



Queensland
Government

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Tomorrow's Queensland

Transport and Main Roads

Consolidation of Commonwealth Anti-Discrimination Law:

The Department of Transport and Main Roads' Submission to the Attorney-General's Department

Contents

Purpose	3
Legislation in the Queensland context	3
1) Commonwealth Disability Discrimination Act 1992	3
2) Commonwealth Disability Standards for Accessible Public Transport 2002	4
3) Queensland Guide, Hearing and Assistance Dogs Act 2009 (GHADA)	4
4) Queensland Transport Operations (Passenger Transport) Act 1994 (TOPTA)	5
5) Queensland Transport Operations (Passenger Transport) Regulation 2005 (TOPTR)	5
Issues	5
Issues for the Department of Transport and Main Roads	5
Issues for passenger transport drivers and operators	6
Issues for people with disability	8
Summary and Recommendations	8
Section 47	8
Section 9 (a) and (b)	9
Section 9 (c)	9
Section 54A (6)	10

Purpose

The Department of Transport and Main Roads (TMR) supports this review of Commonwealth anti-discrimination legislation and looks forward to any outcomes from this process that will improve the anti-discrimination regulatory framework in Australia.

Further, TMR intends to continue working with the Commonwealth through established governance structures to implement the outcomes of the inaugural five year review of the *Disability Standards for Accessible Public Transport 2002* (Transport Standards) as well as subsequent reviews of the DDA thereafter.

The purpose of TMR's submission to the project to consolidate Commonwealth anti-discrimination laws is to seek greater certainty for transport providers and passengers with assistance animals about their respective rights and responsibilities under the DDA.

To that end, TMR's submission provides feedback on a number of provisions contained in the *Disability Discrimination Act 1992* (DDA) regarding assistance animals. It also raises issues relevant to the passenger transport industry in Queensland arising from a lack of clarity in these provisions, particularly within the context of the broader legislative framework for assistance animals that operates in Queensland.

This submission addresses Question 29 in the Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws: Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

Legislation in the Queensland context

To determine the safe and appropriate carriage of passengers with animals, Queensland passenger transport drivers and operators must apply a number of provisions contained in several different Commonwealth and State legislative instruments, which are:

1. The *Disability Discrimination Act 1992 (Cwlth)*;
2. The *Disability Standards for Accessible Public Transport 2002 (Cwlth)*;
3. The *Guide, Hearing and Assistance Dogs Act 2009 (Qld)*;
4. The *Transport Operations (Passenger Transport) Act 1994 (Qld)*; and
5. The *Transport Operations (Passenger Transport) Regulation 2005 (Qld)*.

1) Commonwealth Disability Discrimination Act 1992

The DDA was introduced in 1992 to remove discrimination as far as possible for people with disability.

Subsection 47 does not render unlawful anything done by a person in direct compliance with a prescribed law, which means a law of the Commonwealth or of a State or Territory or regulations or any other instrument made under such a law.

According to the Explanatory Memorandum for the 1992 DDA Bill, section 47 is intended to provide a mechanism for dealing with overlaps with other laws and jurisdictions and preserve the operation of

State and Territory anti-discrimination laws as far as possible. The Explanatory Memorandum states the DDA was not intended to override the provisions of State legislation or prevent regulations being made to exempt legislation from the operations of the DDA.

In 2009, amendments to the DDA were undertaken and provisions were added to define assistance animals and provide specific circumstances where refusal of access for people with assistance animals did not constitute unlawful discrimination.

Section 9 defines an assistance animal as “a dog or other animal:

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

According to the Explanatory Memorandum for the amendments, the purpose of providing a definition for assistance animal was to give greater certainty to both service providers and people with assistance animals on the rights and responsibilities of both parties.

Section 54A (4) does not render it unlawful for a person to discriminate against a person with disability if that person reasonably suspects the assistance animal has an infectious disease and discrimination is reasonably necessary to protect public health or the health of other animals.

The Explanatory Memorandum for the amendments states this provision was included to clarify access rights following anti-discrimination action resulting from a complaint about refusal to allow assistance animals due to hygiene concerns.

Section 54A (6) does not render it unlawful for a person to request a person with disability to produce evidence that:

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

It is not unlawful for a person to discriminate against a person with disability with an assistance animal, if the person with disability is requested or required to produce evidence as above and does not.

According to the Explanatory Memorandum for the amendments, the inclusion of Section 54A to the DDA in 2009 was intended to provide certainty for both people with assistance animals and service providers by clarifying the entitlements and obligations of both parties.

2) Commonwealth Disability Standards for Accessible Public Transport 2002

The Transport Standards aim to provide transport operators and providers with certainty about their obligations under the DDA. Part 4, 28.3 of the Transport Standards requires operators to locate carers, assistants or service animals with the passenger with whom they are travelling.

3) Queensland Guide, Hearing and Assistance Dogs Act 2009 (GHADA)

The GHADA was introduced in 2009. Section 3 states the objectives include protecting the right of people with disability to be accompanied by assistance animals in public places and vehicles and

providing a simple and consistent means of identifying properly trained guide, hearing and assistance dogs.

Under section 12 a person who is accompanied by an accredited guide, hearing or assistance dog must meet identification requirements and display a handler's identity card or be able to produce it if requested by an authorised person. The dog must wear a harness or identifying coat to make it easily identifiable as an assistance dog.

Section 37 states that to be a certified guide, hearing or assistance dog, the dog must be trained by an accredited training organisation and regularly fulfil a 'public access test' to determine if it is safe in a public place. Additional requirements on the dog include being vaccinated, desexed and not a restricted breed.

Section 13 states it is an offence to refuse permission to enter a vehicle if the dog's handler fulfils the identification requirements. Penalties apply to individuals and businesses operating in breach of this provision. A maximum of 100 penalty units or \$10 000 apply to breaches of this provision.

4) Queensland Transport Operations (Passenger Transport) Act 1994 (TOPTA)

In determining whether an animal that is not an assistance animal can travel in a passenger transport vehicle, passenger transport drivers and operators must uphold a fundamental objective contained in section 2 of the *Transport Operations (Passenger Transport) Act 1994*: "provide a system of public passenger transport that promotes the personal safety of all passengers".

There are no provisions in TOPTA that guarantee access for passengers with animals other than assistance animals or that provide any parameters for determining if an animal is an assistance animal or not.

5) Queensland Transport Operations (Passenger Transport) Regulation 2005 (TOPTR)

TOPTR authorises passenger transport drivers to determine whether it is appropriate to provide or refuse access on a vehicle to a person travelling with an animal other than an assistance animal.

Section 129 (1) states it is an offence to take an animal that is not an assistance animal on a public passenger vehicle without the permission of the operator or driver of the vehicle. Penalties apply to individuals in breach of this provision. The maximum penalty is 20 penalty units or \$2000.

Section 129 (2) of TOPTR states the driver of a public passenger vehicle must allow a person who has a disability to take an assistance animal on the vehicle. Penalties apply for failure to comply with this provision. The maximum penalty is 20 penalty units or \$2000.

Issues

Issues for the Department of Transport and Main Roads

Following the introduction of the GHADA the Department of Transport and Main Roads (TMR) received a number of reports of passengers with potentially dangerous or unhygienic animals receiving access to passenger transport vehicles. Passenger transport drivers and operators sought advice and guidance from TMR on the legislative rights to access for assistance animals under the State and Commonwealth laws.

In the same time, TMR also received several complaints that passengers with guide dogs who were unable to fulfil the identification requirements under the GHADA were refused access to passenger

transport vehicles. The precise number of complaints is unknown, however anecdotal information suggests there was an increase in complaints about assistance animals, particularly in 2009 when the GHADA was introduced.

TMR aims to support the transport industry by providing information and advice on the rights and responsibilities of passengers and transport providers. However without clarification on the application of State and Commonwealth laws, a Queensland-wide policy position on access rights for assistance animals cannot be developed.

To explore policy options for ensuring a consistent approach to assistance animals, TMR engaged in consultation with its service delivery partners the TransLink Transit Authority and Queensland Rail, transport drivers and operators, other government agencies and members of the public. As a result, TMR found considerable confusion about the respective rights and responsibilities of people with animals and transport service providers.

In particular, TMR has determined there is a lack of understanding about which legal instrument, if any, is intended to take precedence in the event of any inconsistency between the various legislative instruments. Specifically, there is uncertainty about whether the State and Commonwealth Acts can operate concurrently as intended or whether inconsistencies between provisions render the State legislation as effectively unworkable and therefore invalid.

Section 109 of the *Commonwealth of Australia Constitution Act 1900* provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

As the DDA does not recognise or give precedence to the GHADA, where there are inconsistencies between these Acts, the Constitution gives precedence to the DDA. Provisions in the GHADA relating to requirements for evidence and identification may be inoperative as the DDA provides access rights regardless of whether a person can fulfil these obligations or not. In effect, provisions in the GHADA cannot be enforced if there is the possibility that upholding the GHADA could constitute a breach of the DDA.

TMR has made numerous representations to the Queensland Department of Communities (DoC) seeking clarification on issues around the interoperability of the State and Commonwealth laws. DoC has in turn sought advice from the Australian Human Rights Commission (HRC) as the entity responsible for resolving complaints under the DDA. At this time, DoC has not received a determination on whether passenger transport drivers and operators are at risk of breaching the DDA if they expect passengers with animals to comply with the rigorous identification provisions in the GHADA.

Compliance with the DDA is determined through complaint-based mechanisms administered by the HRC. A determination on the exposure of passenger transport drivers and operators to anti-discrimination claims for upholding the GHADA can only be given if a complaint is made and resolved through the appropriate complaint processes.

Issues for passenger transport drivers and operators

Legislative Framework

The legislative framework that provides access rights to assistance animals in Queensland is complex and in some instances involves multiple interacting legal obligations and penalties for non-compliance. Passenger transport drivers and operators report difficulty applying the laws to determine access for assistance animals, particularly at point of service. Appropriate access for any animal is often determined at the point of boarding a passenger transport vehicle when the driver or operator has limited opportunity to make a thorough assessment. For a legislative framework to be

effective in this context, it must be internally consistent and able to inform operational policy and/or a State-wide position.

In the absence of formal policies, it is difficult to ensure a consistent application of the laws as passenger transport drivers and operators must use their own discretion when applying the legislation. Individual error or differences in opinion can result in an inconsistent or varying approach to legal obligations. In the absence of a clear position on assistance animals, a clear, robust set of legislative rights and responsibilities would ensure greater clarity for passenger transport drivers, operators and passengers.

DDA definition of assistance animal

Passenger transport drivers and operators have indicated to the department that the definition of assistance animals under the DDA has always been problematic but became even more so since the 2009 amendments expanded the definition to specifically include animals that are not suitable for formal training programs. As the 2009 amendments to the DDA coincided with the introduction of the GHADA, this confusion was exacerbated due to inconsistencies between the laws.

By recognising animals other than dogs as assistance animals, the DDA may undermine the relevance of any State or Territory based accreditation regime and renders the provisions 9 (a) and (b) as voluntary.

Accreditation or training schemes in Australia only apply to dogs. Where there is no accreditation scheme (either because one is not offered in the jurisdiction or because there is no scheme for that particular animal) the minimum requirements outlined in section 9 (c) of the DDA may be seen to be the default requirement. Therefore, people with animals that are unable to be formally trained or accredited such as birds or snakes cannot be reasonably expected to provide independent evidence of their animal's training as no such training regimes exist. If a person is travelling with such an animal, then section 9 (c) of the DDA suggests access should be provided.

Inconsistencies between the legal instruments could result in considerable variation in the approach to assessing animals. For instance, if a person with an animal does not have evidence of their animal's training, they may be refused access to a passenger transport vehicle if the driver or operator applies the GHADA. Conversely, if the driver or operator applies the DDA, then the same animal may be provided access.

Refusing access

Many passenger transport drivers or operators in Queensland have a blanket policy position that animals other than assistance animals are not permitted on passenger transport vehicles in accordance with the principles and provisions of TOPTR. However, passenger transport drivers and operators have few specific lawful rights to refuse access to any animal under the various legal instruments. Section 54A of the DDA provides the right to refuse an assistance animal if it presents a health or safety risk to other people or animals. However, the DDA only acknowledges this risk in relation to animals with infectious diseases. Animals that behave aggressively or are visibly unclean may also present a risk to the health or safety of other people or animals but these animals cannot be lawfully refused access under the DDA.

Further, since the introduction of the GHADA passenger transport drivers and operators report being more cautious about refusing animals, particularly dogs. This is reportedly due to increased penalty provisions for unlawful discrimination and a lack of knowledge of how to apply interacting legal provisions in the DDA and GHADA. There is concern about the limitations in the right to refuse access to assistance animals under the DDA as the grounds provided are not consistent with the GHADA. For example, the GHADA requires assistance animal handlers to meet identification requirements and failure to do so may result in refusal of access or service. This provision is not consistent with 9 (c) of the DDA which provides access to animals even without formal training.

Identifying assistance animals

The DDA does not assist in the identification of assistance animals by providing any mechanisms or guidelines to distinguish an assistance animal from another other type of animal. The GHADA requires assistance dogs to be easily identifiable by coats, harnesses or badges. However, there are no mechanisms to identify animals other than dogs or determine if these animals are legitimate assistance animals or other types of animals.

Risks associated with breaching the laws

A passenger transport driver or operator who discriminates against a person with disability without lawful grounds could be in breach of State legislation, that is the GHADA and the TOPTR. Breaching the relevant provisions may result in a fine. A passenger transport driver or operator who discriminates against a person with disability without lawful grounds is also at risk of civil proceedings by the person with disability. Defending an anti-discrimination claim can incur significant legal expenses.

The considerable legal and financial risks a passenger transport driver or operator is exposed to if they wrongly refuse access to a person with an assistance animal is motivation to allow all passengers with animals access to passenger transport vehicles in order to minimise these risks.

Conversely, no legislative penalties apply to passenger transport drivers or operators who allow access to a vehicle for an animal that is not an assistance animal. When considered against the range of penalties and potential legal consequences associated with refusing access to an assistance animal, there may be greater incentive to allow access for all animals, even if they are not identifiable as an assistance animal or there is doubt the animal meets hygiene and behaviour standards as per the DDA. This has the potential to impact on the safety of passenger transport services for drivers, operators and other passengers.

Issues for people with disability

If passenger transport drivers and operators do not have a clear understanding of the legislated access rights for people with assistance animals, there may be consequential effects on the customer service experience for people with disability. For instance, people with assistance animals may be refused entry if they cannot provide evidence their animal is an assistance animal in accordance with the GHADA or may receive inconsistent advice on their rights and responsibilities.

People with disability need to be certain of their rights and responsibilities on the passenger transport system before they travel. Without a clear understanding of their legal rights, people with disability may be less likely to rely on passenger transport services and instead rely on private transportation which may be more expensive.

In addition, confusion about access rights for people with disability may discourage use of passenger transport services by this group and reduce opportunity for people with disability to connect with their communities, seek employment or foster and maintain personal relationships.

Summary and Recommendations

Section 47

This provision does not render unlawful anything done by a person in direct compliance with a prescribed law, which means a law of the Commonwealth or of a State or Territory or regulations or any other instrument made under such a law.

While the DDA does not intend to exclude the GHADA, it does not provide recognition of this legislation or preserve its operations. As the rights enshrined in the Commonwealth legislation are fundamentally inconsistent with the responsibilities outlined in the State Act, these two Acts may not be able to operate concurrently. Given the fundamental inconsistency between these provisions, the Commonwealth law is presumed to take precedence which in turn may render many provisions in the State laws inoperative. Passenger transport drivers and operators who uphold the GHADA may be at risk of breaching the DDA.

Recommendation: It is recommended that amendments to section 47 the DDA are progressed to preserve the functions and operations of state or territory based assistance animal legislation with greater clarity.

Section 9 (a) and (b)

The definition of an assistance animal in section 9 of the DDA allows animals other than dogs to be recognised as assistance animals, despite the fact that existing accreditation or training programs in Australia only provide training or accreditation to dogs.

In the Explanatory Notes for the original DDA, it was acknowledged that assistance animals would “usually be trained dogs”. No explanation to this point in time has been provided for expanding the definition of assistance animal to include other animals.

This section does not provide any mechanisms to enable the identification of assistance animals. There are no exclusions or enforceable criteria to provide some parameters for transport drivers and operators who are responsible for determining the appropriate access for animals on passenger transport vehicles.

Recommendation: It is recommended that amendments to sections 9 (a) and (b) of the DDA are progressed to clarify access rights for other animals, specifically to provide mechanisms to determine if an animal is an assistance animal or other type of animal including when accreditation and training schemes do not exist or apply to that animal.

Section 9 (c)

The minimum requirements for an assistance animal under section 9 (c) are the animal is trained to assist a person with a disability and to meet hygiene and behaviour standards in public places. There is no obligation that the animal must be trained by a registered trainer or for the person with disability to have proof of the animal’s training. These provisions allow an assistance animal to be trained by its owner and as such, there can be no independent evidence the animal has been trained to a satisfactory degree.

The Explanatory Memorandum for the 2009 amendment states the inclusion of section 9 (c) was intended to protect the rights of people with disability in states or territories without accreditation schemes.

The unintended consequence of these provisions extends to jurisdictions with accreditation schemes. Participation in accreditation or formal training for an assistance animal is optional under this section of the DDA because a person’s access rights are guaranteed whether they have participated in an accreditation scheme or not.

This section does not confer powers to or attempt to preserve the functions of jurisdictional accreditation schemes. Where these schemes exist, there is no requirement for people in those jurisdictions to achieve accreditation for their animal.

Recommendation: It is recommended that amendments to the DDA be progressed to preserve state based accreditation schemes while maintaining protection for people with assistance animals in jurisdictions where one does not exist or does not cover other types of animals.

Section 54A (6)

This provision states it is not unlawful to discriminate against a person with disability who fails to produce evidence their animal is an assistance animal or is trained to meet standards of hygiene and behaviour. However, the evidence a driver or operator can reasonably expect from the person with disability is not stated. Without clarification, these provisions offer no assessment framework for passenger transport driver and operators at the point of entry to services. Accordingly, these provisions cannot effectively be enforced and are impractical.

The approach to evidentiary requirements in the GHADA is significantly more robust in comparison to the approach to access rights provided by the DDA. Transport drivers and operators need certainty that if they discriminate against a person with disability who is unable to produce evidence that their animal is an assistance animal, they will not be at risk of breaching Commonwealth or State assistance animal legislation. Without that certainty, this section is not enforceable and offers no support to the transport sector.

Recommendation: It is recommended that amendments to section 54A of the DDA are progressed to clarify rights to refuse access to assistance animals and outline evidentiary requirements to determine an animal's training.