

Disability and the Australian Defence Force

HYDER GULAM discusses whether the courts are demonstrating a wide degree of deference to the ADF in relation to interpreting Commonwealth anti-discrimination law.

Once again, this Court has before it an appeal which concerns the operation of anti-discrimination legislation. Once again, the legislation relates to the disability of a complainant.

Once again, the disability in question is said to arise from the complainant's status as a person living with the Human Immunodeficiency Virus (HIV) which ordinarily progresses at Acquired Immunodeficiency Syndrome (AIDS). Once again, the complainant has succeeded under the legislation, only to have the victory taken away by a judicial determination that the favourable decision was flawed by error of law.

Justice Michael Kirby, High Court of Australia (1999)¹

In recent times a number of judicial matters have dealt specifically with the Australian Defence Force (ADF) and anti-discrimination law, in particular the *Disability Discrimination Act 1992* (Cth) (DDA). The most notable, and recent, of these cases is a Full Court of the Federal Court of Australia matter: *Commonwealth of Australia v Williams*² handed down in late 2002. This particular case was an appeal from the judgment of McInnis FM in the Federal Magistrates Court of Australia (*Williams v Commonwealth of Australia*).³ In this and another case *X v The Commonwealth*,⁴ it is argued that it is premature to determine whether the courts have granted a wide latitude to the ADF in interpreting anti-discrimination law. This Brief examines this premise of a wide degree of deference to the ADF based on one particular aspect of the Commonwealth anti-discrimination law, the combat-related duties provision in s 53 of the DDA.

Discrimination law is, predominantly, a creature of legislation.⁵ The DDA prohibits discrimination on the grounds of a person's disability or a disability of any of that person's associates.⁶ Discrimination is explained in s 5 of the DDA as treating a person less favourably, by reason of a discriminatory factor, than the person would be treated in the absence of the discriminatory factor, where the circumstances are the same or not materially different.⁷ In general, an act of discrimination requires a causal link between the less favourable treatment and the discriminatory factor. It is usually sufficient that the discriminatory factor need not be the only reason for the less favourable treatment, but merely a reason. Until 29 January 1996, with the advent of the *Disability Discrimination Regulations*,⁸ s.15(4) of the DDA was the main avenue via which to circumvent the anti-discrimination provisions of the DDA, in particular s 15(2)(c): dismissing an employee on the grounds of discrimination. Section 15(4)(a) did not render discrimination unlawful because of a disability, on the grounds that the employee was unable to carry out the 'inherent requirements' of a particular employment.

X v The Commonwealth is a High Court case where the matter of 'inherent requirement' was raised in relation to the ADF. This matter concerned whether

an Army recruit who tested HIV-positive was able to carry out the inherent requirements of such employment as a soldier. The Commonwealth could not rely on the s 53 provisions of the DDA, that is excluding from unlawfulness, conduct in connection with employment in the ADF in combat duties and peace-keeping services. The reason was that at the time of the discrimination which X complained of in the proceedings, no such regulations were actually in existence as specified in the Act. Despite this, a majority of the High Court held that the term 'inherent requirement' should not be construed too narrowly, and should include not just the tasks and skills required to be carried out by a soldier, but also the requirement that 'the employee be able to work in a way that does not pose a risk to the health or safety of fellow employees',⁹ in other words to 'bleed safely'.

Only the Federal Magistrates Court and Federal Court of Australia hearings on the aforementioned (Gary) Williams and the Commonwealth of Australia have brought judicial consideration to the combat-related duties exception in s 53. Williams was a member of the RAAF, who had his employment terminated on the grounds of his insulin dependent diabetes. In a relatively concise judgment, the Federal Court overturned the decision of the lower court that the ADF had unlawfully discriminated against Williams contrary to s 15(2)(c) of the DDA.

The Full Federal Court held that s 53, read in conjunction with the definitions of combat-related duties in the Regulations, served to be the 'logical starting point' for the lawfulness of discrimination by the ADF. Section 15(2) of the DDA has no application if the requirements of s 53 are met. These requirements are that discrimination is lawful in relation to:

duties which are likely to require (as distinct from actually require) commission etc of an act of violence in the event of an armed conflict. A person may be employed in the Defence Force in a position to which s 53(a) applies even though there is no armed conflict existing at the moment.¹⁰

In concluding, it is too early at this point to determine whether the courts are demonstrating a wide degree of deference to the ADF in relation to interpreting Commonwealth anti-discrimination law. To date, the only two cases, both concerning the same facts, have gone in different directions, with the spoils going to the court of higher authority.

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REFERENCES

1. *X v The Commonwealth* [1999] HCA 63, (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 2 December 1999) [114] (Kirby J) (footnotes omitted).
2. [2002] FCAFC 435.
3. [2002] FMCA 89.
4. [1999] HCA 63.
5. Australian Government Solicitors, *Discrimination Law and Commonwealth Public Servants*, Legal Briefing, Number 34 (5 August 1997) <www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/br34.htm> at 4 August 2004.
6. *Ibid.*
7. *Ibid.*
8. *Disability Discrimination Regulations SR 27 of 1996*, regs 3, 4.
9. *X v The Commonwealth* [1999] HCA 63 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 2 December 1999) [11] Gleeson CJ).
10. *Commonwealth of Australia v Williams* [2002] FCAFC 435 (Unreported, Hill, Heerey and Gyles JJ, 20 December 2002) [32].