

Submission by ACROD in response to the

INQUIRY INTO THE DISABILITY DISCRIMINATION ACT  
1992

**Introduction**

As the National Industry Association for Disability Services, ACROD welcomes the opportunity to respond to this draft outline. The elimination of discrimination against people with disabilities is central to providing equitable and sustainable services. We welcome all suggestions for improving the opportunities available for people with disabilities.

In general, ACROD is confident that the work of HREOC is furthering this vision. In particular, we applaud the attempt to achieve national consistency between public and private sectors, as well as among jurisdictions. We also fully endorse the right of the Commission to act as a completely independent body. This has required, and will continue to require, courage which is as much moral as intellectual.

The following are comments about points of detail.

**Definitional issues**

There is always a problem about the definition of 'disability'. The DDA offers a very broad definition which contrasts, for example, with that of the National Health Privacy Code, where disability services are defined as health services. There are obvious dangers in too broad a definition (the ease with which the DSP rolls can be increased, for example). There are equal dangers in too narrow a definition (such as the ease with which disability can be defined out of existence and entitlements removed).

The crucial point, ACROD believes, is that there should be some consistency of definition, if only for practical purposes. Were there to emerge future disagreements about definition, they could at least be resolved on a national basis, rather through the current smorgasbord of interpretations.

## **Overview**

There is a central tension between the human rights objectives of the DDA (Box 1, p. 7) and the social and economic considerations that form the environment in which the objectives are to be met (Terms of Reference 2 and 3). Indeed, such values as social welfare, access and equity may come into direct conflict not only with, say, business viability, but also among themselves.

Achieving a workable balance between these conflicting values can be done, but only with full recognition of complexity and compromise. In practice, one set of values has to be dominant. The very nature and mission of HREOC would suggest that there is a preference for the values of human rights, albeit a highly qualified one. If so, this might be made explicit.

On the other hand, this could be said to exemplify HREOC's dilemma. It is an organisation which has to merge interests and expectations that are on the whole antagonistic. It is ACROD's view that, in the area of disability policy, the Commission has steered a course it would be very difficult on which to improve.

## **Unjustifiable hardship**

The most obvious practical manifestation of the tension among interests is in the use of 'unjustifiable hardship' as grounds for exemption, in relation to employment conditions. In principle, the assertion and implementation of human rights in individual businesses or other organisations are limited by the capacity of the organisation to comply with an otherwise defensible claim. HREOC, however, has a tendency to gloss over the difficulties that may be involved here. For example, the issues paper states (p. 20): 'Policies that promote competition are generally worthwhile because they encourage innovation and the production of more or better goods and services. In this way social welfare is enhanced.' This is, to say the least, a distinctive connotation of 'social welfare'. The more common case involves a direct or indirect conflict between the demands of the moral or social objective and those of organisational viability.

In any case, the question of unjustifiable hardship goes beyond economics. Recent cases have focused on educational institutions, especially secondary schools. The underlying question at issue is: to what extent may the rights of an individual infringe on the rights of others? Actual cases have included: the banning of school lunches that use peanut butter or egg, in order to protect the rights of an individual child with anaphylaxis; and the use of school funds to provide ramps for an individual pupil that results in the postponement or cancellation of other infrastructure improvements that would have benefited everyone. In these cases, the infringement of rights is minor compared to the benefits to the individual child. With freedom of speech, we tend to allow an individual to say anything that does not cause immediate harm, no matter what the 'hardship' (or disgust) imposed on or endured by others. Might not the objects of the DDA be interpreted in the same way (even with the qualification 'as far as possible').

All that said, it is probably best to continue with the concept of unjustifiable hardship. As elsewhere, case-based reasoning is much safer than codified and inflexible rules of compliance and reprimand.

### **Employment discrimination**

Much the same considerations apply here. The 'controversial overseas research' about the impact of the Americans with Disabilities Act (p. 30) does not show that the Act in itself discouraged the employment of people with disabilities - rather, that it was one important factor (the principal cause most likely being the greater availability of the equivalent of the DSP).

Recent United States research of which ACROD is aware suggests that the difficulty is almost entirely one of unintended consequences. The practical implication for HREOC would be very much closer liaison with industry - that is, for HREOC to play more freely and comprehensively its educative role.

### **Insurance discrimination**

This (p. 12) is an area in which both direct and indirect discrimination are common. It raises two questions of wider import:

- The extent to which 'reasonable' grounds to do with the 'inherent' nature of an activity or service (in this case, actuarial calculations) may over-ride general human rights.
- The proper status of certain kinds of insurance (such as workers' compensation). Should they be considered as matters of social security (like Medicare) or private, albeit often compulsory, insurance (like car insurance)?

The way in which we deal with these questions will influence the application of the DDA. Is the actuarial discrimination experienced by people with disabilities similar to that experienced by mountaineers or racing car drivers? Does the absence of choice (because, say, of an inherited physical disability) in no way vitiate the actuarial calculation?

### **Equality before the law**

The arguments applying to trends in the unemployment rate of people with disabilities apply with even greater force here. There is no evidence to suggest that the over-representation of people with disabilities in the prison population reflects a greater tendency towards criminality than among other parts of the community. The evidence gathered by the NSW Law Reform Commission strongly indicates the influence of indirect discrimination, especially among those with intellectual disabilities. The proposed questions and suggestions in the issues paper (pp. 18-19) do not go far enough. This should be a major concern of HREOC in the immediate future.

### **Standards**

Standards are appropriate for some issues or environments - such as access to buildings and public transport - but not others (like many elements of education) here discretion is both normal and expected. More generally, codification runs counter to the HREOC preference for case-based reasoning in handling complaints.

## **ABOUT ACROD**

ACROD is the national peak body for disability services. Its purpose is to equip and enable its members to develop quality services and life opportunities for Australians with disabilities.

ACROD's membership includes around 550 non-government, non-profit organisations, which collectively operate several thousand services for Australians with all types of disabilities, including intellectual, physical, psychiatric and sensory. ACROD's members are located in every State and Territory in Australia and range in size from very small to very large – two-thirds of ACROD's organisational members have annual incomes of less than \$500 000.

In seeking to achieve its purpose, ACROD provides a wide range of advice and information to the disability services sector through a monthly newsletter, Newsfaxes, e-mail networks, conferences and seminars. Its consultative structures include a system of issues-based National Committees and State Sub-Committees, forums and interest groups that operate by correspondence/email, teleconferences and face-to-face meetings. ACROD's submissions to Government are developed in consultation with members.

ACROD also seeks to influence public policy so that it responds to the needs of people with disabilities. ACROD works with Government on all significant disability matters. It is currently represented on more than 20 Commonwealth Government (or quasi-Government) reference groups, working parties and advisory groups, and on numerous State and Territory committees.

ACROD has a National Secretariat in Canberra and offices in every State and Territory that focus on State issues in disability. The organisation as a whole is governed by a national Board which includes the elected Chair from each State/Territory Division as well as representatives elected directly by members.

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