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ACT

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SUBJECT: Definition of ‘disability’ under the DDA

1. There is a need to define ‘disability’ in Commonwealth disability discrimination law, which serves to describe the group of persons to which this law applies.
2. At the same time, its impact upon persons with disability needs to be acknowledged. Such defining provides the “gateway” to persons seeking legal protection from disability discrimination; it serves to either allow or deny persons access to this form of protection through a broad or narrow definition, respectively.
 - For example, in *Kitt v Tourism Commissioner and Ors* (1987), a question of legal interpretation arose as to whether epilepsy constituted a physical impairment as defined by the New South Wales discrimination legislation. It was found that certain neurological disabilities (including epilepsy) were not covered by the legislation.
3. Indeed, one of the strengths of the Commonwealth *Disability Discrimination ACT 1992* (DDA) is its broad definition of disability (see paragraph below). To this end, the broad focus of the provision needs to be safeguarded.
4. Under the DDA, *disability*, in relation to a person, means:
 - a loss of the person's bodily or mental functions or part of the body;
 - the presence in the body of organisms, capable of or causing disease or illness;

- the malfunction, malformation or disfigurement of a part of the person's body;
- a disorder or malfunction that results in the person learning differently from a person without the disorder or mal-function; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

This definition includes disabilities that presently exist, previously existed, may exist in the future, or are imputed (s 4 'Interpretation').

5. The DDA definition avoids unproductive disputes over whether a person with disability fitted a particular impairment category or met a major life activity restriction requirement, as in the *Disability Services Act 1986* (Cth) and the *Social Security Act 1991* (Cth). Together, these requirements would serve to narrow a definition of disability and limit the application of discrimination law to only those persons meeting these criteria.
6. These criteria combined, however, are what the Australian community has come to understand by this term. Therefore, not all persons with a health condition identify as having a disability. The upshot of this is that these persons may think the DDA does not apply to them when in fact it may very well apply. It is important, therefore, that the DDA appropriately and aptly capture the health conditions listed in the DDA using language that is clear, easily understood and has meaning to the reader.
7. The answer to improving the DDA definition of disability lie in using terminology and a framework that is consistent with the new International Classification of Functioning, Disability and Health (ICF), adopted by the World Health Organisation in 2001. This suggestion covers both the title and provisions of the Act.
8. The ICF, which replaced the International Classification of Impairments, Disabilities and Handicaps 1980 (ICIDH), provides a unified and standard language and framework to describe and measure health and disability. The ICF is also regarded as an appropriate instrument for the implementation of international human rights instruments and domestic legislation. The essential difference between these two frameworks is that the ICF is grounded in the social (or rights) model of disability and the ICIDH is associated with the medical model of disability.¹

¹ Although the formerly used term *handicap* under the ICIDH emphasised the shortcomings in the environment preventing persons with disability from participating on equal terms in the life of their

- The medical model views the experience of disability as stemming from the individual. Disability is seen as intrinsically related to the person's impairment. The person with disability must change, typically via the mediating interventions of the medical professions and their attempts to effect cures. Placing the person's disability or inability at centre stage has resulted in individual-blaming images of such persons. It is not unreasonable, therefore, to assume that the medical model can become part of the individual: that persons with disability come to see, feel, know themselves and their social position as a function of their impairment.
 - The medical model is viewed as the antithesis of the social (or rights) model. Within the social model, disability is seen as socially constructed and explanations for disablement are to be found within the context of a person's life. The issue is not one of an individual's abilities or limitations, but rather a State and civil society that creates barriers to the full participation and equality of persons with disability. The State and civil society must therefore change by dismantling physical, social and attitudinal barriers.
9. Under the ICF, *disability* serves as an umbrella term for impairments, activity limitations or participation restrictions. A person's disability is conceived as a dynamic interaction between health conditions and personal and environmental factors.² Without rejecting the medical condition, the ICF emphasises that the environment plays a decisive role in the everyday life of persons with disability.
 10. One final point is that, the existing DDA definition of disability needs to be given greater prominence within the Act. The definition is too pivotal to the overall operation of the Act to be "buried" in section 4, 'Interpretation'. This could be remedied by changing the name of the definition to *person with disability* and giving the provision section status, in keeping with separate sections devoted to the meaning of 'Disability discrimination' and 'Indirect disability discrimination' (ss 5, 6).
 11. A separate section would help to raise the "visibility" of persons with disability in the DDA, as *persons* first and foremost, deserving to be seen and heard in Australian society on discrimination matters. This argument still holds despite the Act's intended focus on the actions of the discriminator. The Act needs both

community, the term was used in an unclear and confusing way and often interchangeably with the terms *impairment* and *disability*. The term handicap was also considered too medical and too centred on the individual and did not adequately clarify the interaction between environmental and societal conditions or expectations and the abilities of the individual.

² *Impairments* are problems in body function (i.e. the physiological function of body systems, including psychological functions) or structure (i.e. anatomical parts of the body such as organs, limbs and their components) as a significant deviation or loss. *Activity limitations* are problems an individual may have in executing activities. *Participation restrictions* are problems an individual may experience in involvement in life situations. *Health conditions* comprise diseases, disorders, injuries, trauma, etc. Personal factors may include for example gender, race, age, education, profession, and past and current experience. *Environmental factors* include the facilitating or hindering features of the physical, social and attitudinal world.

as focal points. A criticism often leveled at the United Nations inter-national human rights framework is the relative “invisibility” of persons with disability.