

# **Productivity Commission Inquiry into the DDA**

**A Submission by the Disability Council of NSW**

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## Executive Summary

The Disability Council, operating under the Community Welfare Act 1987, is the official advisory body to the NSW Government on disability issues and policy and acts in NSW as Commonwealth Disability Advisory Body commenting on Commonwealth issues that affect people with disabilities and their families in NSW.

The Disability Council's submission focuses on the following key points.

- No accurate socio-economic and general demographic data exists on people with disabilities' location and until such statistics exist and a measuring tool is developed for the extent of unmet need and disability discrimination all attempts to determine the state of change are questionable.
- People with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure such rights by the failure to recognise differential access and forms of participation as valid.
- Equity of access and social participation are central to the notion of citizenship and the aim of the government should be to ensure the social, attitudinal, architectural, medical, political and economic environment is sufficient to address the differences of all individuals.
- Several social changes that have benefited people with disabilities have occurred as a direct result of the DDA including unintended consequences, a 'stepless' society benefiting mothers with prams and the elderly by improving access to the built environment.
- The DDA's greatest impediments stem from it being complaints based, the onus of proof being placed on the complainant, discrete acts of discrimination being reviewed thus failing to address the systemic nature of discrimination.
- A further problem of the complaints basis of the legislation is the plethora of case law and precedent as the numerous individual cases that are successfully mediated cannot affect case law or set precedent even when they are closely related to a case being contested before the court.
- The DDA maintains the 'medical/deficit' definition of disability, locating the disability (rather than the impairment) with the individual rather than in the society's inability to address difference.
- This 'deficit' definition of disability, along with lack of exposure to issues affecting people with disability allows many social myths and value judgements to be imported to the legal system where legislation, intended to protect the rights of people with disabilities, can be used to legitimate abuses against them.
- The existence of 'unjustifiable hardship' as a defence abrogates the responsibility to ensure citizens' rights to participation and equitable treatment and the DDA is the only Commonwealth anti discrimination legislation, with such a caveat.

- The granting of exemptions to coverage by the DDA has also compromised its integrity.
- HREOC yet requires the legislative authority to ensure Action Plans are written to an acceptable standard, to educate departments in their drafting or to monitor their implementation.
- The existence of the defence of 'unjustifiable hardship' is inappropriate in omnibus legislation and for this reason above all others Council holds that omnibus legislation should be supported.
- Standards allow services to avoid an action if they meet specified conditions, and the continued use of unjustifiable hardship within the Standards allows services not meeting these conditions to justify non compliance.
- Legal complexities present difficulties for most complainants and they are compounded for those from Aboriginal Torres Strait Islander and Non English Speaking Backgrounds.
- The complaints process is currently so protracted that many people with disabilities choose not to lodge a complaint because it is considered that it would take too long to be heard while others refrain from complaining because proof of discrimination has to be so detailed and documented.
- There have been significant problems of process and these are partly attributable to lack of resources and a lack of commitment by Government to effectively consult the disability community.
- A public awareness campaign is needed to counter stigma, harassment and vilification as much as discriminatory practice.
- The DDA needs to be strengthened to require penalties for non-compliance by developing an enforcement role much like an Inspectorate reviewing breaches of Occupational Health and Safety legislation.
- An enforcement body should be established with the role of developing an audit tool, annually reporting to Parliament on the effectiveness of Australia's efforts to address systemic discrimination and discriminatory practice.
- More detailed data on people with disability and the extent of discrimination and should be used to form the basis of a *State of the Nation Report* explaining the impact of disability at a social, ecological as well as an economic level and this might be well used to inform public debate and policy.

## Recommendations

1. A social audit is commissioned to identify broad capturing data and indicators of the prevalence of disability discrimination and then track whether improvements are made or maintained.
2. A review of legislative definitions of disability is conducted and a consistent definition adopted which acknowledges the systemic nature of disability.
3. 'Unjustifiable hardship' is abolished as a defence under the DDA and industry is instead assisted to meet its social obligation to people with disabilities.
4. Exemptions under the DDA are abolished as exemptions do not exist in either the Sex Discrimination Act or the Racial Discrimination Act and their existence allows continued abuse of the right of people with disabilities to equal status as participating citizens.
5. The role HREOC plays in the retention of Action Plans is extended to include an educational and monitoring role in the development and review of Action Plans.
6. Protocols are developed to identify the parameters of 'reasonable accommodation' required by the DDA.
7. The Attorney General reviews the terms of reference of the Disability Standards Project to allow members to accurately reflect the views of the disability community even when they oppose the development of specific standards.
8. The Attorney General approves a wider more comprehensive debate on the value of standards under the DDA which includes representation from local (as well as national) representatives of people with disabilities and people with disabilities themselves.

9. HREOC's role is expanded to educate the public on the extent of discrimination and appropriate ways to reduce/address it and that punitive measures are adopted and enforced to address ongoing abuse of people with disabilities right to equally available and timely services.
10. A body is established with a role to audit efforts to address ongoing disability discrimination and report annually to Parliament on progress made.
11. The Commonwealth Disability Strategy is extended so that its coverage includes all business and all Australians.
12. Employment opportunities for people with disabilities are improved by extensive training for prospective employees and employees in junior positions with disabilities likely to have the skills for higher paid positions.
13. A quota system is adopted in Government to ensure the percentage of Government employees with disabilities equate with the percentage of people with disabilities at workforce age.
14. Businesses are encouraged to employ a percentage of employees with disabilities commensurate with the percentage of their market who are people with disabilities.
15. Employment opportunities for people with disabilities are improved by extensive training for prospective employees and employees in junior positions with disabilities likely to have the skills for higher paid positions.
16. Public awareness of disability is improved by public debate and discussion, promoting the benefits of employing people with disabilities and the social obligation to address discriminatory practice.
17. A State of the Nation Report is developed to fully document the social roles and experience of people with disabilities.

## **Introduction**

### *About the Disability Council of NSW*

The Disability Council of NSW is the official advisory body to the NSW Government on disability issues and policy. The Council, appointed by the Governor and reporting to the Minister for Disability Services, operates under the Community Welfare Act 1987 and is made up of a majority of members who have disabilities. In addition, there are members who have experience in the provision of services for people with disabilities, their families and carers.

The role of the Disability Council is to

- research, evaluate and implement all government policies relating to disability issues and assess their impact on people with disabilities;
- advise government on priorities relating to services provided for people with disabilities;
- promote the integration of people with disabilities into the community through community awareness and education;
- encourage diversity, flexibility and innovation in services through constant consultation with people with disabilities, their families and carers, and
- function in NSW as the State's Disability Advisory Body to the Commonwealth Government, commenting on Commonwealth issues that affect people with disabilities and their families in NSW.

Members of the Disability Council are selected on the basis of their experience of disability and their understanding of issues, knowledge of service delivery and government policy.

### *The structure of the Submission*

For the sake clarity the Disability Council of NSW has been referred to as Council, Disability Discrimination Act 1992 has been referred to as the DDA, and the Human Rights and Equal Opportunity Commission as HREOC throughout this submission. The Productivity Commission has been referred to as 'the Commission' to distinguish reference to it from reference to HREOC. The submission first addresses broader Social Welfare considerations before commenting on the impact of the DDA, ways to improve its effectiveness and other means Government might pursue to address discrimination.

### *Council's proposed input to the Inquiry*

Council will limit this submission to comment on specific Terms of Reference of the Inquiry. It is proposed to address the following:

- a) the social impacts in terms of costs and benefits that the legislation has had upon the community as a whole and people with disabilities, in particular its effectiveness in eliminating, as far as possible, discrimination on the ground of disability, ensuring equality between people with disabilities and others in the

community, and promoting recognition and acceptance of the rights of people with disabilities;

- c) without limiting the matters that may be taken into account, in assessing the matters in (a) regard should be had, where relevant, to:
- i) social welfare and equity considerations, including those relating to people with disabilities, including community service obligations;
  - ii) government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity;
  - iii) economic and regional development, including employment and investment growth;
  - iv) the interests of consumers generally or of a class of consumers (including people with disabilities);
  - v) the competitiveness of Australian business, including small business;
- d) the need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication.

In addition to lodging this Submission it is proposed that Council will provide input to the public hearing in May/June, a response to the Commission's draft report and comment at the public hearing following that report.

## **Social, Welfare and Equity Considerations**

### *The need for accurate statistics and a measuring tool*

People with disabilities are not a homogenous group. They are people of different ages, languages, races and cultures; different genders, experiences, lifestyles and choices. They have a diverse range of incomes, histories, and political and social commitments. They understand, describe and identify with disability in different ways.

Yet the majority of people with disabilities are in the lower socio-economic strata. Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers: Summary of Findings, 1998*, found that 47% of people with disabilities were in the lowest two income groups, compared with 30% of people with no disability. It was also found that the greater the degree of restriction experienced by a person with a disability the higher the likelihood they will be represented among low income groups (50% of people with disabilities with specific restrictions, 60% with severe/profound restrictions).

These statistics suggest a strong correlation between disability and welfare so it is surprising that Morrow's research suggests otherwise. He notes:

*...regional analysis has revealed that the incidence of disability has only a weak relationship to the incidence of the Disability Support Pension (DSP) ... (and) ... that DSP receipt (can) be modelled with 97% accuracy using unemployment, age and education data.<sup>1</sup>*

Yet the assumption that people with disabilities and acceptance of welfare support is strongly correlated is widespread. Its consequence is that equitable treatment of people with disabilities is to some extent countered by the misconception that they are less productive and less value to the commonweal.

No accurate statistics yet exist on the location and variation in occupation and/or support needs of people with disabilities. The ABS Report (noted above) suggested that in 1998 people with disabilities were participating in many areas of Australian life, although often not to the same extent as the overall population. Additionally, that they were more likely to be living in the community than in previous years, less likely to use public transport or to have a driver's licence than the general population; tended to report lower levels of health, were less likely to have finished school and less likely to be actively involved in the paid workforce.

These statistics are a major source of research compiled at the national level on the subject. Yet they fail to quantify the number of people with disabilities in open employment (either requiring or not requiring adjustments to the workplace), or the number in supported employment, state schools, special schools, requiring post school support or seeking open employment.

It needs to be acknowledged that there are many factors other than discrimination which influence the participation of people with disabilities in society. Yet Council contends that it is likely that discrimination is a major factor accounting for the lack of participation of people with disabilities in key areas of social life.

Base line statistics are needed to capture a broader picture of people with disabilities' participation in the social arena. Without such statistics no measurement is possible of the extent of disability, or disability discrimination. The National Census could be a reliable and valuable data source to inform social modelling/ microsimulation modelling (as carried out by the National Centre for Social and Economic Modelling, University of Canberra). Questions to capture this broader picture could be incorporated in ABS updates on the Statistics in *Disability Ageing*

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<sup>1</sup> Morrow I. (1998) *The Growth of Disability Support Pension Receipt among Australian Males: 1971-1996*, Canberra, Strategic Analysis and Evaluation Branch, Department of Social Security.

*and Carers* (above). At present, statistics on disability are extremely limited. Until more extensive statistics exist and tool is developed to measure the extent of unmet need and disability discrimination all attempts to determine the state of change are questionable.

### **Recommendation 1**

A social audit is commissioned to identify broad capturing data and indicators of the prevalence of disability discrimination and then track whether improvements are made or maintained.

### *The Social Contract and Equity*

The Senate Legal and Constitutional References Committee has summarised citizenship as consisting of the following four linked elements:

- (demonstrating) the quality of full membership and active participation;
- (occurring) in a just, democratic and mutually supportive political community;
- including the individual and collective rights and responsibilities - legal, social, economic, cultural and environmental - that go with such membership; and
- (having) the public and private policies and resources needed to sustain it<sup>2</sup>

However, people with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure these rights are upheld. Those who cannot read or write, or who require accessible formats, cannot complete registration forms, citizens who have had few educational opportunities, and /or who live in institutional settings, may have little support or assistance to register and exercise their right to vote. While they are, ostensibly, equally entitled, they are effectively disempowered by the failure to recognise differential access and forms of participation as valid.

Similarly, many are exempted from jury duty (though they may wish to act on a jury) when their disability will not allow them access to the jury box. In a courtroom a deaf or hearing impaired person is disadvantaged by their inability to hear a judgement or a defence, no hearing loop or interpreters being made available. Thus, equity cannot be achieved for all citizens until it is recognisable as 'equity of outcomes'.

### *The extent of disability discrimination*

Attempts to address the issue of discrimination require acceptance of the requirement to restructure the society to meet the needs of all. In addressing the

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<sup>2</sup> Senate Legal and Constitutional Reference Committee 1995. *Discussion Paper on a system of National Citizenship Indicators*, Senate Legal and Constitutional Reference Committee, Parliament of the Commonwealth of Australia, p20.

needs of people with disabilities, this is often seen as making concessions to a 'special' group at a cost to the public purse. Council contends that equity of access and social participation are central to the notion of citizenship and that the aim of the government, and its citizens, should be to ensure the social, attitudinal, architectural, medical, political and economic environment is sufficient to address the differences of all individuals. For a government to do otherwise is to abrogate its social obligation to its citizens.

Society discriminates against someone when it fails to meet this obligation. It discriminates against people with different impairments when, due to their impairments, their needs are not addressed. Without accurate measurement of the location and occupation of people with disabilities it is impossible to define how much discrimination relates to inaccessible accommodation, inaccessible information, inappropriate service delivery, or reduced educational or employment opportunity. Yet the reality of this inequitable treatment equates with the lived experience of all people with disabilities (*i.e.* people presented with such barriers to equal participation).

#### *The social benefit of legislation*

There is no doubt that several social changes that have benefited people with disabilities have occurred as a direct result of the DDA. The existence of the legislation and the promotion of its objectives, the development of Action Plans and the publicity of its findings in specific cases have all informed the public discourse on disability. The Transport Standard, requiring accessible public transport within a specific timeframe, will benefit future generations of people with disabilities. Yet there are some social change that might be more appropriately attributed to the public profile and effective lobbying of people with disabilities.

Whether the matter is attributable to the existence of the DDA or wider lobbying of activists with disabilities there are unintended consequences of a 'stepless' society: mothers with prams and the elderly being better able to access the environment. Similarly, captions on films assist both Deaf people and (in the case of foreign films) many others. The increasing accessible environment is therefore 'family friendly' in keeping with policies of the current government and will benefit Australia's increasing aged population.

One great improvement on past legislation that is attributable directly to the DDA is the opportunity for associates of people with disabilities to bring cases of discrimination as 'companions' to the person with a disability who was discriminated against. In this way the DDA has recognised a wider social consequence of discrimination in that discrimination against one person will negatively impact on their associates. An example might be when two people decide to see a film, one being in a wheelchair, and the cinema is inaccessible. (Both parties are discriminated against, and each able to bring a case under the DDA, as in this

instance being unable to enjoy the film together results from discrimination affecting both).

Further, the DDA's coverage of harassment of people with disabilities, and its coverage of both direct and indirect discrimination, have all positively contributed to the lives/ treatment of people with disabilities. Similarly the penalty for victimisation (DDA, Section 42 (1) and those covered under Part 5 Other Offences provides some punitive power to HREOC. Yet Council contends that such powers could be justifiably extended (see *Strengthening the Legislation* below).

Its most powerful benefits can be attributed to the consequence of well publicised successful cases (e.g. Local Council reviewing access provisions following one publicised successful complaint against a Local Council). Yet this benefit, being the vehicle for desired outcomes for *complainants* is also closely linked to one of its greatest impediments.

## **Structural impediments to effectiveness**

### *The complaints basis of the DDA*

As the DDA is complaints based its use as an effective tool to counter the ongoing systemic discrimination experienced by people with disabilities is severely limited. The DDA, if the logic of the Moxon vs Westbus case (below) is followed, is reduced to a response to specific, discreet acts of discrimination. This may explain the limited number of cases pursued by people with a disability to the Federal Court. The legal interpretation only acknowledges discrimination applying in a particular incidence and as such fails to address systemic discrimination.

Thus, legal decisions, hanging on points of law, seem incommensurate with the 'intent' of the DDA. An example in this regard is the case of Moxon vs Westbus in which Mr Moxon alleged discrimination as he was unable to board a Westbus bus (his wheelchair being unable to ascend steps). The court's findings, that he was discriminated against on the occasion he attempted to board the bus **but** needed to raise a further complaint each time he attempted to board a bus (the discrimination applying to the incident), failed to address the issue of systemic discrimination. It is impractical for Mr Moxon to raise a complaint each time he is unable to board a bus and the ongoing failure of Westbus to provide accessible transport goes unaddressed by the DDA. The development of the Transport Standard and its time limited, graded compliance process does little to address the present ongoing discrimination Mr Moxon (and others) continue to experience.

While Mr Moxon can clearly prove he is being continually treated differently than those members of the public able to board a bus or coach his ability to prove it is unlawful is too difficult given the court's interpretation of the DDA.

This 'case by case' basis of the legislation is further restricted by its limited coverage. For example, should a person who is unable to drive due to a disability consider a position advertised as requiring a driving license not so, the ability to drive not being an intrinsic requirement of the job (*i.e* the job calls for a willingness to travel rather than drive) he/she is unable to raise a complaint of discrimination unless they wish to apply for the job and can demonstrate that, without the criterion, they would be able to fulfill all requirements of the position. This example makes clear that the DDA is **not** intended to address the existence of the discriminatory practice but to act as an avenue of redress for an aggrieved individual.

Thus, the DDA remains an instance based approach ineffective in addressing systemic discrimination, particularly when the discrimination or its impact is difficult to quantify. This results in its prominent use in addressing physical barriers although it was intended to be used more broadly.

A further problem of the complaints basis of the legislation is the plethora of case law and precedent. The numerous individual cases that are successfully mediated cannot affect case law or set precedent even when they are closely related to a case being contested before the court.

#### *Legislative definitions of disability*

A further structural impediment affecting the DDA, and indeed all legislation, is the acceptance of a 'deficit' model of disability. The legislative definition of disability (and impairment) changes considerably from Act to Act and a consistent definition is required.

The Anti Discrimination Act (1977) initially defined physical impairment and intellectual impairment but not disability<sup>3</sup>. Physical impairment was defined as '*a defect or disturbance in the normal structure and functioning of the body*' and intellectual impairment was defined as '*a defect or disturbance in the normal structure and functioning of the brain*'.

These definitions led to many difficulties in implementing the Act, disadvantaging the victims of discrimination it purported to protect. People with epilepsy or cerebral palsy for example needed to define themselves as having an intellectual disability in order to be covered by the Act. Many were unwilling to do this as they identified themselves as people with physical disability. The Act was therefore amended but remained within the medical model, now defining disability as '*a total or partial loss of a person's bodily or mental functions*' (among other things) attempting to align its definition to that of the DDA.

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<sup>3</sup> It is interesting to note that this 'omnibus' legislation, enacted in 1977, did not include physical impairment as a basis for discrimination until 1981, nor intellectual impairment until 1982.

The DDA is far more encompassing in its definition/ coverage than this and other legislation, yet it defines disability as:

- “a total or partial loss of the person’s bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness; or
- the malfunction, malformation, or disfigurement of a part of the person’s body; or
- disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour...”

It maintains the ‘medical/deficit’ definition of disability incorporated in other Commonwealth and State legislation. As such it locates the disability (rather than the impairment) with the individual rather than, as argued above, the society’s inability to address difference. It is Council’s contention that this definition of disability, along with lack of exposure to issues affecting people with disability allows many social myths and value judgements to be imported to the legal system, and that legislation, intended to protect/assist people with disabilities, can be thus used to legitimate abuses against them.

The Purvis case (Purvis v State of NSW (Department of Education and Training) (2002) FCA 503) is a case in point. It is a significant case as its findings go to the heart of the definition of disability accepted under the DDA and will set precedent for future cases.

HREOC’s original findings (in favour of the claimant) were overturned on appeal by Justice Emmet (FCA 1199). An appeal to the Full Court of the Federal Court was dismissed. In dismissing the appeal the Full Court held that: “conduct that is a consequence of a disability within the meaning of s. 4 of the DDA is not itself the disability”. This restriction on the ‘definition’ sets precedent for future interpretation, establishing another hurdle to a person with a disability attempting to establish that systemic barriers hinder equitable treatment.

### **Recommendation 2**

A review of legislative definitions of disability is conducted and a consistent definition adopted which acknowledges the systemic nature of disability.

### *Unjustifiable Hardship*

In accepting the defence of unjustifiable hardship, which appears to be an attempt to reduce the cost of compliance, the government has replaced the obligation to ensure equitable treatment of its citizens with a requirement to address 'special needs' and turned social participation from a citizen's right to a 'economic convenience'.

The existence of 'unjustifiable hardship' as a defence abrogates the responsibility to ensure citizens' rights to participation and equitable treatment. The DDA is the only anti-discrimination legislation, within the suite of Federal protections in Australia, with coverage contingent on the costs to achieve its objectives. In neither the Racial Discrimination Act 1975, nor the Sex Discrimination Act 1984 would such a caveat be acceptable.

It would be more in keeping with the Government's acknowledgement of the rights of all citizens to participate equally in society to seek means to assist industry in reducing social barriers facing people with disabilities (e.g. by approving tax incentives, revising the building code to ensure all dwellings, including newly constructed residential accommodation, are accessible).

#### **Recommendation 3**

'Unjustifiable hardship' is abolished as a defence under the DDA and industry is instead assisted to meet its social obligation to people with disabilities.

### *Exemptions*

The granting of exemptions to coverage by the DDA has also compromised its integrity. As an example, the Immigration Act (and subsequent actions of the Department of Immigration and Multicultural Affairs in administering the Act) is exempt from the provisions of the DDA. Therefore, in terms of policy and practice, people with disabilities are often discriminated against in applying for residency and visas are rejected on the basis of a person's disability as a matter of course.

The rationale is that people with disabilities place an undue burden or hardship on the Australian community because our society does not have the necessary services, supports and equality of opportunity to reasonably expect people with a disability to be self supporting.

Similarly, provisions under the Social Security's Act 1991, while discriminatory, are not unlawful, being exempted under the DDA (Sec. 51 (1) (d)). The requirement for a person who enters the country with an existing disability to wait ten years from the date of becoming a permanent resident to be eligible to apply for the Disability Support Pension, discriminates against that specific group. Those injured following the permanent residency being granted having to wait only two years.

A further anomaly relates to those being employed to carry out domestic duties within an individual's home being exempted from coverage under the DDA (DDA Section 15 (3)). Such an anomaly needs to be addressed as discrimination against an employee should be unlawful regardless of the 'type' or location of employment. Other employees within the home (eg contract workers, support workers and attendants) are covered under the DDA, thus it is not merely the location but the 'type of duties'.

#### **Recommendation 4**

Exemptions under the DDA are abolished as exemptions do not exist in either the Sex Discrimination Act or the Racial Discrimination Act and their existence allows continued abuse of the rights of people with disabilities to equal status as participating citizens.

#### *The weakness of Action Plans*

The DDA has authorised HREOC to retain Action Plans written by State and Federal Departments and other parties wishing to develop a partial defence against the charge of discriminatory practices. While a boon to raising the profile of the DDA and raising awareness of disability HREOC has no authority to ensure Action Plans are written to an acceptable standard or educate departments in the drafting of Action Plans or the acknowledgement of discriminatory practice. There are some Action Plans registered with HREOC that suggest laudable means to ensure responsibility for review of practice and reduction of discrimination. For example, the NSW Attorney General's Action Plan where responsibility is tied to the duties of line management. Yet in the main they are poorly conceived and designed and in need of significant improvements.

Despite their weakness Council does recognize that there have been significant advances received through merely the threat of a "DDA Complaint". Similarly the requirement to develop Action Plans to address current discriminatory practice has had a positive effect. Though many of the Action Plans forwarded are of low quality and no process has been implemented to monitor these Plans awareness has been raised by their construction. A number of providers have amended plans or redesigned their facilities without an action being raised. Changes have been made merely through the provision of advice that they could be in breach of the Act and therefore liable prosecution.

#### **Recommendation 5**

The role HREOC plays in the retention of Action Plans is extended to include an educational and monitoring role in the development and review of Action Plans.

### *Restriction of targeted legislation*

Omnibus legislation has several advantages over targeted legislation. Consistent terms of discrimination can be incorporated into the legislation making it clearer to all what constitutes unlawful discrimination (regardless of its basis: gender, race or disability). The existence of the defence of 'unjustifiable hardship' (discussed above) would be inappropriate in omnibus legislation and for this reason above all others Council holds that omnibus legislation should be supported.

There is also a tendency in interpreting targeted legislation to address the targeted group as a specific subgroup of the population with unique 'discrimination' difficulties rather than viewing discrimination itself as an anathema to a democratic society.

### *Reasonable Accommodation*

Reasonable Accommodation, essential to interpretation of the DDA, has no clear meaning within the Act. This creates difficulties as one employer may interpret the term 'reasonable' in a very narrow sense while another may interpret it broadly. It is also difficult for a potential complainant to judge whether accommodations made are to be considered reasonable. Resources need to be made available to develop a set of measurable factors leading to protocols for the determination of 'reasonable' accommodation.

### **Recommendation 6**

Protocols are developed to identify the parameters of 'reasonable accommodation' required by the DDA.

### *Standards*

A further difficulty with the creation of omnibus legislation is the existence of Standards under the DDA. The Transport Standard suggests several significant benefits to most people with disabilities. While not a structural deficit of the legislation there are several difficulties with the standards process (discussed below) and difficulties, noted here, arising from their position in complaints based legislation.

The first practical difficulty is that there appears no actual (legal) compulsion for a provider to comply with a DDA Standard once it is adopted. The complaints based focus of the DDA leaves the burden of proof that a standard is not being met with the complainant. If a complainant feels that a company is not meeting the quota for increasing the number of accessible transport services over the next 20 years (as an example) it has to be proven. Most complainants will not have the wherewithal to monitor progress on standards. The obligation remains on the individual to prove the Standard has not been met and again that it would not constitute an unjustifiable hardship to comply.

Further the retention of unjustifiable hardship provisions in the Standards appears to have been a decision made late in the development of Standards and the extent of consultation on this matter is questionable. There is a strong view held in the community that the Standards as they apply under the DDA will actually diminish the rights of people with disabilities. Many believe that the Act as it stood allowed them the opportunity to lodge a complaint if and when they felt aggrieved. The introduction of Standards will allow the service to be monitored for compliance against Standards and to avoid an action if they meet specified conditions, despite the disadvantage to the person with a disability.

## **Process issues, their impact and consequence**

### *Complexity*

There are legal complexities in determining;

- responsibility;
- level of lawfulness;
- appropriate compensation, and
- equitable outcomes.

Each serves to reduce the likelihood of complaints being raised. While these complexities present difficulties for most complainants (*i.e.* all without legal training) they are compounded for those from Aboriginal Torres Strait Islander and Non English Speaking Backgrounds.

The role of HREOC in the conciliation of a complaint is vital to the success or failure of the legislation to remove discrimination against people with disabilities in the community. Yet the process is currently so protracted that many people with disabilities choose not to lodge a complaint because it is considered that it would take too long to be heard. Others have felt that the onus of proof having to be so detailed and documented is a deterrent to preparing a case. Often the discrimination is manifested in such a way that the aggrieved is hurt or humiliated but is unable to put into the written word the actions that brought on this response. To expect a person to establish proof in these instances and then that it would be justified to expect not to be discriminated under the circumstance is considered overly harsh and an impractical way to address change.

This problem is compounded when a complainant seeks to present a representative complaint. The added legal difficulties in proving that the complainant is a true representative of the aggrieved population (specified in the DDA) make it yet more onerous to present a case.

### *Standards Development and Consultations*

The Standards development process has been an extended exercise, with only one Standard adopted and appended to legislation to date. The disability sector has been highly critical of the process yet the voice of dissent is well muffled. The draft Standards for

Education, Employment, Access to the Built Environment, etc., are still in development and will be yet be subject to numerous drafts.

The Standards Project has been funded and will continue to be funded only while it progresses the development of standards. This is a profound restriction on its outlook as its members are unable to voice the opinion that a standard should not be adopted in a specific area (e.g. employment). When the majority of people with disabilities are opposed to a standard (as was the case with the employment standard) the people with disabilities purportedly representing their voice on the Standards Project cannot support the view of this majority. Their position has been determined prior to their appointment – they must support the adoption of standards or risk their funding.

The consultation process too has had many critics. Some ‘consultations’ have seemed closer to a ‘marketing exercise’ than a genuine attempt to gain community opinion. In 1998 the Disability Council advised the Attorney General of process issues needing to be addressed using the example of a national consultation on the Employment Standard. This exercise was severely criticized by Council and major lobbyists across the disability community in NSW. A copy of Council’s Briefing to the Commonwealth Attorney General is appended for information.

Further, The Attorney General has restricted the Standards Project regarding the bodies it can consult. The process requires that the Standards Project Chairperson consult only with the National Disability Advisory Council and the Caucus of Commonwealth peak bodies (Caucus). This has three major drawbacks. The first is that it is dependent on the federal peaks to consult with their state based equivalents and for those bodies to consult with people with disabilities. The process is flawed as information fails to move up and down this line of communication.

A second problem is that there is no Commonwealth peak representing people with psychiatric disability on Caucus. Council has recommended to the Attorney General that the Standards Project Chairperson be permitted to consult with the Mental Health Coordinating Council of Australia, the national peak of service associations and has a strong consumer representation on its management board. The third difficulty is that the National Council for Intellectual Disability has very little interaction with its state equivalents and no real management input from people with intellectual disability. This, in effect means that information on the viability and advisability of standards gets very little ‘grass roots’ input.

The procedure for adopting of Standards is also problematic in that the Standards are negotiated with business and other financial stakeholders rather than promoted as a means of redressing society’s failure to provide mechanisms for the participation of all citizens. The standards can thus be ‘watered down’ when businesses put cost factors before the rights of citizens to participate fully in the wider society.

Discrimination is everyone's business and Government needs to move proactively with public consultations addressing the need for Standards and (at least among the disability community) determining their support by public debate.

**Recommendation 7**

The Attorney General reviews the terms of reference of the Disability Standards Project to allow members to accurately reflect the views of the disability community even when they oppose the development of specific standards.

**Recommendation 8**

The Attorney General approves a wider more comprehensive debate on the value of standards under the DDA which includes representation from local (as well as national) representatives of people with disabilities and people with disabilities themselves.

## **Improving effectiveness of the DDA**

### *The consequence of limited resources*

While the consultation process of the Standards Project has significant failings it is perhaps understandable given its limited resources (one individual, currently Paul Larcombe, is funded to gather information Australia wide). Similarly, the under-resourcing of HREOC's Disability Rights Section (three staff in NSW) suggests a lack of Government commitment to the process.

The ten years taken to agree on a single standard under the legislation is principally due to the lack of funding by Government. This implies a lack of commitment to a group of citizens historically disfranchised and subject to long term systemic discrimination. The structure of the DDA as a 'complaints based' mechanism further suggests Governments failure to acknowledge its obligation to these citizens as the onus of proof of discrimination is placed with the complainant and ongoing systemic discrimination is not addressed appropriately.

The lack of resources and commitment is accentuated by comparison with the American experience where the development of Standards to address rights received extensive funding in acknowledgement of its Government's failure to meet its obligation to its citizens.

### *Extending HREOC's role*

While HREOC is seen to have an educative role it is under-staffed and under-resourced. The lack of resources and the lack of power to enforce compliance with the legislation are two major factors affecting the effectiveness of the DDA. Further, as noted above, its role in the collection of Action Plans needs to be extended to include educating those providing Action Plans to improve their scope and quality. A role in monitoring attempts at addressing discriminatory practice would be of great value and HREOC may be the appropriate body to monitor this process.

Current inadequacies in addressing legislative obligations include attempts to make buildings accessible, provide equal opportunity in employment, and register appropriate licensed accessible taxis for people unable to travel in all taxis. Some examples might include failure to meet building code or access standard regulations when purportedly designing/building accessible premises (making a ramp one in three gradient when the standard calls for one in fourteen), insisting on drivers licenses for jobs that require only a 'willingness to travel' (discriminating against those unable to drive due to a disability), providing 'accessible cabs' not properly fitted with safety harnesses, or licensed to carry two passengers but unable to carry two with safety.

It would be worthwhile extending HREOC's role (or extending the coverage of the DDA) to provide this monitoring as such a monitoring role could include an educational component. Some public buildings and services (required by the DDA to be accessible) are not so although an attempt has been made to provide access. In such cases there is a role for better monitoring by building inspectors and better education of building inspectors, architects and builders.

On other occasions there is a clear disregard for regulation and sometimes a pernicious misuse of power, ignoring the intent of legislation or exploiting the vulnerability of people with disabilities. To focus on the taxi industry as one area where such abuse is rife examples include:

- the demand for signed blank cab vouchers,
- the practice of signing vouchers on behalf of the person with the disability who is unable (due to their position in the cab) to see the meter,
- licensing taxis that do not fit licensing requirements (like the roof being too low or safety straps (seat belts) not being available,
- refusing to pick up a fare because the passenger is known to be too much bother,
- using accessible taxis for the most profitable enterprise (e.g. delivering flowers on Valentine's Day) when license restrictions note the licenses are provided principally for the purpose of transporting disabled passengers.

The owner of one major taxi company in Sydney, to restrict competition has purchased a significant number of accessible taxi plates and put them in storage, effectively reducing the limited number of accessible taxis on the road. Complaints boards that are currently in existence fail to respond to complaints as the industry fails to see the issue in terms of human rights abuse.

Other instances of abuse can include sexual or physical abuse where the person due to their disability is unable to mount a successful complaint (e.g. the blind victim of abuse may not be able to identify the aggressor). Such instances of abuse require policing, not merely monitoring, and a strengthening of the legislation, to demand compliance (as with Occupational Health and Safety breaches) is arguably the best means of reducing such practices.

### *Strengthening the Legislation*

Initially the DDA gave a three year exemption to any act being done in compliance with and Commonwealth State or Territory legislation. This blanket exemption was repealed and Division 5 now specifies the legislation continuing to be exempted from compliance.

Yet the fact that certain legislation remains exempt from compliance indicates compliance with the DDA is less important to Government than compliance with the exempted legislation. This suggests a lack of commitment by Government to address all aspects of disability discrimination.

Council contends that the Act needs to be strengthened to demand compliance. Compliance with the Act requires not only a more proactive educative role for HREOC (suggested above) but the development of a body with legislative authority and an enforcement role.

A monitoring body that would function like WorkCover NSW or the Environmental Protection Authority is required to monitor compliance with the legislative requirements. It would ideally be able to enforce compliance with the DDA and penalize businesses who take no steps to comply. It would also be advantageous if this body were to audit government and businesses on an annual basis and report to Parliament on Australia's progress in meeting the challenge to make Australia a fair and equitable society.

#### **Recommendation 9**

HREOC's role is expanded to educate the public on the extent of discrimination and appropriate ways to reduce/address it and that punitive measures are adopted and enforced to address ongoing abuse of people with disabilities rights to equally available and timely services.

#### **Recommendation 10**

A body is established with a role to audit efforts to address ongoing disability discrimination and report annually to Parliament on progress made.

### *Widening Government focus and developing a national awareness*

The few advertised cases won by HREOC over ten years and the limited number of Action Plans held are both telling indicators showing that systemic discrimination is not being successfully addressed. The Commonwealth Disability Strategy currently covering developments in the Commonwealth public sector must be extended to acknowledge the Commonwealth's commitment to work with industry to address discrimination across the nation.

There is a need to go beyond the DDA in requiring compliance. Education of government bodies, the business sector and the general public is but part of the solution.

In recognition of the effect of long term systemic discrimination Government should address the shortfall in employment opportunities for people with disabilities. These could be improved by extensive training for prospective employees and employees with disabilities in junior positions likely to have the skills for higher paid positions.

Demanding quotas of staff with disabilities, or delegated positions (as with Aboriginal and Torres Strait Islanders under Section 14 (d) of the Anti-Discrimination Act 1977) is one way to address the clear lack of equity in employment.

Businesses might be induced (or required) to tie the number of staff with disabilities to the percentage of people with disabilities in their market as a means of addressing the current shortfall of the percentage of people with disabilities in employment.

Public awareness has to be raised to counter stigma, harassment and vilification as much as discriminatory practice. Several issues need to be addressed including the value of a diverse community, including people of different ethnicities and different disabilities, the need for a 'stepless society', information in alternative formats, improved educational facilities, employment and recreational opportunities.

Use of the Media in informing this debate is essential yet it might be preceded by education of the media (and the Government). Developing accurate statistical data may be a role for the ABS or NATSEM. It could be used to form the basis of a *State of the Nation Report* explaining the impact of disability at a social, ecological as well as an economic level and this might be well used to inform public debate and public policy.

**Recommendation 11**

The Commonwealth Disability Strategy is extended so that its coverage includes all business and all Australians.

**Recommendation 12**

Employment opportunities for people with disabilities are improved by extensive training for prospective employees and employees in junior positions with disabilities likely to have the skills for higher paid positions.

**Recommendation 13**

A quota system is adopted in Government to ensure the percentage of Government employees with disabilities equate with the percentage of people with disabilities at workforce age.

**Recommendation 14**

Businesses are encouraged to employ a percentage of employees with disabilities commensurate with the percentage of their market who are people with disabilities.

**Recommendation 15**

Employment opportunities for people with disabilities are improved by extensive training for prospective employees and employees in junior positions with disabilities likely to have the skills for higher paid positions.

**Recommendation 16**

Public awareness of disability is improved by public debate and discussion, promoting the benefits of employing people with disabilities and the social obligation to address discriminatory practice.

**Recommendation 17**

A State of the Nation Report is developed to fully document the social roles and experience of people with disabilities.

**Conclusion**

In conclusion, the DDA has had a significant impact on the lives of people with disabilities over the past ten years and will continue to do so. One of its greatest benefits is that it has raised the profile of the rights of people with a disability and expectations about those rights. However, it could have achieved much more had it been designed differently, had the inherent contradictions been removed and had it been “rights based” rather than “complaints based”.

Broader strategies need to be seriously considered to implement the DDA along with the further development of Standards, including the development of a monitoring role and sanctions against ignoring standards. These strategies must, as their core aim, ensure the rights and opportunities for people with disabilities to receive barrier free services are upheld and not diminished. The consultation process also requires considerable attention and this is an area where greater resources need to be applied.

## **Appendix 1**

### **98.014.02 JH**

#### **Briefing Note**

#### **Consumer dissatisfaction with Revised DDA Employment Standards**

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**Issue:** The Revised Disability Discrimination Act (DDA) Employment Standards, Version 2, (Jan. 1998) is being presented to people with disabilities without sufficient care to ensure informed criticism from those most affected by the legislation.

**Background:** The revised draft of the DDA Employment Standards is the product of the Disability Standards Subcommittee of the National Advisory Committee on Discrimination in Employment and Occupation. The document was released for community comment in January 1998.

A nationwide satellite 'community consultation' (including participants from 13 locations) was coordinated by the DDA Standards Project Team, Commonwealth Attorney General's Department, on 23/3/98.

The 'consultation' was advertised as a forum for information exchange, considering key issues such as the relationship between Standards and the DDA and/or the parameters of key concepts like 'unjustifiable hardship'.

The 'consultation' was conducted in a manner which angered participants from Sydney who felt their questions were ignored and debate stifled.

This view was supported by:

- the location for the 'consultation' not being advised to all participants until the morning of the 'consultation'
- documentation accompanying notice of the meeting not being identified as being endorsed by the Attorney General, presenting contradictory views, and being too extensive to be read in the time span permitted
- the parameters of discussion being restricted by the DDA Standards Project Team (who were seen as following a preset Agenda)
- the questions asked by the Sydney participants (and faxed to Canberra for inclusion in discussion) going unanswered.

**Current Position** The Sydney participants in the 'consultation' of 23/3/98 expressed the view that the decision to develop Standards had been made prior to gaining informed opinion from people with disabilities, the group most clearly affected by the legislation.

Further, that while industry might support Standards in their current form, peak bodies representing people with disabilities saw their adoption as contrary to the best interest of people with disabilities.

Sydney participants in the 'consultation' have suggested a moratorium be placed on the Attorney General's decisions on the matter of the adoption of Standards under the DDA until people with disabilities are better informed of the impact of such Standards on rights currently guaranteed under the DDA.

**Comment:** The revised draft of the DDA Employment Standards represent a clear improvement on the first draft (circulated for comment until February 1997). However, it is clear following discussion on 23/3/98, that the development of an Employment Standard is not widely supported as:

- it is not seen as beneficial to people with disabilities by representative peaks
- it requires a Standards monitoring mechanism (yet to be agreed to by the Commonwealth Government)
- an awareness/education budget for industry and the sector are required to precede debate (and thus better informed discussion)
- dedicated Federal funding is needed to support the future lodgement of complaints to the Federal Court (currently of a prohibitive cost) as this is likely to be the sole avenue of testing Standards at law
- fundamental questions of legal process remain unanswered and the adoption of Standards has the potential to compromise the DDA
- the Employment Standards, in their present form, are more appropriately referred to as guidelines, though considered by many to be inadequate still for this purpose
- Council has discussed the matter and supports the position that a moratorium be placed on the development of an Employment Standard until the Sector is better informed and the consultation process improved.

**Recommended Action:** That the Attorney General consider supporting the position of the Disability Council of NSW by calling a moratorium on the development of an Employment Standard under the Disability Discrimination Act, until the issues of process, as noted, have been addressed.

Noted

The Hon Darryl Williams  
Attorney General

DK Byrne AM  
Executive Officer  
7 May 1998