



Anti-Discrimination Commission

Level 5, Executive Building, 15 Murray Street, Hobart , GPO Box 197 Hobart, Tasmania, Australia, 7001
Telephone: (03) 6224 4905 Statewide: 1800 632 716 Facsimile: (03) 6233 5333
International Phone: + 61 3 6224 4905 International Facsimile: + 61 3 6233 5333
E:Mail - AntiDiscrimination@justice.tas.gov.au

SUBMISSION

TO THE

PRODUCTIVITY COMMISSION

INQUIRY INTO THE

DISABILITY DISCRIMINATION ACT

1992 (Cth)

‘National Competition Policy Review’

The Anti-Discrimination Commission welcomes the opportunity to provide a submission to the Productivity Commission in the ‘National Competition Policy Review’ re the *Disability Discrimination Act* 1992 (Cth). The Commission works with the *Anti-Discrimination Act* 1998 rather than the federal legislation. However, experience under the latter Act may assist in informing the Review of continuing needs and effects of disability discrimination legislation, for some 12–15% of Commission claims involve disability as a principal attribute or ground. Further, exemptions are sought under the *Anti-Discrimination Act* 1998 and all applications are advertised, with submissions called for. The type and frequency of applications based in disability, and the content or otherwise of submissions, may provide some insights that are useful to the Review.

1. Summary

1. The *Disability Discrimination Act* 1992(Cth) remains a vital piece of legislation requiring retention: real issues for persons with a disability, their carers, families, associates and colleagues, etc remain in the community, in

- employment, provision of services, accommodation, education and training, etc;
2. Amendments to improve the Disability Discrimination Act's scope, purpose, effect and application need to be made, so that the Act is improved for the benefit of the community, business and government;
 3. The Disability Discrimination Act assists business and government as well as persons with disability, their carers, etc and community generally by ensuring that fairness, merit, and rights are recognised as socially important;
 4. The Disability Discrimination Act and any standards and/or guidelines promulgated under it should not undermine state anti-discrimination/equal opportunity/human rights legislation, and 'minimum standards' should not be viewed as 'maximum' requirements;
 5. Education for business, government, the legal profession, courts and the community is essential to a proper understanding of the Disability Discrimination Act, its aims, objects and operation – it is pointless introducing legislation without an accompanying education programme, and such a programme will assist business, etc in productivity complying with its provisions.

2. Introduction

2.1 In March 2003, to assist in providing this Submission to the Review, the Commission held a 'mini-consultation' with representatives of organisations and individuals. Those attending included representatives of Tasmanians with Disabilities, Glenorchy City Council (Access Committee) and Aurora (Disability Organisation). Their views, ideas, issues and concerns are incorporated.

2.2 Generally people (business, government entities, etc) do not 'grumble' about the existence of disability discrimination legislation, although a few do, not seeing the benefits accruing to their businesses, etc financially and economically through providing access and services, etc to persons with a disability and hence to their associates, friends, family groupings, etc.

2.3 The general awareness exists re access to buildings and transport, and can always be improved. In education – primary, secondary and tertiary – greater difficulties arise because there is potentially greater complexity – not only physical access as in ramps, etc but other sorts of access – to information (sight, hearing, reading – dyslexia, etc) for example.

2.4 Often people think of 'disability access' as confined to buildings and transport access, not recognising that sight, hearing and other disabilities can interfere with access and need to be catered for. There is a greater awareness of a need for ramps, elevators, access platforms to buses and 'Maxi Taxis', than for hearing loops, larger

fonts for computers, Braille signage for street locations, etc, and the ‘time’ factor re disabilities involving reading (dyslexia, etc), and so on.

3. Provision for Persons with a Disability Provides Access for Other Groups

3.1 An educative programme is vital to ensure that everyone becomes aware that disability access provision enhances access for people in other groups, for example –

- o a ramp and refashioned street kerbing provides access to people with prams and pushers, toddlers, elderly people who may have difficulty negotiating ‘straight’ or ‘step’ kerbing, and people with temporary health conditions – requiring (for example) the use of crutches;
- o toilets or lavatories providing access for persons with a disability providing safe toileting for parents with a child in a pram, or an infant and toddler, or even just a toddler – that is, these groups can use ‘disability toilets’ so meaning that the space is not limited to disability access, but means that a parent does not have to leave an empty pusher or stroller outside a toilet, or rush in with a toddler, leaving the baby in a pram outside – as a safety risk.

3.2 A focus on disability rights and needs should be maintained through the Disability Discrimination Act. At the same time, everyone needs to be made aware that modifications and accommodations re disability *not only enhance* disability access, but also extend to other groups and needs.

4. Terms of Reference – Specific Points

4A. 2a) Social impacts ...

4.1 (i) **Garity case:** Prior to the introduction of the *Anti-Discrimination Act* 1998 (Tas.), the *Disability Discrimination Act* 1992 (Cth) played a significant part in the proper and fair advancement of the rights of persons with a disability, and in the rights of the community to ensure that persons with a disability are able to work productively and function well in all aspects of life.

4.2 For example, *Garity v. Commonwealth Bank of Australia*, decided in 1998 under the *Disability Discrimination Act* 1992, established a number of important legal principles and recognised amongst other matters the right of persons with a disability to have:

- Equal access to training on the job, and access to equal training programmes as other workers;
- Equal access to career development and opportunities;
- Equal recognition in terms of duty of care of employer to employee;

- Quiet enjoyment of the workplace or workspace, without unfair treatment that might be classed or perceived as ‘bullying’, etc.

4.3 Ms Garity was awarded a \$153,500 dollars and the Commonwealth Bank did not appeal against this decision or the amount. This indicates a recognition that the most positive approach of the Commonwealth Bank was to accept the decisions and work to ensure that persons with a disability were granted equal access, recognition and quiet enjoyment as above, in the future.

4.4 This case had a significant and positive impact on future conduct. The Anti-Discrimination Commission has received a number of claims where the respondent has been extremely cooperative and helpful, and the claims have been able to be resolved early. This is directly attributable to the *Garity case* and the fact that respondents and potential respondents saw that it was important not to engage in conduct breaching or that may breach human rights, and that *advantages* accrue to business when disability rights are taken into account.

4.5 The case had a positive productivity effect, in that it meant that later claims of discrimination were/dealt with better by respondents who are aware of the precedent. Dealing cooperatively with the body established to receive discrimination claims, and working to ensure practices and procedures are improved and enhanced is conducive to productivity and productivity principles and precepts.

4.6 **(ii) Building Surveyors, etc:** Other social and economic impacts of the *Disability Discrimination Act 1998* (Cth) include (for example):

- building surveyors have acquainted themselves well with the standards to be met in building, and generally are very much ‘on top’ of the requirements and ways to ensure that buildings positively conform;
- architects have sometimes consulted with the Anti-Discrimination Commission for advice as to construction of specialist institutions/buildings so as to ensure that the purpose of the building is met, alongside accessibility for persons with a disability – this is apposite advance for building owners and all seeking access;
- standards and principles laid down as to access for persons with a disability serve to ensure that persons with other attributes – say the aged and frail aged, persons with family responsibilities (young children in pushers, prams, etc) – gain access.

4.7 **(iii) Heritage Buildings, etc:** Many councils (local government), surveyors, architects and associated professionals are increasingly aware of the *Disability Discrimination Act 1992* (Cth) and *Anti-Discrimination Act 1998* (Tas.) provisions and requirements, and are informing their clients or business people in the local government area, so that they can take proactive steps to ensure compliance. Where buildings are heritage listed, councils, architects, surveyors, etc are more and more often alerting their clients, etc to the exemption provisions of the legislation.

4.8 The Commission receives applications for exemption from the *Anti-Discrimination Act 1998* (Tas.) provisions. These provide a means for alerting the

community to disability access requirements and increase awareness in the business community. Some buildings, due to their age, style and heritage listing are not able to be modified to accommodate to disability access. Putting together a case to highlight this, for the purpose of an exemption application under the Act, is not a costly nor a complex exercise, whilst as noted it provide a means of educating business alongside the community about the provisions and requirements of the Act and the rights of persons with disability to access services, facilities and business, etc accommodation.

4.9 Consideration needs to be given to ‘partial compliance’ with access requirements. If a building can be partly modified, this can be both positive and negative. That is, say a heritage building can provide accommodation on the lower flows, but not on the upper, should proprietors be ‘allowed’ to advertise ‘partial access’ or ‘accessible – with restrictions’, etc or should partial accessibility be ruled out to eliminate disputes?

4.10 (iv) **Ensuring Persons with a Disability Participate:** The *Disability Discrimination Act* 1992 (Cth) has also given an impetus to persons with a disability being advocates in their own cause. At least 10% of claims coming to the Anti-Discrimination Commission, Tasmania under the *Anti-Discrimination Act* 1998 (Tas.) involve ‘disability’, and the vast bulk are brought by persons with a disability or parents on behalf of a child with a disability.

4.11 The public attention given to the *Disability Discrimination Act* 1992 (Cth) has meant that now that Tasmania has its own Act with ‘disability’ as an attribute on which a claim can be founded, many people come direct to this Commission. The Commission has put a deal of effort and energy into publicising the state Act and ensuring accessibility, knowledge, understanding and educating generally as to its provisions. Although this has been an independent initiative of this Commission, there is no doubt that the existence of the federal Act made this task more straightforward.

4.12 (v) **Need for Greater Awareness, Accessibility, etc:** Although as noted there is increased awareness and accessibility, the *Disability Discrimination Act* 1992 (Cth) needs to be strengthened and improved to ensure that people are more easily able to bring their concerns to attention through it. The *Anti-Discrimination Act* 1998 (Tas.) plays a more significant role in Tasmania in relation to the rights of persons with a disability than does the *Disability Discrimination Act* 1992 (Cth), because the state Act is not as complex or convoluted, is straightforward, ‘plain-English written’, and far more readily understood.

4.13 The federal Act needs to be improved so that it can have a continuing impact rather than becoming obsolete because it is less accessible and complex.

4B. 2b) ‘Restricting’ Competition?

4.14 The Act’s provisions are designed to take into account the legitimate needs of persons with a disability to participate equally in society, whilst simultaneously

recognising the need for ‘balance’ so that business is able to conduct itself productively.

4.15 The provisions in the Act as to ‘unjustifiable hardship’ and ‘reasonable accommodation’ balance these requirements well. Productivity is not ‘harmed’ because these provisions provide a fair and equal balance, taking into account both complementary and competing interests.

4.16 Arguably competition is *enhanced* by attention being paid to merit and the Act’s intention of removing prejudice and bias from the process – whether in employment, production, service provision, education, etc.

4.17 Provision for properly targeted and comprehensive support in education programmes from pre-school means that persons with a disability (congenital or from a young age) will have real chances at education and possibilities of taking on trades and professions and gaining productive paidwork, and making contributions they may otherwise be unable to make. Many people who may otherwise be seen as ‘unproductive’ in adulthood or ‘burdens’ on industry because of a need for greater modifications or accommodations would, if gaining access to education through a supportive environment and modifications in pre-schools and kindergartens, be more likely to benefit from support and accommodations in primary, secondary and tertiary education. Hence, they are more likely to be productive contributors to business, corporations, government, the community, etc.

4C. 2c) General Matters

4.18 Sometimes anti-discrimination legislation is seen as ‘in conflict’ with occupational health and safety legislation. This is not so. Business, government and the corporate sector need to be educated in this.

4.19 Anti-discrimination legislation and occupational health and safety laws are complementary. Anti-discrimination legislation does not put at risk health or safety of persons with a disability, nor those without a disability work together or socialising across disability/ies ‘boundaries. If utilised and interpreted fairly and properly, together they promote occupational health and safety, merit and fairness. Anti-discrimination legislation *enhances* occupational health and safety along with the rights of all workers.

4.20 Seeing ‘persons with a disability’ as a separate and distinct group, with their interests somehow in conflict with ‘others’ or in competition with them, is a narrow and limited perspective that damages competition and can stultify progress. The Disability Discrimination Act recognises that ‘everyone’ has a capacity to endure a disability - congenital, permanent and transitory or future illness, disease and disability is covered. **Also**, people with a disability have relationships with people who have no disability – just as those without disabilities have relationships with those who do. This needs to be taken into account in any competition policy and productivity assessments and plans.

4.21 ‘Consumers’ includes persons with a disability, and persons without, *and* people who are associated with one another. That is, ensuring access to persons with a disability enhances the ability of people to engage in recreation, business, consuming, etc in groups rather than in isolation and as separate individuals. Persons with a disability are members of couples, of partnerships, of families. To ensure that couples, partnerships and families can participate together in society, provisions for access for persons with a disability (like persons with family desensitise) are essential.

4.22 The Disability Discrimination Act provides a *beginning* for access, etc rights. It can be improved. If the legislation is to be updated, this should be done with attention paid to the *Anti-Discrimination Act 1998* (Tas.) to ensure that the improvements are soundly based.

5. Focus on Improvements for Persons with a Disability and Improved Productivity

5.1 The following issues have been raised with the Commission as important to persons with a disability, their families and associates, the community generally, business and government.

5.2 The Disability Discrimination Act must be retained and strengthened. Any ‘watering down’ of the Act would not assist all these groups, and ultimately business would suffer through lack of access not only to persons with a disability, but to other groups referred to above (parents with children in prams/pushers, etc). The ‘disability population’ should not be seen as the only population or part of the population served by the *Disability Discrimination Act 1992*(Cth) – all members of the families, their associates, friends, etc and those families, associates, friends of parents with pram-borne children will utilise facilities where their colleagues with a disability are included. Otherwise, all these groups will go elsewhere, so that they can be together at entertainment, service facilities, retail stores, etc:

- Access to Taxis - Costs for people with disabilities is increasingly high, and ‘add on’ amounts covering persons with a disability getting in and out of taxis adds to already high costs – improved public transport *and* education including ingress/egress training for public transport drivers and taxi drivers would cut down on costs – this would advantage not only users/customers/passengers but also taxi companies, owner and drivers, and bus companies and drivers, because of cuts in transport time
- (Un)employment for persons with a disability remains a real problem, and even disability organisations find this difficult, because of funding and resourcing problems, and lack of support to assist ‘small business’ and ‘smaller business’ in modifying their workplaces to make them accessible
- Incentives need to be provided to businesses/government and corporations to encourage them to assist and support small businesses to comply with the Act’s provisions, particularly re physical access (as a start)
- Sometimes, parts of buildings can be made accessible, but other parts cannot – particularly, for example, with heritage buildings – this means that there should be a capacity in the Act to provide ‘part-exemptions’, where (say) part

of a heritage building cannot possibly be altered for access, but there is no impediment to changing/modifying other parts – perhaps this ‘part-exemption’ facility could be restricted to heritage buildings rather than made universal, for universal application may make business and builders, etc ‘lazy’ in ensuring that *a whole building is accessible* where there is no heritage element

- Australian Standards should be extended to apply not only to new buildings – they should apply to all buildings, with the ‘part-exemption restricted to heritage buildings’ allowing for problems with modifying very old buildings
- Australian Standards are Minimum Standards, and should not be used to oust state anti-discrimination and equal opportunity legislation – people complying with Australian Standards should be informed that they are minimum and that compliance will not exempt them from the operation of state legislation – claims of disability discrimination should be able to be brought even where ‘Minimum Standards’ have been met, so that an investigation or inquiry can occur into whether greater accessibility can be arranged
- Guidelines need to be developed for surveyors, builders, architects, engineers, etc and local government
- Australian Building Code provides Minimum Standards only, also and the same should apply to the Building Code as to Australian Standards – claims should be able to be brought so that whether or not greater accessibility can be arranged can be investigated and/or inquired into
- Australian Standards and the Australian Building Code should be reviewed more frequently, so that they can keep abreast of improved building, transport and access capacities and capabilities; otherwise the incentive for buildings and transport to be *more* accessible and keep pace with improvements is lost
- ‘Hardship provisions’ in the *Disability Discrimination Act 1992* (Cth) and state legislation should be reviewed – not to *expand the scope for an ‘escape route’* but to ensure that business, builders, engineers, government, architects, professionals, etc do not become complacent in their approach.
- Consideration should be given to a business tax to provide equipment for ‘reasonable adjustment’ so that business can ensure that persons with a disability can be effectively employed.
- Funding for Disability Organisations to lobby for improved services and awareness is insufficient and needs to be increased to raise awareness from the grassroots – too often changes are made to buildings or transport, etc facilities without consultation with persons with a disability. This is wasted resourcing, because unless there is consultation, the changes may not enhance access in any event. The provisions of the Act will effect real changes only when funding and resourcing of bodies bringing disability issues to attention, and with expertise to assist business, government, etc in compliance with Disability Discrimination Act (and state legislative) requirements

6. Government, Local Government/Planning, etc

6.1 Planning, etc issues are of particular importance – these issues have been drawn to the Commission’s attention by local government, disability organisations and individuals:

- It appears that some private surveyors may not be providing clients with full information and requirements under a variety of legislation; this has made compliance with disability discrimination legislation a hazard for local government, and accessible education, readily available, for all levels of government, trades and professions is imperative.
- Councils can face difficulties and may be in jeopardy where they are required to provide permits on the 'say so' of private surveyors who have no knowledge or limited knowledge of Disability Discrimination Act requirements. Where liability falls on Councils (as they provide permits and can bring liability on themselves and ratepayers, etc), proper standards set for all surveyors would assist, or reversion to the requirement that surveyors be attached to local government and local government areas rather than being from 'anywhere' (that is, not 'local')
- The upward and base-level limits on disability requirements need to be clarified through guidelines under the Disability Discrimination Act or some form of subordinate legislation that undergoes public scrutiny
- Education programs to assist community knowledge of the Disability Discrimination Act is vital and must be provided on a wide scale
- Whilst a clear acknowledgement of issues facing small business is vital (re their capacity for providing access, etc), at the same time accessibility for small businesses needs to be comprehensive and fairly applied, without 'watering down': rights of small business to be accessible to persons with a disability, their associates, families, etc *along with* persons with family responsibilities, etc is vital, along with the rights of persons with a disability and family responsibilities needing across the board recognition. An awareness programme to ensure that small (as well as big) business have an opportunity to provide access and to recognise the benefits is vital
- Rather than limiting the scope of the Disability Discrimination Act or cutting down or cutting out provisions, resources should be provided to ensure greater access to information – resources are needed to ensure that the Disability Discrimination Act can do its work properly and effectively, and without needlessly drawing criticism which would not occur if there was greater knowledge and understanding of the Act
- A great deal more work, awareness etc needs to be done and increased within the tertiary education sector and particular within universities. There appears to be a belief that 'access' means providing ramps and elevators, etc whereas it goes way beyond this and students cannot get access to education without hearing loops, accessible computer programmes (particular 'voice' machines), accessible Websites (Acrobat Readers are not accessible to many people with a sight disability and there is no impediment to Websites being set up with alternative access at minimal cost)
- Provision – financial and resourcing – needs to be made for advocates to provide assistance and guidance to organisations, business (small and large) and government about the Disability Discrimination Act. In Tasmania, there is a need for such provision and advocacy in the north and south of the state. The

Disability Discriminating Advocate located at Launceston Community Legal Service is vital and there should be a similar service provided explicitly in Hobart and the North West. Criticisms of the Disability Discrimination Act are unfair and misplaced where there is insufficient provision and resourcing for advocates and educational programmes

7. Disability Discrimination Act – Improvement, Amendments, Clarification, etc

7.1 Improvements can and should be made to the Disability Discrimination Act, including:

- A definition of ‘disability’ which recognises fully the broad scope of disabilities – physical and mental/psychological/psychiatric;
- Inclusion in the definition and in the Act of genetic discrimination as a specific category (the implications can be broad reaching);
- A clear indication that the Act covers ‘temporary’ conditions and ‘minor’ conditions – there is often confusion in the community, business, employers, service providers etc about ‘disability’ because there is a tendency to see ‘person with a disability’ as meaning ‘someone using a wheelchair for mobility’, etc whereas it includes congenital disabilities, ‘unseen’ disabilities, ‘permanent’ disabilities, etc as well as transitory conditions – such as a broken leg, or burn that heals completely, etc;
- Attention to the need to ensure that both the Disability Discrimination Act and state legislation are not ‘cut out’ by minimum standards and guidelines – these should be promulgated **clearly** as minimum standards, and people (builders, business, government etc) conforming to them should be clear that this will not absolve them from making efforts to ensure greater access, etc than the minimum. Minimum standards and guidelines should be just that – standards and guidelines to *assist* in compliance, not ‘cutting out’ possible avenues of redress and effective change for people who are not assisted by the minimum standard or guideline, etc.
- “Incitement to hatred” should include ‘incitement on the basis of a disability’ (as in the *Anti-Discrimination Act 1998* (Tasmania)).
- Desire to change title of Act – ‘Disability Discrimination Act’ is not the best description, because often persons with a disability do not appreciate being classified under legislation with this title – consideration should be given to a new title that is both descriptive and appreciated by persons with a disability.
- Access should be included specifically in the Act, rather than seen as included in the other areas, and it should be defined on an inclusive basis so that it is clear it is not ‘just about’ physical access as in ramps, elevators, etc but includes sight access, language access, hearing access, literacy access, etc.

- ‘Provision of facilities, goods and services’ should be changed to ‘facilities, goods and services’ (just as ‘employment’ and ‘education’ are set out – it is not ‘provision of employment’ or ‘provision of education’, etc).
- ‘Direct’ and ‘indirect’ terms for discrimination are confusing for the public, for business, for the courts, etc. The arguments about what is and what is not ‘direct’ or ‘indirect’ waste courts’ and tribunals’, etc time and there needs to be a revision of this, to incorporate the terminology used in United Nations treaties, covenants and conventions in all discrimination legislation including the Disability Discrimination Act.
- Guidance on ‘unjustifiable hardship’ needs to be provided, and how it is to be interpreted and employed in the Act, with a flexibility ensuring that changes, improvements, etc in technology and other aspects of living are be taken into account.
- ‘Reasonable adjustment’ – needs to be spelled out in the Act in a clear way – and as a practical matter funding and resourcing needs to be available so that persons with a disability can ‘carry’ aiding equipment with them – employers should be able to obtain equipment on a rental basis (see above re tax, etc incentives).
- It is *essential* that there be education for business, government, the community and legislators about disability discrimination and the scope of the definition and what it means, etc. Funding and resources should be made available by the federal government for this, to state entities including Commissions and disability advocacy groups.

Dr Jocelynn A. Scutt
Commissioner

Note: Ms Santi Mariso and Ms Katrina Aird assisted in the compilation of this Submission, along with those attending the Commission’s ‘mini forum’ and all claimants and respondents in claims before the Commission, and the community.