



Submission by

ACT Government

to the

Productivity Commission

Inquiry into

Disability Discrimination Act 1992 (DDA)

March 2004

INTRODUCTION

The ACT Government welcomes the opportunity to comment on the Draft Productivity Commission Report on the Inquiry into the *Disability Discrimination Act 1992* (DDA).

The ACT Government has recently released *The Canberra Social Plan*, which has as its vision “all people reach their potential, make a contribution and share the benefits of our community”. In particular, a key goal of the Social Plan is to “promote the inclusion of people with a disability in all areas of the ACT community”. The ACT Government considers that for people with a disability, the practical attainment of this goal is assisted by a legal framework that recognises and addresses the barriers (whether legal, physical or attitudinal) to full and effective participation in the economic, social and cultural life of the community.

As outlined in the Commission’s draft report, the ACT has its own anti-discrimination legislation (the *Discrimination Act 1991*), which addresses discrimination against people with disabilities. On 2 March 2004, the ACT Legislative Assembly also passed the *Human Rights Act 2004*, demonstrating the ACT Government’s commitment to ensuring that the rights of all members of the ACT community are explicitly recognised and protected.

The ACT Government is currently developing a whole of government Framework for Employing People with Disabilities in the ACT Public Service which is intended to address many of the issues related to ‘a limited positive duty on employers’ within government.

The ACT is also developing a whole of government Access to Government strategy that aims to improve the physical and sensory accessibility of Government premises, services and information. As part of this process, each agency is required to conduct an accessibility audit and develop an action plan to address any identified shortcomings.

The importance of providing equitable access is also acknowledged as a Strategic Principle in the ACT’s Territory Plan, which states that “The needs of people with disabilities will be recognised in all facets of urban planning, including in particular the design and operation of transport and access systems, and the assessment of development proposals”. This includes improving the physical accessibility of places people access everyday such as houses, shops and government facilities.

We have found that significant good-will exists within the community to improve accessibility, however at times the strength of legislation such as the DDA assists business or building owners to take the next step in improving the accessibility of their premises. Without such legislation, it is not certain that such agreement would be as forthcoming.

Measuring progress in these areas is not easy. Evidence tends to be anecdotal, qualitative or even complaints-based. The key people who can inform governments on the issues are those directly affected by disability and the ACT Government is

committed to ongoing consultation with people with disabilities and their families and carers on a broad range of issues, including accessibility.

The ACT *Disability Services Act 1991* includes National Disability Service Standards, which apply to organisations providing services to people with a disability. The ACT actively implements the National Disability Service Standards with funded disability services. As a small jurisdiction, the development of specific standards linked to the ACT *Disability Services Act 1991* has not been achieved to date. However, the existence of the national Standards has enabled the ACT to implement a set of standards that are tested, and consistent with agreed national priorities. Whilst the ACT intends to develop an ACT specific set of standards to reflect local circumstances, these will be based on, and consistent with, the prescribed national standards.

The ACT supports the development of interpretive guidelines, or information that would provide greater clarity around the meanings and intent of standards. The ACT also supports enshrining independent monitoring of standards in the DDA, however the issue of enforcement for State and Territory services should be the responsibility of the relevant State or Territory.

Whilst the ACT understands the need for formal systems of complaint, for a person with a disability this can be daunting and may inhibit their willingness to raise an issue formally. The ability to raise issues with the Human Rights and Equal Opportunity Commission (HREOC), and have that organisation take forward an issue that affects many people would be a positive step. Allowing HREOC to initiate complaints would also allow representation about strategic or recurring issues to occur, even when there is not a current individual complaint. This would ensure that the best interests of people with a disability can be served, without imposing costs both financially and time based on any individual.

COMMENTS ON THE DRAFT RECOMMENDATIONS

<p><i>6.1 The Attorney General should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system. (p.130)</i></p>

Supported

It would be desirable for such a review should go beyond procedural aspects such as rights of equality and access to appropriate legal representation for accused persons with a disability, to encompass a wider range of issues, for example:

- whether there is appropriate support for witnesses and victims with a disability involved in criminal proceeding, particularly during questioning by police, while giving evidence in court and in preparing victim impact statements;

- whether the range of sentencing options for people with a disability is sufficiently broad, and how sentencing courts can be properly informed of the likely impact of a particular sentence on a person with a disability;
- access by persons with a disability, especially people with an intellectual disability, to relevant and up to date information about the legal system; and
- physical, social and economic impediments to participation in the justice system experienced by people with a disability, including access to private sector legal services located in facilities that are not “disability friendly”.

The review of the Disability Discrimination Act Legal Services (DDALS) also highlighted the issues of access for people with intellectual disabilities and people in institutions. The DDALS can only assist with disability discrimination matters. Protection of rights for people with disabilities in the criminal justice system is left to the Legal Aid offices. The ACT Government would like the Commonwealth Attorney General to examine the capacity, resources and expertise of Legal Aid to represent people with disabilities in criminal matters. The ACT Government also recommends that the Commonwealth Attorney General investigate the level of unmet need for people with disabilities in relation to Legal Aid services.

6.2 The Australian Federal Government should amend the Electoral Act 1918 to ensure polling places are accessible (both physically and in the provision of independent assistance) to ensure the right to vote of people with disabilities

Supported

The ACT Government supports this Recommendation in principle and will consider revising the ACT Electoral Act in line with the Federal Act. The ACT Government acknowledges that people with disabilities and those who are illiterate may be denied the right to vote in secret. Article 25 of the ICCPR mandates every citizen shall have, without discrimination or unreasonable restrictions, the right to participate in public affairs including the right to vote in periodic elections that shall be held in secret. The comparable provisions in the ACT *Human Rights Act 2004* are clause 8 and 17. Despite minor differences in language it is expected that the provisions of the *Human Rights Act 2004* will be interpreted consistently with international law.

The ACT Government recommends that the AEC trials computerised voting. This is consistent with the Joint Standing Committee on Electoral Matters (JSCEM) Report in 2001, which pointed out that computerised voting, can “extend the secret ballot to those with visual impairment who otherwise require assisted voting to cast their vote”¹. Computerised voting was used in the 2001 ACT election and is to be expanded for the 2004 ACT election.

¹ *JSCEM Report, The 2001 Federal Election*, p. 78-84

6.3 The DDA 1992 should be amended to make it clear that actions done in compliance with non-prescribed laws are not exempt from challenge under the Act, regardless of the degree of discretion of the decision maker. (p.140)

Supported

9.1 The definition of disability in the DDA 1992 (s.4) should be amended to ensure that it includes:

- **Medically recognised symptoms where a cause has not been medically identified or diagnosed**
- **Genetic abnormalities and conditions**
- **Behaviour that is a symptom or manifestation of a disability (p. 216)**

Supported

Discrimination on the basis of behaviour is currently a complex debate in the sector. The inclusion of “Behaviour that is a symptom or manifestation of a disability” in the amended definition is supported provided there is consultation with the disability community regarding the clarification of “reasonable proportionality” between behaviour and manifestation of a disability.

The ACT Government supports the ACT Discrimination Commissioner's endorsement of a “broad definition of disability” in the DDA. The ACT Government believes that the definition does not adequately include certain conditions, including depression, chronic fatigue syndrome, addictions, multiple chemical sensitivities and genetic disorders – in particular, where people need to take substances in relation to their illness or condition.

9.2 The definition of indirect discrimination in the DDA (s.5) should be amended to:

- **Clarify what constitutes circumstances that are ‘not materially different’ for comparison purposes**
- **Make failure to provide ‘different accommodation or services’ required by a person with a disability ‘less favourable treatment’. (p. 216)**

Supported

As the Productivity Commission has noted, the ACT's *Discrimination Act 1991* does not make use of a comparator.

9.3 The definition of direct discrimination in the DDA (s.6) should be amended to:

- **Remove the proportionality test**
- **Include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances of the case'**
- **Place the burden of proving that a requirement or condition is reasonable 'having regard to the circumstances of the case' on the respondent instead of the complainant**
- **Cover instances of proposed indirect discrimination. (p. 231)**

Supported

10.1 The DDA should be amended to allow an unjustifiable hardship defence in all substantive provisions of the Act that make discrimination on the ground of disability unlawful, including education and administration of Commonwealth laws and programs. (p.251)

Supported

10.2 The criteria for determining unjustifiable hardship in the DDA (s.11) should be amended to clarify that community-wide benefits and costs should be taken into account. (p. 255)

Supported

10.3 The DDA should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:

- **Stereotypical assumptions about disability that are not supported by reasonable evidence**
- **Unfounded assumptions about risks related to disability. (p.265)**

Supported

10.4 The scope of the Migration Act 1958 in the DDA (s.52) should be amended to ensure it:

- **Exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision making for Australian entry and migration visa categories, but**
- **Does not exempt more general actions done in the administration of Commonwealth migration laws and programs. (p.269)**

Supported

In relation to the comments of Blind Citizens Australia (p. 267 of the Commission's draft report), the Commonwealth Government may also wish to consider reviewing the effectiveness of the *Migration Act 1958* and regulations under this Act in regard to entry and migration visas for people with disabilities.

10.5 The 'special measures' exemption in the DDA (s.45) should be clarified to ensure that it:

- **Exempts the establishment, eligibility and funding arrangements of 'special measures' that are reasonably intended to benefit people with disabilities but**
- **Does not exempt general actions done in the administration of 'special measures' that are reasonably intended to benefit people with disabilities (p.271)**

Supported

10.6 The DDA should be amended to clarify that the specific provisions governing productivity-based wages (s.47(1)(c)) take precedence over the general exemption for 'special measures' (s.45). (p.273)

Supported

11.1 The HREOC should enter into formal arrangements with State/Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction. This would reduce confusion for people wishing to obtain advice or lodge a complaint. The HREOC should retain responsibility for accepting or declining complaints and for conducting conciliations. (p. 294)

Supported

This position is consistent with the ACT Discrimination Commissioner's submission. The ACT Government supports people with disabilities having choice in whether to make complaints under the Territory or Commonwealth legislation. Currently the costs and

difficulties involved in dealing with HREOC in Sydney can be prohibitive. More people are likely to utilise the HREOC if there is a local presence.

11.2 Subject to a review of the implications for other federal discrimination laws, the HREOC Act 1986 should be amended to incorporate grounds for not awarding costs against complainants in the Federal Court and Federal Magistrates Service. (p.302)

Supported

There should also be clear and accessible guidelines about the Commonwealth Attorney General's discretionary funding under s.46PU of the *HREOC Act 1986*.

11.3 The HREOC Act 1986 (s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service. (p. 303)

Supported

11.4 The HREOC Act 1986 (s.46P) should be amended to allow the HREOC to initiate complaints under prescribed circumstances. Administrative separation should be maintained between its complaint initiation and complaints handling functions. (p.318)

Supported

11.5 The Attorney General's Department should investigate the implications of this inquiry's recommendations about DDA complaints for other Commonwealth anti-discrimination Acts. (p. 319)

Supported

12.1 The scope of the DDA should only be altered via amendment of the Act, not via disability standards. (p. 327)

Supported

The ACT Government has given strong endorsement to the DDA Disability Standards for Education. Given that the draft education standards would have an effect of altering the scope of the DDA, the ACT Government supports amendments to the DDA as required.

12.2 The DDA (s.13) should be amended to make it clear that disability standards displace the general provisions of State and Territory anti-discrimination legislation. Any jurisdiction wanting to introduce a higher level of compliance in an area should request that allowance be made for this through a jurisdiction-specific component in the disability standards. (p. 336)

Not Supported

The ACT Government believes that it would be better to pursue national consistency as far as possible and to prevent standards set by the Commonwealth from being reduced through State and Territory provision, rather than to support the recommendation as it stands.

State and Territory governments have a responsibility to their constituents to reflect the respective community standards in their own legislation. In line with this, the ACT Government has consistently demonstrated that it wishes the ACT's anti-discrimination legislation to be at the forefront of protecting the rights of people in our community. The ACT Government does not consider that this objective is consistent with, in effect, handing over legislative responsibility to the Commonwealth in the vital area of protecting the full range of rights of people with disabilities.

The ACT Government notes that, should the Commonwealth be in a position to make Standards which override State and Territory legislation, it may impose a lower standard than some States or Territories (especially the ACT, but also Queensland and Tasmania) would prefer. Redressing this through the process outlined in the recommendation would, as a matter of practicality, be extremely unwieldy for States and Territories. It would also rely on the Commonwealth's willingness and ability to support another jurisdiction's request and progress that request in a timely manner.

12.3 The DDA (s.31) should be amended to allow for disability standards to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standard making power should extend to the clarification of the operation of statutory exemptions. (p. 335)

Supported

12.4 Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes. HREOC's role should be to report to the Attorney General on the operation and adequacy of those processes. (p. 336)

Supported

A monitoring and enforcement mechanism must be in place to ensure that the standards become effective. The standards will not have the desired effect without appropriate monitoring and enforcement. The incorporation of monitoring into existing regulatory processes will enhance the wider community's awareness of the rights of people with disabilities.

12.5 HREOC should replace the Frequently Asked Questions for employment with guidelines in order to provide more formal recognition under the DDA. (p. 346)

Supported

12.6 The DDA (s.59) should be amended to clarify that voluntary action plans can be developed and registered by employers. (p. 351)

Supported

12.7 The laws currently prescribed under s.47 of the DDA should be delisted unless relevant States request their retention (p. 352)

Supported

COMMENTS ON REQUESTS FOR INFORMATION

The Productivity Commission seeks further comment on the desirability of developing an accommodation disability standard, and the forms of accommodation such a standard should cover (for example private rental accommodation, supported accommodation and/or institutional accommodation) (p. 122)

The ACT Government does not support the development of a disability accommodation standard under the DDA for all forms of accommodation. As is mentioned in the draft report, it is considered that a standard for private rental accommodation may encourage landlords not to rent to people with disabilities. The Government considers that for

private rental accommodation networking with the Real Estate sector in the ACT may provide better outcomes than regulation.

However, the Government does give in principle support for a disability accommodation standard that would apply to both Government and non-government organisation (NGO) supported accommodation and institutional accommodation.

It would be desirable that these standards address safety issues covered in other Australian Standards such as fire drills, smoke detectors, electric doors and back-up generators. The standard may also cover obligations of the landlord and support provider.

The Productivity Commission seeks information on the costs and benefits to organisations of complying with the provisions of the Disability Discrimination Act 1992 and disability standards. The Commission would welcome information on the nature of those costs and benefits, and on their magnitude.

Education

The ACT Government has given strong endorsement to the DDA Disability Standards for Education and does not share the view of some jurisdictions about the significant financial impact of the Standards or the need for a phased implementation. The ACT Government also supports the position that overall benefits flowing from the introduction of the Standards will exceed the costs.

Notwithstanding this, in endorsing the draft standards at the July 2003 meeting of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), the ACT Minister for Education, Youth and Family Services emphasised the continued growth in the number of students being identified with a disability, the need for ongoing professional development of staff and the ACT Government's expectation that the Commonwealth would address resourcing needs associated with the education of students with disabilities in the context of quadrennial funding negotiations.

The ACT's government school system is well placed to meet its obligations under the proposed DDA.

- For many years, all new government schools have been designed and constructed to be fully accessible for persons with a disability. Special facilities include lifts, ramps and suitable toilets with shower facilities.
- Where general upgrading works are undertaken in older schools, opportunities are taken to provide facilities for persons with disabilities.
- Since 1995/96, a rolling program has been undertaken to upgrade secondary schools with facilities for persons with disabilities. Currently more than 75 per cent of secondary schools are suitable for persons with a disability.

- In primary schools, minor new works are undertaken as the need arises. Many primary schools are single level and do not require expensive modification.
- One of the initiatives recently introduced that is consistent with the Standards is a student centred appraisal and resourcing model for students with a disability. This new approach is closely linked to the student's individual learning plan and identifies the additional support needed across a number of key areas to support the student in accessing and participating in their school program.
- The ACT also has in place a program for providing students with disabilities with the essential specialised equipment and technology needed to participate in their educational program.

Transport Standard Under the DDA

With reference to the *Disability Discrimination Act 1992*, the ACT Government has identified existing barriers to public transport for people with disabilities in its "Action Plan for Accessible Public Transport in the ACT". The identified programs and costs to address these barriers are:

- The commencement of an ACT bus replacement program to improve public transport accessibility. As part of this plan, \$17.5 million has been committed up to 2005 for the purchase of forty-two accessible vehicles, supplemented by the one-off 2003 purchase of twenty accessible buses. Combined with its existing accessible fleet, the Government bus operator, ACTION, will have ninety-four accessible buses operating by 2007, meeting the requirement for twenty-five percent of the fleet being accessible by that date.
- A public transport infrastructure upgrade program has been incorporated into the Territory's capital works program.

The anticipated benefits from the infrastructure and bus fleet upgrades include increased transport options for people with disabilities, people with prams and the aged. The potential financial benefits have not been costed beyond the original benefits identified in the Regulatory Impact Statement completed by the Commonwealth Attorney General in 1999.

Access to ACT Government Strategy (does not sit under legislation)

Under the Strategy, all Government Departments must conduct audits and develop action plans, within a twelve-month period. Departments will report on the progress of implementing their access action plans in their annual reports, beginning in the 2004-05 financial year.

The kit was developed by the ACT Disability Advisory Council and will be of great benefit to people with disabilities in the ACT who access government services and facilities. The areas covered by the strategy include:

- access to premises used by the public;
- employment;

- purchase of houses and land;
- education;
- provision of goods, services and facilities; and
- administration of Government laws and programs.

The initial costs of the strategy will not be known until agencies conduct audits and produce their action plans. This will be at the end of next financial year.

The Productivity Commission requests further information on options for extending the scope of the harassment provisions and addressing the vilification of people with disabilities.

Racial vilification in the *Discrimination Act 1991 (ACT)* (s.65) is unlawful if it is a “public act, inciting hatred towards, serious contempt for, or severe ridicule of, a person or a group of people on the ground of their race”. The ACT Government supports the development of provisions in the DDA making vilification of a person / group of people with a disability unlawful provided vilification is a “public act”. The Government notes that if vilification is not defined as a “public act” it would be hard to separate from harassment.

The Productivity Commission seeks views on how the costs of adjustments should be shared between governments, organisations and consumers. The Commission would welcome comment on the adequacy of existing government funding schemes for such adjustments, and the advantages and disadvantages of extending particular arrangements (such as portable grants).

A *Vision and Values* statement for people with disabilities was developed by the Disability Reform Group established following the 2001 Board of Inquiry into Disability Services in the ACT and has been endorsed by the ACT Government including through *The Canberra Social Plan*.

The *Vision and Values* include a value encompassing “meaningful involvement in the ACT community”. The ACT Government desires to be a leader in employment policy and is presently drafting a whole of government Framework for Employing People with a Disability in the ACT Public Service. Alongside the ACT Inclusion Awards for employment of people with disabilities, the Government seeks to encourage innovative and new approaches organisations may take to employ people with disabilities including the sharing of costs of adjustments. The Government believes that as community and business attitudes to employment for people with disabilities change so to will the attitude of businesses to costs of adjustments.

It should be noted that the Commonwealth workplace modifications assistance is often marketed to businesses as a benefit to offset costs of adjustment when employing a person with a disability.

The ACT Government supports the role of government in offsetting the costs of adjustment and thus encouraging businesses to employ people with disabilities. The ACT Government supports approaches to costs of adjustments that will ensure consultative and collaborative approaches between business and government.

The Productivity Commission seeks information on the potential impact on businesses and people with disabilities of introducing a limited positive duty on employers to take 'reasonable steps' to identify and work towards removing barriers to employment of people with disabilities, including:

- ***The nature of the duty***
- ***How it should be implemented and enforced***
- ***The costs and benefits for business, including small businesses***
- ***The costs and benefits for people with disabilities***
- ***The role of government in sharing costs and maximising benefits***

The ACT Government provides in principle support to the introduction of a limited positive duty on employers to take 'reasonable steps' to identify and work towards removing barriers to employment of people with disabilities.

Whilst the ACT Government cannot comment on the nature of the impact on businesses, the impact on people with disabilities would be extremely positive. The ACT Government agrees that the enforcement of the duty would be best handled by HREOC and that the duty should not apply to small businesses but to government organisations and large employers.

Presently the ACT Government is developing a whole of government Framework for Employing People with a Disability in the ACT Public Service which is intended to address many of the issues related to "a limited positive duty on employers".

A "reasonable steps" approach by all government agencies – Commonwealth, State and Territory – would be of significant benefit to people with disabilities, provide leadership in the employment sector and help to address the dismal rate of employment of people with disabilities in the public sector.