contains provisions similar to subclause 2 but in this case deals with conduct on behalf of persons other than a body corporate.

Subclause 5 provides that where a person who is not a body corporate is convicted of an offence because of the provisions of this clause (which basically impute a state of mind or conduct to someone whether they had that state of mind or not) then the person cannot be punished by imprisonment.

Subclause 6 indicates that for the purposes of this legislation, when a person who acts on behalf of a body of persons at a hearing that person's conduct will be regarded as conduct of the body itself. Subclause 7 defines what is meant by 'state of mind' in a person. The term 'state of mind' is used in both subclauses 1 and 3. Subclauses 8 and 9 are self-explanatory.

#### Clause 124 - Commonwealth taken to be employer

This clause is self-explanatory.

### Clause 125 - Unlawful Act not basis of civil action unless expressly so provided

This Act provides for a mechanism for dealing with complaints about matters which are unlawful under this Act. It is not intended that rights created under this Act give rise to civil actions in the courts.

This clause provides that, notwithstanding that an act is unlawful under the provisions of Part 2, no separate right of action is created unless there is an express provision concerning such actions.

Subclause 2 refers to the offences created under Division 4 of Part 2 and indicates that for the purposes of this clause they are to be regarded as unlawful acts. That essentially means that the only action in relation to those matters is a complaint under this legislation or the prosecution for an offence.

### Clause 126 - Protection from civil actions

This provision provides a protection for the Commission or members of the Commission or for the Commissioner or their delegates in relation to any action or other proceedings for damages that might happen in the course of their duties under this Act. Providing that action is done or the admission is done in good faith then there is no right to take a civil action against the person concerned.

Subclause 2 of Clause 126 indicates that there is no right of action created where someone has suffered loss or damage from the making of a complaint or the lodging of a submission or giving of information in any form under this Act.

### Clause 127 - Non-disclosure of private information

This clause provides a comprehensive code dealing with the use of private information by the Commission, its members and its staff.

Subclause 1 states that a person who has been or is, either a member of the Commission or a Commissioner or a member of the staff of the Commission must not, either directly or indirectly, keep records of or divulge or communicate to other people information which has come to that person in the course of their duties and which relates to the affairs of another person. That includes making any use of that information whatsoever and a serious criminal penalty is provided for so doing.

Subclause 2 provides that a court must not require a person to divulge information that that person has received in the course of their duties under this legislation unless this is necessary for the purposes of this Bill.

Subclause 3 provides an exemption for people in relation to the making of records and the divulging of information if that is necessary for proceedings under this legislation or in relation to any arrangement that might be entered between the Commonwealth and a State body under section 16 of the *Human Rights and Equal Opportunity Commission Act 1986*. That State body would only be another anti-discrimination body. Subclause 4 also provides that where another Act specifically requires someone to provide information then the provisions of subclause 2 do not prevent that information being divulged or communicated or produced.

Subclause 5 defines the word 'court'; and 'produce' is defined to include giving access to information.

**Clause 128 - Information stored otherwise than in written form**

This provision is designed to make it clear that where there is a duty otherwise imposed by this Act to produce a document that is stored by means other than in written form then the obligation is actually to produce a reproduction in writing of that document or information.

**Clause 129 - Commissioner to give information**

This clause requires the Commissioner to provide the Commission with any information relating to the Commissioner's operations that the Commission may at any time require.

**Clause 130 - Jurisdiction of Federal Court**

This provision provides the Federal Court with the power to deal with matters that might arise under Part 4 of this Act which essentially means the Court only has jurisdiction after the processes for dealing with complaints under this legislation have been gone through.

**Clause 131 - Courts to ensure just terms**

This clause is designed to ensure that if the final result of this Act in any way results in the acquisition of property from any person then that can only be done on just terms and the Federal Court has jurisdiction to determine the compensation that might be necessary so as to ensure that the acquisition does take place on just terms.

**Clause 132 - Regulations**

The clause provides the Governor-General with power to make regulations which are required to be prescribed by this legislation or which are necessary or convenient for the operations of the Bill.

Subclause 2 is a special clause which requires the Governor-General to take into account any comments that might be made by a relevant State or Territory Minister in relation to the making of regulations under Clause 31, which is the clause relating to the setting of disability standards.