

REGULATING ‘FAKE’ ASSISTANCE ANIMALS—
A COMPARATIVE REVIEW OF DISABILITY LAW IN
AUSTRALIA AND THE UNITED STATES

By
Paul Harpur, Simon Bronitt, Peter Billings,
Martie-Louise Verreynne, and Nancy A. Pachana*

The current regulatory framework surrounding assistance animals is inadequate in both American and Australian law. The uncertainty it creates raises practical barriers to access for disabled people who rely on service animals. This article compares the respective shortcomings of each systems’ controls for service animals and recommends a direct system of regulation for the certification of service animals.

| | |
|--|----|
| I. INTRODUCTION | 77 |
| A. <i>Outline of Paper</i> | 79 |
| II. PART II | 80 |
| A. <i>The Use of ‘Fake’ Assistance Animals: Gauging Harms</i> . . . | 80 |
| B. <i>What is an Assistance Animal? A Definitional Typology</i> . | 83 |
| III. PART III | 89 |
| A. <i>Broader Systemic Issues with the Regulation of</i> <i>Assistance Animals</i> | 89 |
| 1. <i>What is Appropriate Training and Accreditation for</i> <i>Assistance Animals?</i> | 89 |
| IV. PART IV | 91 |
| A. <i>Criminalizing the Use of ‘Fake’ Assistance Animals:</i> <i>Comparing Indirect and Direct Models</i> | 91 |
| V. CONCLUSION | 96 |

I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides that persons with a disability have the right to be accompanied by an assistance animal to provide living accommo-

* © Dr. Paul Harpur, Senior Lecturer, TC Beirne School of Law, the University of Queensland, Australia and International Distinguished Fellow, the Burton Blatt Institute, Syracuse University, New York; Professor Simon Bronitt, Deputy Dean (Research) & Deputy Head of School, the University of Queensland; Associate Professor Peter Billings, TC Beirne School of Law, the University of Queensland; Professor Martie-Louise Verreynne, The University of Queensland School of Business, the University of Queensland; and Professor Nancy A. Pachana, School of Psychology, the University of Queensland; Co-Director, UQ Ageing Mind Initiative; Co-Chair, Ageing Theme, Brisbane Diamantina Health Partners. We thank Ms. Zoe Brereton and Ms. Ellen Wood for their excellent research assistance and editorial work.

dations in the navigation of routine daily activities.¹ The aim of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”² The CRPD imposes upon states an obligation to identify and eliminate obstacles and barriers to accessibility,³ as well as to take effective measures to ensure personal mobility with the greatest possible independence.⁴ This extends to recognizing the rights of persons with disabilities to be accompanied by assistance animals.⁵ In jurisdictions like Australia and the United States, the practical effect of these international legal norms rests primarily on their implementation and effective enforcement in domestic law, typically through anti-discrimination laws.⁶ These anti-discrimination laws expressly provide persons who have disabilities with assistance animal access rights.⁷ These access rights entitle persons with disabilities to demand the right to be accompanied by an accredited or trained assistance animal.⁸ There is added complexity within federal systems, such as Australia and the United States, where the legal regulation of assistance animals is a matter of both federal and state laws, which inter-

¹ Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD] (“State parties shall also take appropriate measures to provide forms of live assistance . . .”). *See generally* Paul Harpur & Michael Ashley Stein, *Universities as Disability Rights Change Agents*, 10 *Ne. U. L. Rev.* (June 2018) (explaining, inter alia, that the CRPD imposes duties upon private actors that receive State support as well as State parties). *See also* Paul Harpur, *Collective Verses Individual Rights: The Able Worker and the Promotion of Precarious Work for Persons with Disabilities Under Conflicting International Law Regimes*, 41 *LOYOLA L.A. INT’L & COMP. L. REV.* 1, 51 (2017) (analyzing transformational nature of the rights in the CRPD).

² CRPD, *supra* note 1, art 1.

³ *Id.* art 9. For an analysis of the right to access, *see* PAUL HARPUR, *DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED* 45–58 (2017).

⁴ CRPD, *supra* note 1 arts 9, 20.

⁵ *Id.* art 20; *see also* Paul Harpur, *Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?*, 29 *U. TAS. L. REV.* 49, 49 (2010) (stating that Australians with disabilities have the right to be accompanied by an assistance animal).

⁶ International human rights treaties require state parties to provide effective remedies and reparation for those whose rights are breached. *See, e.g.*, International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 17 (stating that each Party to the treaty promises “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”); *see also* Harpur, *supra* note 5, at 56 (discussing the penalties for employers who do not comply with occupational health laws by selectively prohibiting assistance animals on the work premises).

⁷ Harpur, *supra* note 5, at 67.

⁸ *See* Harpur, *supra* note 5 (analyzing Australian anti-discrimination laws and the CRPD regulate for service dogs, guide dogs and assistance animals. Harpur noted that the most common forms of service dogs are guide dogs for the blind or deaf. However, the role of service dogs is much broader, with dogs assisting people with disabilities including diabetes, epilepsy, and various forms of disabilities associated with social interactions.).

sect and overlap. This federal dimension gives rise to inconsistencies, uncertainties, and potential conflicts between legal norms governing the meaning of assistance animals, and their accreditation, training, and use. This Article contends that this prevailing state of legal uncertainty and confusion surrounding the legitimate and illegitimate use, training, and accreditation of assistance animals, itself, operates as a barrier to the exercise of the rights recognized under the CRPD.

A. Outline of Paper

In Part II, we provide an overview of the problems arising from the use of 'fake' assistance animals. Rights-holders, service providers, and policy makers in many countries, including Australia and United States, express increasing concern over the uncertainties and related inadequacies of government regulation and legal enforcement to curb assistance animal misuse.⁹ Adopting a comparative approach, this Article seeks to identify the principal legal and regulatory issues. To appreciate the diversity of problems with fake assistance animals, the authors propose a typology that identifies and distinguishes between types of assistance animals, their users, and their uses, both legitimate and illegitimate. Part III will then outline broader regulatory issues relating to the adequacy of processes governing accreditation, training and identification of assistance animals. Finally, Part IV examines the case for criminalization of the fake use of assistance animals, concluding with an examination of future directions for research and reform.

Ultimately, we argue that the regulation of assistance animals must take place at the federal level, and that a single national system—where training institutions are accredited and authorized under federal law to assess and accredit various disability service animals—must be created.¹⁰ From such a process, standardized national identification cards could be issued at the federal level. While there is a well-established definition of "disability," applying this definition to distinguish between a pet and an assistance animal remains a substantial problem. An important first step would be to clarify where an animal provides sufficient assistance to a person with a disability to obtain protected status and how that animal is trained to be entitled to pro-

⁹ See Sam Downing, *The Ever-Worsening Problem of Fake Assistance Dogs*, PICKLE (Apr. 17, 2015), <http://pickle.nine.com.au/2015/04/17/11/20/assistance-dog-fraud-in-australia> [<https://perma.cc/KU4N-EUAK>] (accessed Jan. 19, 2018) (discussing assistance animal misuse in Australia); Sue Manning, *Fake Service Dogs a Growing Problem*, NBC NEWS (Oct. 10, 2013, 10:06 AM), <https://www.nbcnews.com/health/fake-service-dogs-growing-problem-8c11366537> [<https://perma.cc/XG8N-EX62>] (accessed Jan. 19, 2018) (discussing assistance animal misuse in the United States).

¹⁰ The processes of obtaining accreditation for access rights would be similar to processes used to obtain disability car parking rights. See Deni Elliott & Pamela S. Hogle, *Access Rights and Access Wrongs: Ethical Issues and Ethical Solutions for Service Dog Use*, INT'L J. APPLIED PHIL. 1, 8–9 (2013) (discussing a registration system for assistance animals that is similar to registering for an accessible parking permit).

tection. Enabling the public to efficiently distinguish between pets and assistance animals is critical to protecting fundamental rights, and respecting the human dignity, of persons with disabilities.

II. PART II

A. *The Use of ‘Fake’ Assistance Animals: Gauging Harms*

Assistance animal misuse is now recognized as a major problem in several countries including Australia and the United States.¹¹ The media in the United States has claimed that fake assistance animal use is widespread.¹² However, the expression ‘fake assistance animal’ may be applied to a wide range of cases of assistance animal misuse including: a user who does not have a disability and is not entitled to use an assistance animal; a user who has a disability and is entitled to use an assistance animal, but the assistance animal is unaccredited or inadequately trained; or, both the user and assistance animal are incompetent in terms of being un(der)-qualified. Unscrupulous businesses are exploiting the current regulatory framework to sell under-trained animals to people with disabilities,¹³ as well as selling apparel and documentation designed to facilitate disability fraud.¹⁴

¹¹ See, e.g., S. BUS. PROFESSIONS AND ECON. DEV. COMM., BACKGROUND PAPER: HEARING ON THE POSSIBLE USE OF FAKE SERVICE DOGS AND FAKE IDENTIFICATION BY INDIVIDUALS TO OBTAIN SPECIAL ACCESS TO HOUSING, PUBLIC PLACES OR AIRPORTS/AIRLINES FOR THEIR ANIMAL 1, at 11–13 (2014), [http://servicedogcentral.org/content/files/California%20Background%20Paper%20for%20Fake%20Service%20Dog%20Hearing%20\(2-14-14\).pdf](http://servicedogcentral.org/content/files/California%20Background%20Paper%20for%20Fake%20Service%20Dog%20Hearing%20(2-14-14).pdf) [<https://perma.cc/59YU-Y4H6>] (accessed Jan. 19, 2018) [hereinafter BACKGROUND PAPER] (discussing the growing problem of fake service dogs); SELECT COMMITTEE ON THE EQUALITY ACT 2010 AND DISABILITY, THE EQUALITY ACT 2010: THE IMPACT ON DISABLED PEOPLE, 2015–16, HL 117 1, at 65 (UK) (describing the problem of assistance dog owners being denied access to a service because of their assistance dog); Sev Ozdowski, *Reform of the Assistance Animal Provisions of the Disability Discrimination Act*, AUSTL. HUM. RTS. COMMISSION (Nov. 18, 2003), <https://www.humanrights.gov.au/our-work/disability-rights/inquiries/reform-assistance-animals-provision-disability-discrimination> [<https://perma.cc/V7VG-AG5C>] (accessed Jan. 19, 2018) (stating that, under Australian law at the time, there was a “lack of clarity on what evidence may be required of an animal’s status as an appropriately trained animal and of a person’s need for assistance by that animal.”).

¹² See BACKGROUND PAPER, *supra* note 11, at 11 (stating that “the news media have dubbed [the use of fake service dogs] a ‘National Epidemic of Horrible People Pretending to be Disabled.’”).

¹³ *Assistance Dogs UK – Written Evidence (EQD0081)*, UK PARLIAMENT (Sept. 3, 2015), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/written/20697.pdf> [<https://perma.cc/MEG8-3K5X>] (accessed Jan. 19, 2018). There are also examples of people tampering with documentation or fraudulently attaching signatures to create documents that purport to certify assistance animals. See, e.g., ASSISTANCE ANIMALS: FINAL REPORT 1 (Victoria Law Reform Commission, 2008), <http://www.lawreform.vic.gov.au/projects/assistance-animals/assistance-animals-final-report> [perma.cc/3BR3-DUVD] (accessed Jan. 19, 2018).

¹⁴ Peter Bowes, *Advocates Fight Against Fake Service Dogs*, BBC NEWS, (Mar. 26, 2015), <http://www.bbc.com/news/magazine-31646970> [<https://perma.cc/YC88-GR4K>] (accessed Jan. 19, 2018). There are also examples of people tampering with documenta-

The harms arising from assistance animal misuse are manifold: first, it may result in persons obtaining undue benefits from transport operators (e.g., aviation, road, rail, and sea), hotels, schools, hospitals, and other public or private service providers;¹⁵ second, it consumes resources that should otherwise be available for people with actual disabilities and assistance animals;¹⁶ third, it fuels negative public perceptions and feeds prejudicial attitudes about disability animals and their users;¹⁷ fourth, and relatedly, the effect on public perceptions and prejudicial attitudes may disproportionately affect those with 'invisible' or less obvious disabilities, "such as deafness, autism, epilepsy or diabetes";¹⁸ and finally, the fake assistance animals may be poorly trained, posing public health and safety risks, as well as placing both fake and genuine assistance animals at risk from harm.¹⁹

In general terms, ongoing doubts over the scope for the legitimate use of assistance animals causes further harm to persons with disabilities, who must live with the added insecurity and uncertainty about whether their assistance animal is afforded legal protection and whether access to public spaces and services will be granted by the

tion or fraudulently attaching signatures to create documents that state animals are certified as assistance animals when in fact they have no such certification. See PAUL HARPUR ET AL., *DISABILITY ASSISTANCE ANIMALS OR NOT? PROBLEMS IN POLICY AND PRACTICE WORKSHOP: SUMMARY AND SCOPING DISCUSSION PAPER 24* (2016), <http://espace.library.uq.edu.au/view/UQ:409735> [<https://perma.cc/3CKM-M49Z>] (accessed Jan. 19, 2018) (describing an incident where fake service animal letters were created using a person's signature, without their authorization).

¹⁵ See Rebecca Huss, *Canines in the Classroom: Issues Relating to Service Animals in Primary and Secondary Educational Institutions*, 24 *ANIMAL L.* 53 (2018) (discussing the type of support a student can request from an educational institution).

¹⁶ For example, restaurants can force disabled people to keep a secondary service animal outside at their discretion. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA 1* (2015). Abuse by fraudulent service animals might make restaurant owners more inclined to deny full access to legitimate service animals. Mackensy Lunsford, *Fake Service Dogs are Unruly Beasts*, *CITIZEN-TIMES* (May 5, 2016), <http://www.citizen-times.com/story/news/local/2017/05/05/fake-service-dogs-unruly-beasts/99451434/> [<https://perma.cc/4PRW-JBPZ>] (accessed Jan. 19, 2018).

¹⁷ Editorial Board, *Enough with the Fake Service Dogs and 'Emotional Support' Pigs*, *CHI. TRIBUNE* (Jan. 16, 2015, 12:01 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-ada-fake-service-animals-guide-dog-edit-jm-20150116-story.html> [<https://perma.cc/L54A-5632>] (accessed Jan. 19, 2018).

¹⁸ UK PARLIAMENT, *supra* note 13.

¹⁹ Fake assistance animals have reportedly caused injury to other persons, including those with disabilities. In one case reported in the media, a poorly trained Saint Bernard that was wearing a service vest attacked a quadriplegic woman's golden retriever service dog in a retail mall. Kelly Weill, *Finally, Colorado Is Cracking Down on Service Dog Fraud*, *DAILY BEAST* (Apr. 2, 2016, 11:10 AM), <http://www.thedailybeast.com/articles/2016/04/02/finally-colorado-is-cracking-down-on-service-dog-fraud.html> [<https://perma.cc/8M3U-7M9W>] (accessed Jan. 19, 2018). In another recently-reported case, a fake service dog lunged at a woman's service dog in a physical therapy gym. Mark Davis, *Is That Service Dog a Fake? Under Federal Law, You Can't Even Ask*, *KAN. CITY STAR* (Nov. 1, 2017, 12:11 PM), <http://www.kansascity.com/news/business/health-care/article182076846.html> [<https://perma.cc/J3H8-9QSF>] (accessed Jan. 19, 2018).

people they encounter throughout their daily movements to and from school, work, and other destinations.²⁰ Moreover, for those with legal responsibilities to respect the rights of persons with disabilities (the duty-holders), there is the prospect of legal proceedings and potential financial liability for wrongfully denying access to an assistance animal,²¹ or, conversely, the harms that flow from wrongfully granting access to an animal that is not accredited or properly trained.²²

An absence of clear, consistent, and effective legal regulation of assistance animals and training associations may contribute to public and stakeholder concerns about the prevalence of fake assistance animals, and may also lead to people increasingly questioning the status of genuine assistance animals.²³ The failure of state authorities to require assistance animal training bodies to be accredited produces a ‘grey’ market for businesses and associations to misrepresent the quality and capability of their training programs.²⁴ Indeed, disability activist groups report a concerning and dangerous rise in poorly trained

²⁰ For example, different rail operators across different States in Australia have made different determinations about the legally protected status of assistance animals within a single journey. This has resulted in at least one person with a disability being refused service halfway through the journey across states and the transport operator paying for a taxi to complete the journey. Letter from Placido Belardo, Principal Solicitor, Disability Discrimination Legal Service Inc, to Susan Ryan, Disability Commissioner, Australian Human Rights Commission (June 29, 2015), <http://ddlsaustralia.org/wp-content/uploads/2015/07/Laws-and-policy-on-Assistance-Animals-June-2015.pdf> [<https://perma.cc/9Z4D-DVFE>] (accessed Jan. 19, 2018); see also PAUL HARPUR ET AL., *supra* note 14, at 24 (describing an incident where a train passenger was unable to board a connecting train to their destination because the connecting train’s conductor determined the passenger’s animals were not assistance animals). See generally Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots—Policies, Practices, and Procedures in Pubs, Pads, Planes, and Professions—Where We Live, Work, and Play, and How We Get There—Animal Accommodations in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. 13 (2018) (discussing the difficulties that people with assistance animals face when traveling through the United States). For a recent example of where the status of an assistance dog resulted in the child with autism being denied the use of their service dog, see *Human Rights Tribunal of Ontario Ruling On Right of a Student with Autism to Bring His Service Dog to School*, ADOA ALLIANCE (Aug. 30, 2017), <http://www.aodaalliance.org/strong-effective-aoda/09232017.asp> [<https://perma.cc/W9Y8-276F>] (accessed Jan. 19, 2018) (providing a recent case where a student with autism was denied the use of the child’s service dog at school).

²¹ Rob Olmstead, *Theater Sued Over Guide Dog Denial*, CHI. DAILY HERALD, Feb. 5, 2005.

²² See Weill, *supra* note 19 (describing a situation involving a fake assistance animal attacking a legitimate service animal).

²³ See UK PARLIAMENT, *supra* note 13 (“The lack of a recognizable standard has led to a loss of confidence among employees of industries (such as retail, leisure, and public services) in the legitimacy of assistance dogs, thereby causing genuine assistance dog users to face discrimination.”); see also SELECT COMMITTEE ON THE EQUALITY ACT 2010 AND DISABILITY, *supra* note 11 (stating a concern that business owners are prohibiting assistance animals).

²⁴ Merritt Clifton, *How the Americans with Disabilities Act Has Become the “Pit Bull Pushers Act,”* ANIMALS 24-7 (June 20, 2017), www.animals24-7.org/2017/06/20/how-the-americans-with-disabilities-act-has-become-the-pit-bull-pushers-act/ [<https://perma.cc/BDJ7-FRW3>] (accessed Jan. 19, 2018).

service animals.²⁵ A striking example is the 'bogus' disability assistance animal training school based in Ireland, which was exposed by former employees in 2015 who claimed that the school was endangering lives and dishonestly defrauding customers by charging tens of thousands of euros for delivery of untrained animals.²⁶

For the foregoing reasons it is, therefore, vitally important that domestic law and policy clearly and consistently regulate the use of assistance animals so that users, service providers, and other stakeholders can readily distinguish between legitimate and illegitimate uses of assistance animals.

B. What is an Assistance Animal? A Definitional Typology

Assistance animals can assist: a person with a vision impairment with his mobility; a person with a hearing impairment to respond to noise; a person with diabetes to identify when he or she is at risk of ketoacidosis; a person with autism to enhance his or her social interactions; a person with physical immobility to navigate and collect items; as a psychiatric service dog to manage social interactions; and in a wide range of other situations to reduce the impact of physical, sensory, mental and intellectual impairments.²⁷ Beyond uses in assisting impairment that are widely regarded as disability, animals can also provide emotional or therapeutic support for people.²⁸ Where emotional or therapeutic animals do and should obtain protection remains an unsettled social and legal issue.²⁹

One of the most significant challenges in determining whether an animal has the necessary training and capacity to assist a person with a disability is the absence of any common standards against which to assess the quality and efficacy of training.³⁰ While there is a broad international consensus regarding standards for training and accredi-

²⁵ UK PARLIAMENT, *supra* note 13.

²⁶ Press Release, Autistic Rights Together, ART Autistic Rights Together Press Release regarding Service Dogs Europe, <http://autisticrightstogether.ie/index.php/2-uncategorised/44-press-release-service-dogs-europe> [<https://perma.cc/856Y-4WJF>] (accessed Jan. 19, 2018); James Dunn, *Mother's Fury After Spending £4,000 on a Trained Assistance Golden Retriever for her Autistic Son Only to Find It Hasn't Been Taught to Sit, Fetch or Stay*, DAILY MAIL (updated Oct. 26, 2015, 12:34 PM), <http://www.dailymail.co.uk/news/article-3290099/Bogus-charity-charges-thousands-service-dogs-without-training.html> [<https://perma.cc/G2QW-5XYQ>] (accessed Jan. 19, 2018); Tom Morgan, *Exposed: The Dog Training Firm Exploiting the Vulnerable*, TELEGRAPH (Nov. 7, 2015, 12:01 PM), <http://www.telegraph.co.uk/news/politics/11980667/Exposed-The-dog-training-firm-exploiting-the-vulnerable.html> [<https://perma.cc/C3VH-RQ5E>] (accessed Jan. 19, 2018).

²⁷ BACKGROUND PAPER, *supra* note 11, at 2–3; Harpur, *supra* note 5, at 51–54.

²⁸ BACKGROUND PAPER, *supra* note 11, at 9.

²⁹ Kristin Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 U. LOUISVILLE L. REV. 197, 215 (2009).

³⁰ Susan L. Duncan, *The Importance of Training Standards and Policy for Service Animals*, in COMPANION ANIMALS IN HUM. HEALTH 251, 251–52 (Cindy C. Wilson & Dennis C. Turner eds., 1998).

tation of guide dogs for the blind and assistance dogs for certain impairment categories,³¹ questions have arisen about the legitimacy of use and training standards for ‘non-traditional’ service animals such as birds, pigs, or cats.³²

There are significant differences between how statutes distinguish between pets and assistance animals, both across and within single jurisdictions. Some jurisdictions limit legal protection to established categories, such as guide dogs, while other jurisdictions extend protection to *any* animal species capable of mitigating the effects of a person’s disability.³³ This Section outlines the source of these uncertainties and unresolved problems of legal definition in Australia, with a brief comparison of the position in the United States.³⁴

In Australia, the enactment of the *Disability Discrimination Act 1992* (Austl.) (*DDA*) established the federal legal framework governing disability rights and remedies.³⁵ Although federal law operates across Australia, it does not simply supplant local state and territory laws: section 13 of the *DDA* provides that both federal and state or territory discrimination laws broadly operate concurrently.³⁶ The effect is that the *DDA*, combined with the provisions of state and territory anti-discrimination laws, define (inter alia) the types of animals afforded legal recognition and protection.³⁷

The concurrent operation of laws at federal, state and territory level inevitably creates some degree of regulatory confusion. As Table 1 reveals, there are significant definitional differences between jurisdictions. Overlapping but inconsistent laws in federal legal systems have been shown to encourage and facilitate forum shopping among users of assistance animals.³⁸

³¹ Assistance Dogs International provides information on the minimum standards for certifying private trained teams. *Standards for Programs*, ASSISTANCE DOGS INT’L, <http://www.assistedogsinternational.org/standards> [https://perma.cc/6V88-XKJE] (accessed Jan. 19, 2018).

³² See generally Robert Adair, *Monkeys and Horses and Ferrets . . . Oh My! Non-Traditional Service Animals under the ADA*, 37 N. KY. L. REV. 415, 415–38 (2010) (discussing non-traditional service animals); Susan Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 BARRY L. REV. 39, 44 (2002) (providing examples of different species that act as service animals).

³³ See *infra* Table 1 (summarizing the kinds of animals capable of being assistance animals in different Australian States).

³⁴ See Rothstein, *supra* note 20 (discussing service animals and how United States law handles them).

³⁵ PAUL HARPUR, DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED 156 (2017).

³⁶ *Disability Discrimination Act 1992* (Austl.) s 13(3).

³⁷ See Harpur, *supra* note 5, at 64 (discussing the extent to which federal, state, and territorial laws protect people with disabilities using assistance animals).

³⁸ HARPUR ET AL., *supra* note 14, at 8, 20.

**Table 1: Comparing Assistance Animal Definitions
in Australia**

| JURISDICTION | PROTECTED ANIMAL |
|--|---|
| COMMONWEALTH Disability Discrimination Act 1992 (Austl.) s 9(2) | All animals. |
| SOUTH AUSTRALIA Equal Opportunity Act 1984 (S.A.) ss 88 and 88A | Assistance animals and therapeutic animals. |
| QUEENSLAND Anti-Discrimination Act 1991 (Queensl.) s 85 Guide, Hearing and Assistance Dogs Act 2009 (Queensl.) | Guide, hearing, or assistance dog. Guide, hearing, or assistance dog. |
| AUSTRALIAN CAPITAL TERRITORY Discrimination Act 1991 (Austl. Cap. Terr.) s 5AA | All animals. |
| VICTORIA Equal Opportunity Act 2010 (Vic.) ss 4 and 7(4) | Assistance dogs. |
| NEW SOUTH WALES Anti-Discrimination Act 1977 (N.S.W.) s 49B (3) | Guide dogs assisting a person with a disability of or related to vision, hearing or mobility. |
| TASMANIA Anti-Discrimination Act 1998 (Tas.) s 3(g) | Guide dogs assisting any particular disability. |
| NORTHERN TERRITORY Anti-Discrimination Act (N.Terr.) ss 4 and 21 | Guide dogs (providing assistance to persons with visual, hearing, or mobility impairments only). |
| WESTERN AUSTRALIA Equal Opportunity Act 1984 (W. Austl.) s 66A(4) Dog Act 1976 (W. Austl.) ss 8(1), 15(4) and 56. | Guide dogs (providing assistance to persons with vision or hearing impairments only). Assistance dogs. |

Sections 8 and 9 of the *DDA* recognize that there are disabilities that may be materially alleviated with the assistance of an animal trained to do so; section 8 prohibits *direct* or *indirect* disability discrimination on the ground that a person is accompanied by an assistance animal.³⁹ The definition of “assistance animal” under the *DDA* was broadened by legislative amendments in 2009.⁴⁰ Sub-section 9(2)(a) and (b) of the *DDA* defines an assistance animal as a “dog or other animal” that is *accredited* either (a) under relevant state or territory laws “to assist a person with a disability to alleviate the effect of the disability,” or (b) by relevant animal training organizations, as pre-

³⁹ *Disability Discrimination Act* (Austl.) ss 8–9.

⁴⁰ *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), s 9(2) (Austl.).

scribed by law.⁴¹ Under this accreditation framework in the *DDA*, there are no limits on the types of animal that could fall within the definition of an “assistance animal.” Accreditation is not the only basis for legal recognition of an assistance animal. Sub-section 9(2)(c) of the *DDA* extends legal protection to a “dog or other animal” that is trained “to assist a person . . . to alleviate the effect of the disability,” and “to meet standards of hygiene and behavior that are appropriate for an animal in a public place.”⁴²

The failure to resolve the definitional uncertainties relating to ‘assistance animals’ must be addressed as such uncertainties may result in conflict between assistance animal users (rights holders), service providers (duty-holders), and the general public (interested third parties). Maintaining an open-ended functional definition of ‘assistance animal’ may have the unintended effect of impeding or frustrating the purposes of the *DDA*, which include inter alia promoting “acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community,”⁴³ and to ensure that these rights are achieved.⁴⁴ The menagerie of alternate assistance animals receiving legal protection may however, in due course, diminish the acceptance within the community, and public and private sectors, of the need for assistance animals generally.⁴⁵ Growing public distrust may, in turn, result in the imposition of more regulatory hurdles for persons using assistance animals, including more stringent thresholds of proof relating to accreditation or the appropriate standards of training, hygiene, and behavior.

The statutory definition of “assistance animal” in Australia was extended by legislative reform in 2009, ostensibly to provide greater legal certainty about rights and responsibilities for service providers, for animal users and the general public.⁴⁶ However, several definitional and regulatory gaps in the legislation previously identified by the Australian courts in 2008 were not, regrettably, remedied in 2009.⁴⁷ And, notably, the third pathway to legally protected status for

⁴¹ *Disability Discrimination Act* (Austl.) ss 9(2)(a)–(b).

⁴² *Id.* s 9(2)(c).

⁴³ *Id.* s 3(c).

⁴⁴ *Id.* ss 3(a)–(b).

⁴⁵ See Adair, *supra* note 32, at 416 (discussing the trend towards more diverse service animal species that prompts public resistance to the expansion and government regulatory responses); Semmel, *supra* note 32, at 39 (providing an example of the public dissatisfaction with the use of a pig as an assistance animal on a flight).

⁴⁶ Explanatory memorandum from the House of Representatives, Disability Discrimination and other Human Rights Legislation Amendment Bill 2008 10 (2008) (Austl.). Legislative deficiencies (prior to the 2009 amendments to the *DDA*), identified as the absence of an interpretation of “trained,” legal requirements that addressed the amount of required training or type of training provider, or need for accreditation, were raised in two cases. *Queensl. v Forest* (2008) 168 FCR 532, 553–56 (Austl.); *Forest v Queensl. Health* (2007) 161 FCR 152, 174–77 (Austl.).

⁴⁷ *Changes to the DDA: Disability Discrimination and Other Human Rights Legislation Amendment Act 2008*, AUSTRAL. HUM. RTS. COMMISSION, <https://www.humanrights>

an assistance animal based on appropriate training (section 9(2)(c) above), which was intended to promote wider access to legal protections under the *DDA*, has only given rise to additional legal uncertainty.⁴⁸

Section 9(2)(c) of the *DDA* was introduced to ensure that persons with a disability, who may not live in a locality with a relevant accreditation scheme, or have access to an officially recognized assistance animal trainer, could nevertheless be protected under the *DDA*.⁴⁹ In *Mulligan v. Virgin Australia* the Federal Court of Australia accepted that a dog or other animal may satisfy the legal requirements under the *DDA* without accreditation provided that there is evidence that the animal is appropriately trained and meets hygiene and behavioral standards.⁵⁰ However, there is no statutory definition of “training,” and no guidance on what constitutes “appropriate” standards of “hygiene” and “behavior.”⁵¹ Nor is there legislative, regulatory, or policy guidance about what constitutes relevant, probative evidence for the purposes of establishing proper assistance animal training and that the animal meets hygiene/behavioral standards.⁵² The effect of *Mulligan* has been to generate significant confusion among assistance animal users, service providers, and trainers about how to operationalize this aspect of the legal test.⁵³ This uncertainty has been amplified by the lack of definitional consistency in each Australian State and Territory (outlined above in Table 1) as to the type of animal and the context within which legal protection for an assistance animal will be triggered.

.gov.au/changes-dda-disability-discrimination-and-other-human-rights-legislation-amendment-act-2008 [https://perma.cc/V5CY-N43V] (accessed Jan. 19, 2018).

⁴⁸ See, e.g., Letter from Zoe Morgan, Legal Counsel, Queensl. Rail Ltd., to Assistant Sec’y, Human Rights Policy Branch, Att’y-Gen.’s Dep’t, Submission in Relation to Consolidation of Anti-Discrimination Laws - Assistance Animals 1 (Feb. 1, 2012) (Austl.), [https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20163%20-%20Queensland%20Rail%20-%201%20%20Feb%202012%20\(pdf\).pdf](https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20163%20-%20Queensland%20Rail%20-%201%20%20Feb%202012%20(pdf).pdf) [https://perma.cc/T6BD-P97A] (accessed Jan. 19, 2018) (explaining Queensland Rail’s confusion over what section 9 includes and its difficulty complying with the *DDA* as a result).

⁴⁹ Explanatory Memorandum, *supra* note 46.

⁵⁰ *Mulligan v Virgin Austl. Airlines Pty Ltd* (2015) 234 FCR 207, 230 (Austl.).

⁵¹ *Id.* at 228. The interpretation of the definition of disability assistance animal in *Mulligan* has implications outside anti-discrimination laws. See *R v BL* [2016] ACTSC 209 (Austl.) (using the approach in *Mulligan* to determine if a child witness could be accompanied by a dog for support during a criminal trial); see also Ellen Wood, Paul Harpur & Nancy A. Pachana, *Teaching an Old Dog New Tricks: A Look into Courthouse Facility Dogs and their Place in the Australian Courtroom* ALTERNATIVE LAW J. (forthcoming 2018) (demonstrating how the courthouse facility dog program is developing in Australia).

⁵² *Assistance Animals and the Disability Discrimination Act 1992* (Cth), AUSTRAL. HUM. RTS. COMMISSION (Jan. 18, 2016), <https://www.humanrights.gov.au/our-work/disability-rights/projects/assistance-animals-and-disability-discrimination-act-1992-cth> [https://perma.cc/ME5T-Y7QJ] (accessed Jan. 19, 2018).

⁵³ *Id.*

To enhance access rights, a number of Australian jurisdictions have introduced voluntary certification processes, which result in official disability service animal identification cards.⁵⁴ Where handlers are refused protected status for their owner-trained animals, the owner can reapply to the government agency or forum shop, and apply to a different agency for an analogous identification card.⁵⁵

The Americans with Disabilities Act of 1990 (ADA), like its Australian counterpart, provides the legal framework governing disability rights and remedies.⁵⁶ As in Australia, the operation of the ADA has given rise to a number of legal challenges, with definitional development occurring through judicial interpretation, legislative reform, and issuing administrative policy guidance.⁵⁷ A plain reading of the definition in the ADA is misleading: *prima facie*, the ADA definition limits legal protection to “dogs” only, though this has been extended by subordinate regulations to a range of other *expressly* nominated animal species, such as miniature horses.⁵⁸ Other federal laws expand the range of animal species that can benefit from statutory protection. The federal Air Carrier Access Act and Fair Housing Act have adopted broad definitions that extend legal protection to *all* assistance animals.⁵⁹ Under these specific areas governed by federal law, there is no restriction of the species of animal eligible for legal protection.⁶⁰ With these potentially open-ended definitions of “assistance animal” in both Australia and the United States, the need to ensure the adequacy of training, supported by evidence that relevant standards have been attained through processes of accreditation, becomes even more important from a policy standpoint.

⁵⁴ See, e.g., *Guide, Hearing and Assistance Dogs Act 2009* (Queensl.) pt 3 (establishing a certification process for individuals and corporations); *Dog and Cat Management Act 1995* (S. Austl.) s 21A (establishing an accreditation process for assistance dogs); *Guide Dogs and Hearing Dogs Act 1967* (Tas.) s 3 (establishing certification processes); see also Harpur, *supra* note 5, at 65, 77–78 (discussing certification schemes under federal, state, and territory jurisdictions).

⁵⁵ HARPUR ET AL., *supra* note 14, at 19–20.

⁵⁶ *Information and Technical Assistance on the Americans with Disabilities Act*, ADA.GOV (July 15, 2017), https://www.ada.gov/ada_intro.htm [<https://perma.cc/FB39-JAHE>] (accessed Jan. 19, 2018).

⁵⁷ 42 U.S.C. §§ 12101–12213 (2012); Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990).

⁵⁸ Americans with Disabilities Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34516 (June 17, 2008).

⁵⁹ 42 U.S.C. §§ 3601–3631 (2012); 49 U.S.C. § 41705 (2012); Rebecca Huss, *Why Context Matters: Defining Service Animals under Federal Law*, 37 PEPP. L. REV. 1163, 1195 (2010).

⁶⁰ Adair, *supra* note 32, at 415–16; Semmel, *supra* note 32, at 39.

III. PART III

A. *Broader Systemic Issues with the Regulation of Assistance Animals*

1. *What is Appropriate Training and Accreditation for Assistance Animals?*

Federal law in Australia, as noted above, requires “assistance animals” either to be “accredited” or, in the absence of accreditation, be appropriately “trained” to alleviate the effects of a person’s disability and meet relevant hygiene and behavior standards under the *DDA*. There remains considerable confusion surrounding the legal status of non-accredited animal assistance training. Who can lawfully train an assistance animal to both alleviate the effects of a disability and meet the standards required by the *DDA*? Persons with disabilities are increasingly using small operators and train their own animals to help mitigate their particular impairment.⁶¹ Owner-trained service animals create particular challenges for decision-makers tasked with making evidence-based determinations about whether an animal has been sufficiently trained to attract legal recognition.⁶² For example, who is the appropriate regulator, how is the owner’s private training regulated to ensure it is appropriate, and who pays for that assessment? Additionally, there are equally pressing issues around the regulation of an increased number of smaller, non-charitable, commercial operators offering assistance animal training to mitigate the impact of a wide range of disabilities.⁶³ Some jurisdictions in Australia require either the trainer or animal be assessed by a government-approved certifier,⁶⁴ while other jurisdictions (including the federal jurisdiction) have no such express requirement.⁶⁵

⁶¹ HARPUR ET AL., *supra* note 14, at 5.

⁶² Brooke Sillaby, *Redefining ‘Service Dog’ in Canada* (Sept. 2016) (unpublished M.A. thesis, McMaster University), <https://macsphere.mcmaster.ca/bitstream/11375/20578/2/Governing%20Dogs-%20An%20Autoethnographic%20Tale%20of%20Redefining%20%27Service%20Dog%27%20in%20Canada%20-%20Brooke%20Sillaby.pdf> [https://perma.cc/8W2G-KK85] (accessed Jan. 19, 2018).

⁶³ HARPUR ET AL., *supra* note 14, at 15–16.

⁶⁴ *See, e.g., Dog Regulations 2013* (W. Austl.) reg 12 (listing a number of associations where all animals are automatically approved for protection). Animals that are trained by owners or associations not provided for in reg 12 need to be individually assessed in accordance with s 8 of the *Dog Act 1976*. *Dog Act 1976* (W. Austl.) s 8. Following the passage of the *Guide, Hearing and Assistance Dogs Amendment Act 2015*, which came into effect on 27 April 2016, trainers who want to certify guide dogs must be approved. *Guide, Hearing and Assistance Dogs Act 2009* (Queensl.) p 3. A list of approved trainers can be found on this Queensland government website, *see For Trainers*, DEP’T OF COMMUNITIES, CHILD SAFETY AND DISABILITY SERVICES (updated July 6, 2017), <https://www.comunities.qld.gov.au/disability/key-projects/guide-hearing-and-assistance-dogs/for-trainers> [https://perma.cc/9WHE-86D7] (accessed Jan. 19, 2018) (listing approved Queensland trainers).

⁶⁵ *Disability Discrimination Act* (Austl.) s 9(2).

Across Australia there is a lack of guidance on the appropriate training standards for the expanding range of assistance animals now employed by persons with disabilities. In some jurisdictions, there are no publicly accessible standards.⁶⁶ Non-legislated (public agency or departmental) standards regulating training, behavior, and hygiene lack transparency and may be operationalized in different ways in different jurisdictions. Asserting legal protection for an assistance animal under the *DDA* rests on adducing proof of the following: (i) The person has a specified disability within the meaning of the *DDA*.⁶⁷ This assessment, in the expert opinion of the medical practitioner or specialist, would outline the *nature and extent* of disability, and how the assistance animal will alleviate or ameliorate the effects of that disability; (ii) The assistance animal has the appropriate training to meet the requisite legal standards under the *DDA*.⁶⁸ This assessment would need to be based on a skills assessment by the training organization or an independent expert certifier.

This dual threshold of proof can be challenging to meet where there is no legislatively mandated process governing disability registration, accreditation, or certification.⁶⁹ For legitimate reasons, such as regional remoteness or incapacity, a person may face difficulties accessing the services of a qualified trainer or certifier. Persons using assistance animals without evidence of registration, accreditation, or certification will be required to rely upon ‘alternate’ evidence of training under section 9(2)(c) of the *DDA*.⁷⁰ Indeed, in *Mulligan*, the Australian Human Rights Commission (AHRC), which was granted status as an intervener, submitted to the Federal Court that an assistance animal could legally receive relevant training from the animal’s owner (who may not be a professional trainer) and thereby gain legal protection under the *DDA*.⁷¹ The AHRC further submitted that, in such a case, a statement from the owner herself evidencing that the dog was properly trained could constitute proof of training in satisfaction of section 54A(5).⁷² This submission was not directly addressed by the

⁶⁶ See, e.g., *Guide Dogs and Hearing Dogs Act* (Tas.) s 3 (providing no guidance on standards for trained service animals).

⁶⁷ See Harpur, *supra* note 5, at 68–78 (discussing how the *DDA* protects against discrimination).

⁶⁸ See *id.* (discussing how the *DDA* protects against discrimination).

⁶⁹ Indeed, in some jurisdictions—Tasmania, Australian Capital Territory and Northern Territory—there are no accreditation schemes. AUSTRL. HUM. RTS. COMMISSION, *supra* note 52.

⁷⁰ *Disability Discrimination Act* (Austl.) s 9(2).

⁷¹ Outline of Submissions of the Australian Human Rights Commission Seeking Leave to Intervene or Appear as Amicus Curiae at 7, *Mulligan v Virgin Austl. Airlines Pty Ltd* (2015) 234 FCR 207, <https://www.humanrights.gov.au/sites/default/files/AHRC%20Submissions%20-%20stamped.pdf> [https://perma.cc/24LS-SWCF] (accessed Jan. 19, 2018).

⁷² *Mulligan*, 234 FCR at 224; see also *Disability Discrimination Act* (Austl.) s 54A(5) (providing that it is not unlawful to require evidence that the animal is an assistance animal, or alternatively that the animal has been trained to an appropriate standard of behavior and hygiene).

court in *Mulligan* and so the matter of “owner accreditation” remains unresolved.⁷³

Definitional uncertainty over the scope of “assistance animal,” combined with the non-mandatory nature and inconsistent approach to registration, accreditation, and certification processes, makes it extremely difficult for users, service providers, and the wider public to know whether or not a particular animal enjoys legal protection as an assistance animal. The current legal position in Australia relies heavily upon persons with disabilities to advocate for their rights, and for service providers to make ‘on the spot’ determinations about whether or not the requested access should be granted.⁷⁴ Placing the burden upon frontline duty-holders to ‘police’ the use of assistance animals on a case-by-case basis will disproportionately impact persons with less visible or obvious disabilities, such as autism. A recent study by Meghan Mills demonstrates that users of assistance dogs with these types of disabilities are more likely to be interrogated about the “legitimacy of their disability and need for a Service Dog,” with the consequence that some users report that negative aspects “outweigh [] its benefit as a type of assistive technology.”⁷⁵ Indeed, as Ann Davis argues, people in this situation “face a double bind: either they forgo the assistance or accommodation they need . . . and thus suffer the consequences of attempting to do things they may not be able to do safely by themselves—or they endure the discomfort of subjecting themselves to strangers’ interrogations.”⁷⁶ When these ‘interrogations’ occur in a public place, the indignities will be compounded further, infringing upon Australia’s international obligations under Article 1 of the CRPD that signatories must respect the rights and “inherent dignity” of persons with disabilities.⁷⁷

IV. PART IV

A. *Criminalizing the Use of ‘Fake’ Assistance Animals: Comparing Indirect and Direct Models*

In Part IV, we examine the extent to which prosecutions under the existing laws potentially apply to the use of fake assistance animals, comparing and contrasting a selection of Australian and United States offense provisions. As outlined in Part II, anti-discrimination laws provide persons with disabilities a legal right to be accompanied by an

⁷³ *Id.*

⁷⁴ See, e.g., Zoe Morgan, *supra* note 48 (“Without adequate certainty about identification of an assistance animal, front-line staff are forced to make quick evaluations about animals being brought onto the stations and trains by passengers and members of the public.”).

⁷⁵ Meghan L. Mills, *Invisible Disabilities, Visible Service Dogs: The Discrimination of Service Dog Handlers*, 32 *DISABILITY & SOC’Y* 635, 635 (2017).

⁷⁶ N. Ann Davis, *Invisible Disability*, 116 *ETHICS* 153, 154–55 (2005).

⁷⁷ UN General Assembly, *Convention on Rights of Persons with Disabilities: resolution adopted by the General Assembly* (Jan. 24, 2007).

accredited or adequately trained assistance animal.⁷⁸ Animal access rights thus provide a legal shield, protecting users from prosecution under the general laws that otherwise restrict animal access in public or other specified places. As we shall demonstrate, the existing laws, once again, are poorly adapted for distinguishing between legitimate and illegitimate uses of assistance animals, and fail to send clear messages about the nature and associated harms of such misuse.

In Australia, there is a wide range of offense provisions, mainly found in regulations or bylaws, which prohibit a person from entering into specified premises or places accompanied by an animal.⁷⁹ Such regulatory provisions are typically strict liability, and can be enforced by police or specified enforcement officers issuing an ‘on the spot’ infringement or fixed penalty notice.⁸⁰ Since criminal liability is strict, the prosecution need not adduce proof of intent, knowledge, or recklessness, though a defendant may be able to rely on general criminal defenses such as reasonable mistake of fact or necessity.⁸¹ Clearly then, any user who is not disabled, or whose animal is not accredited or adequately trained, cannot claim a valid defense and would *prima facie* be liable. To avoid reliance on these broad general defenses and provide further legal assurance to legitimate users, legislatures have enacted specific exemptions. In New South Wales for example, section 14 of the *Companion Animals Act 1998* (N.S.W.) prohibits dogs from certain public places, including within ten meters of play equipment,⁸² apparatus provided for food preparation,⁸³ as well as inside or outside of shopping centers.⁸⁴ It is not an offense, however, to bring an animal into these places if it meets the criteria for an “assistance animal.”⁸⁵

By contrast, a person who misrepresents the legal status of an animal to gain access to these restricted spaces could not rely upon this exemption, and thus, in theory, is liable for the offense.

Some regulatory regimes place legal liability for misuse not on the user of an assistance animal, but on the person or organization—in effect the ‘gatekeeper’—that exercises legal control of a particular space to which that animal may gain access. For example, in the Australian State of Victoria, it is unlawful for a taxi driver to allow an animal to access the passenger area of a taxi unless the animal is an assistance animal.⁸⁶ If the user deceives the driver about the assis-

⁷⁸ Harpur, *supra* note 5, at 49–50.

⁷⁹ SIMON BRONITT AND BERNADETTE MCSHERRY, *PRINCIPLES OF CRIMINAL LAW* 227–41 (4th ed. 2017).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Companion Animals Act 1998* (N.S.W.) s 14(1)(a).

⁸³ *Id.* s 14(1)(b).

⁸⁴ *Id.* s 14(1)(g).

⁸⁵ Section 5 of the *Companion Animals Act 1998* (N.S.W.) adopts the definition of “assistance animal” from section 9 of the *DDA*. *Id.* (Austl.) s 5(1).

⁸⁶ *Transport (Buses, Taxi-Cabs and Other Commercial Passenger Vehicles) 2016* (Vict.) reg 38 (Austl.). Under this regulation, “assistance animal” has the same meaning as it has in the *DDA*. (Austl.) *Id.* reg 38(3).

tance animal's status, then the taxi driver prima facie is in breach of the law and liable for a fine.⁸⁷ The burden is placed on the taxi driver to demonstrate that he or she mistakenly believed, honestly and reasonably, that the animal granted access was an assistance animal. This places taxi drivers in Victoria in an invidious position; being subject to liability for both granting animals access to their taxis that are not assistance animals, as well as for wrongfully preventing access to a user who is accompanied by an assistance animal. Oddly, there is no corresponding fine for a user who misrepresents, dishonestly or otherwise, the legal status of their animal.⁸⁸

The most serious forms of misuse, both in terms of the seriousness of harm caused and culpability involved, relate to users who make misrepresentations in order to obtain benefits to which they are not entitled. To be liable for theft or a related offense, the prosecution must establish that the misrepresentation was also dishonest.⁸⁹ Dishonesty must however fit within the legal definition; while the test is set by reference to community standards, users may be able to deny criminal liability for their misrepresentation on a number of grounds. With its associated stigma in the community, the law of theft and fraud requires a high level of blameworthiness: thus users who have acted under a "claim of right," cannot be liable for theft and related fraud offenses, provided that the conduct was accompanied by the honest and reasonable belief that it was justified by law.⁹⁰ As the legal complexity and uncertainties in Part III reveal, there is plenty of scope for the defense to raise reasonable doubt in relation to the question of dishonesty and claim of right. Proof of dishonesty, including rebutting any claim of right, lies on the prosecution and must be established beyond reasonable doubt.⁹¹

The burden of discharging the higher standard and onus of proof in prosecutions is less acute in civil actions for fraud. Persons or orga-

⁸⁷ *Id.* reg 38. There is no public register of fines under reg 38, *see id.* (stating that the fine is "10 penalty units"), though it is highly probable the issuing of such a fine would be reported in the media and a web search has not found reference of any such fine being issued.

⁸⁸ *See id.* (outlining fines that are currently in place regarding the transportation of assistance animals).

⁸⁹ Section 130.3 of the *Criminal Code* (Austl.) defines dishonesty as "(a) dishonest according to the standards of ordinary people; and (b) known by the defendant to be dishonest according to the standards of ordinary people." *Criminal Code Act 1995* (Austl.) s 130.3. This test reflects the position in English law in *Regina v Ghosh* (1982) 3 All ER 689. While dishonesty is objectively determined by reference to community standards, a finding of dishonesty cannot be made "independently of the knowledge or belief of the actual accused." BRONITT AND MCSHERRY, *supra* note 79, at 725.

⁹⁰ *Id.* at 720.

⁹¹ Depending on jurisdiction, claim of right is recognized either as a general defense that applies to any property offense, or as an element of the definition of dishonesty, namely, that a person is not dishonest where he or she believes honestly, but incorrectly, that the conduct was legally justified. *Id.* at 720. Claim of right operates as a defense of mistake of law, and there is no requirement that the mistake be reasonable in the circumstances.

nizations defrauded by ‘fake’ users into providing valuable benefits may consider instituting civil action for fraud to recover their losses. Acts of fraud in such cases can result in clearly quantifiable losses.⁹² Notwithstanding this potential civil liability, there have been no recorded civil suits in Australia relating to the fraudulent obtaining of benefits (services or property) through use of a fake assistance animal. From a practical standpoint, it is doubtful whether aggrieved consumers who have been supplied with defective assistance animals will have effective remedies against dubious training bodies given the difficulties (discussed above) of tracking down potential defendants and their assets.

Reliance on theft and related fraud offenses may be obviated in jurisdictions that have enacted “evidential offenses” that criminalize preparations or facilitations of the fraud, such as possession of fake identification and persons who make or supply the tools for committing other crimes.⁹³ These offenses take a number of forms. For instance, in Queensland, section 95 of the Guide, Hearing and Assistance Dogs Act 2009 provides that it is a criminal offense to make false or misleading statements while applying for an identification card.⁹⁴

The model of regulation above may be described as “indirect,” relying on existing criminal laws governing dishonesty generally, or specific forms of tax or welfare fraud.⁹⁵ However, utilizing existing offenses to cater with the problem of fake assistance animals may require some prosecutorial ingenuity, as well as bold judicial interpretation, to extend the existing offenses to these cases. New applications and interpretations may precipitate appeals to clarify the correctness of the approach, and in the meantime, regulatory agencies and duty-holders will continue to send mixed policy messages about the scope of

⁹² Such as airlines giving away free seats and hotels granting free access to pets. See, e.g., *Service Dogs*, QANTAS, <https://www.qantas.com/travel/airlines/service-dogs/global/en> [<https://perma.cc/BBW4-QPX5>] (accessed Jan. 19, 2018) (allowing service animal crates to be carried on flights “free of charge to and from the UK”); *Traveling with a service dog*, VIRGIN AUSTRALIA, <https://www.virginaustralia.com/au/en/plan/special-needs-assistance/travelling-with-an-assistance-dog/> [<https://perma.cc/LX9G-584K>] (accessed Jan. 19, 2018) (“Service Dogs are carried free of charge on Virgin Australia[] flights.”).

⁹³ See Frederick Schauer and Richard Zeckhauser, *Regulation by Generalization*, 1 REG. & GOVERNANCE, 68, 73–74 (2007) (providing an overview on the use of evidential offenses).

⁹⁴ The relevant statutory regimes in South Australia and Tasmania do not create offenses for misrepresentations, but merely revoke the improperly obtained identification card. *Dog and Cat Management Act* (S. Austl.) s 21A(4); *Guide Dogs and Hearing Dogs Act* (Tas.) s 3.

⁹⁵ This potentially extends to tax law. The process to claim an income reduction for the costs associated with a service animal allowed claimants to self-assess whether or not their animal satisfied the legal requirements of an assistance animal. There is, however, no evidence of actions against users fraudulently claiming tax benefits who have either misled authorities by faking disability or purchase sub-standard assistance animal training.

the legal rights and responsibilities in relation to the use of assistance animals. Under the present cloud of regulatory uncertainty, formal enforcement action against misuse will be rare. This enforcement deficit will, over time, potentially weaken the deterrent impact of and public confidence in anti-discrimination laws more generally.

In contrast to this indirect regulatory approach, some jurisdictions in the United States have adopted a “direct” regulatory response, enacting new legislative provisions that prohibit the misuse of assistance animals, whether by individual users or training bodies. In the United States, a number of States have directly targeted people who lie about having a disability in order to acquire an assistance dog. For example, in Idaho and Kansas it is an offense to pretend to be disabled to obtain a benefit,⁹⁶ and in Nebraska and Washington, it is an offense to pretend to be blind or to use a white cane or a guide dog if a person is not vision impaired.⁹⁷ Several States have prohibited people from falsely claiming their pets to be service animals. For example, in North Carolina and Nevada, the laws prohibit disguising a pet as an assistance or service animal;⁹⁸ in Florida the law prohibits conduct or verbal or written notice that disguises a pet as a service animal;⁹⁹ and in Utah, the prohibition against misrepresentation extends beyond written and verbal communication to the use of a distinctive disability service animal jacket.¹⁰⁰ The prohibitions in New York and Texas are limited to fitting or using a harness.¹⁰¹ It is a misdemeanor to perpetrate disability assistance fraud in those jurisdictions where it is an offense.¹⁰² The penalties range from a maximum imprisonment of six months, to a fine not exceeding \$1000, or both in California, to a small fine not exceeding \$500 in Nevada.¹⁰³

Some states have gone further in tackling the supply side of the market for fake assistance animals, by outlawing organizations that commercially produce fake assistance animal documentation and paraphernalia. Laws have been enacted to prohibit this trade in fake assistance animal identification in California,¹⁰⁴ Florida,¹⁰⁵ Maine,¹⁰⁶

⁹⁶ IDAHO CODE ANN. § 18-5811A (1997); KAN. STAT. ANN. § 39-1112 (2003).

⁹⁷ NEB. REV. STAT. ANN. § 28-1313 (1977); WASH. REV. CODE ANN. § 70.84.060 (1997).

⁹⁸ NC GEN. STAT. ANN. § 168-4.5 (2005); NEV. REV. STAT. ANN. § 426-805 (2005).

⁹⁹ FLA. STAT. § 413.08(9) (2015).

¹⁰⁰ UTAH CODE ANN. § 62A-5b-106 (2007).

¹⁰¹ N.Y. AGRIC. & MKTS. § 118 (Consol. 2010); TEX. HUM. RES. CODE ANN. § 121.006(a) (2013).

¹⁰² FLA. STAT. § 413.08(9); IDAHO CODE ANN. § 18-5811A; KAN. STAT. ANN. § 39-1112; N.Y. Agric. & Mkts. § 118; TEX. HUM. RES. CODE ANN. § 121.006(a); UTAH CODE ANN. § 62A-5b-106.

¹⁰³ CAL. PEN. CODE § 365.7 (Deering 1994); NEV. REV. STAT. § 426.805 (2005).

¹⁰⁴ CAL. PEN. CODE § 365.7 (Deering 1994).

¹⁰⁵ FLA. STAT. § 413.08(9).

¹⁰⁶ ME. REV. STAT. ANN. tit. 17, § 1314-A (2016).

Missouri,¹⁰⁷ New Hampshire,¹⁰⁸ New Mexico,¹⁰⁹ New York,¹¹⁰ and Utah.¹¹¹ The impetus for reform related to the risks posed by offering fake identification, risks that an inquiry by the Senate of California had noted related to the interests of the wider communities, business operations, and the animals themselves:

[t]he biggest backlash is creating public resentment of real service dogs. One act of disobedience, one minute of misbehaviour, one unfortunate attack from a faker can create a lifetime of public suspicion, mistrust and tension. Handicapped individuals who depend on their service dogs, and the animals themselves do not deserve the added stigma.¹¹²

These recent and diverse legislative responses in the United States, briefly outlined here, serve as a regulatory laboratory from which other jurisdictions, including Australia, can draw lessons.

V. CONCLUSION

Persons with a wide variety of disabilities benefit from anti-discrimination laws and policies that have extended legal protection to the access rights for assistance animals. The current laws in Australia and the United States are, however, blighted by confusion and uncertainty with a wide diversity of legal tests and processes for determining whether a particular user, use, accreditation, or training, stands within the bounds of legality. This is problematic where the disability is not obvious and it is not apparent how the accompanying animal serves to mitigate a particular disability. In the absence of a national or uniform system of accreditation, the difficulties in distinguishing between a companion animal and assistance animal creates the legal space for dishonest persons to claim disabilities and associated benefits without justification. This legal grey zone has in turn facilitated demand for the accreditation of fake (or perhaps inadequately trained) assistance animals.

By comparing and contrasting the legal position in Australia and the United States—including the indirect versus direct models of criminalization—it is apparent that the adoption of a direct regulatory response may assist in sharpening the legal lines between legitimate and illegitimate uses.

Ultimately, the lack of government certification creates a difficult situation where duty-holders and persons with disabilities need to negotiate access rights against opaque statutory definitions. Rather than leaving this until the point of access, arguably it would be desirable for federal governments to create a system where training institutions can become accredited and authorized to assess and accredit disability ser-

¹⁰⁷ MO. REV. STAT. § 209.204 (2005).

¹⁰⁸ N.H. REV. STAT. ANN. § 167-D:8 (2011).

¹⁰⁹ N.M. Stat. Ann. § 28-11-6 (2013).

¹¹⁰ N.Y. AGRIC. & MKTS. § 118.

¹¹¹ UTAH CODE ANN. § 62A-5b-106.

¹¹² BACKGROUND PAPER, *supra* note 11, at 12.

vice animals. These processes of obtaining accreditation for access rights would be similar to processes used to obtain disability car parking rights. From this process, standardized identification cards could be issued at the federal level. This regime should be supported by direct regulatory sanctions for wrongfully claiming an animal is an assistance animal and for supporting the fake assistance animal industry. This process would enhance the probability that persons with disabilities, especially invisible disabilities, will not have their access rights denied, while ensuring the safety of the public, persons with disabilities, and animals.