



**Blind Citizens Australia
submission to the
Productivity Commission Inquiry
into the
Disability Discrimination Act**

May 2003

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Summary of Recommendations

Recommendation 1

That section 46 of the DDA be amended to remove the reference to "other reasonable factors". The purpose of this amendment is to oblige insurance companies to obtain actuarial and statistical data to support exclusion or higher premiums.

Recommendation 2

That section 52 of the DDA be amended along with necessary sections of the Migration Act 1958 to ensure that where a person is eligible for migration to Australia, the fact that a person has a disability or has a dependent family member or spouse with a disability, should not operate to prevent migration.

Recommendation 3

That section 47 of the DDA be amended to make it clear that only prescribed laws are exempt from the operation of the DDA. Section 29 should be amended or a new section added to ensure that discriminatory provisions in laws can be challenged with the Commonwealth named as the appropriate Respondent.

Recommendation 4

That there be a review of the comparator definition of disability discrimination to evaluate its usefulness in meeting the objects of the DDA.

Recommendation 5

That the DDA be amended to include a positive obligation to make reasonable accommodations.

Recommendation 6

That the Productivity Commission recommend that prisons be required to develop Action Plans outlining how prisoners with disabilities can expect to access rehabilitation and education opportunities.

Recommendation 7

That the Productivity Commission recommend that mandatory Disability Standards be developed in all areas listed in section 31.

Recommendation 8

That the Human Rights and Equal Opportunity Commission Act 1986 and/or other relevant legislation be amended to clarify that the costs are only to be awarded against a complainant when a complaint is judged to be frivolous or vexatious.

Recommendation 9

That the Productivity Commission recognise that systemic discrimination in employment is the most important factor which affects the participation of people with disabilities in the labour market.

1.0 Introduction

1.1 Blind Citizens Australia

Blind Citizens Australia is the united voice of blind and vision impaired Australians. Our mission is to achieve equity and equality by our empowerment, by promoting positive community attitudes and by striving for high quality and accessible services which meet our needs. We have over 3,000 individual members and fifteen organisational members.

Blind Citizens Australia was aware, long before the enactment of the Disability Discrimination Act (DDA), of the need for national anti-discrimination legislation specifically for people with disabilities. Our members participated enthusiastically in the community consultation processes which developed the legislation and campaigned strongly for its enactment into law.

This submission draws on the experience of Blind Citizens Australia in using the DDA to address discrimination encountered by blind people in their daily lives. Our individual advocacy service, which is available to all blind Australians, supports people from all over Australia, including rural and remote areas, in the making and pursuit of complaints under the DDA. Our individual advocacy work informs our broader policy development and group advocacy activities, so that we use the two streams of advocacy together in assisting our members to overcome discrimination on account of blindness.

Blind Citizens Australia has also made a substantial contribution to the development of DDA Standards both through the provision of input from blind people and the co-ordination of the DDA Standards Project. We have also contributed to the HREOC public inquiry process and other initiatives which have sprung from the legislation, such as the Commonwealth Disability Strategy and worked with government authorities and private sector organisations to develop collaborative strategies to address discrimination against blind people.

1.2 Terminology

In this submission, unless otherwise indicated, the word "blind" is used to include both people who are totally blind and people who are vision impaired.

2.0 General Issues for the Inquiry

2.1 Definitional Issues

Our experience in using the Disability Discrimination Act has not revealed any problems with the definition of "disability". We strongly support the current definition of "disability" in the DDA and would oppose any suggestion that it be narrowed. An element of the definition particularly important to blind people is the coverage of guide dogs. Though not used extensively to date, the coverage of readers in section 8 is also important for people who are blind.

2.1.1 Discrimination-Prohibitions and Exemptions

The activities in which discrimination is prohibited are the key areas in which blind people encounter discrimination. In particular, discrimination in relation to employment, education, access to goods, services and facilities, activities of clubs and associations and Commonwealth laws and programs are of particular importance to our members. Major areas of activity for our advocacy service involve discrimination in provision of information in accessible formats (braille, audio and large print) and discrimination on the grounds of use of a guide dog.

With respect to the exemption relating to superannuation and insurance, Blind Citizens Australia believes that the exemption is too broad. We believe that the onus must be placed on the insurance and superannuation industry to collect actuarial or statistical data to justify discriminatory policies. In the cases in which Blind Citizens Australia has been involved, the industry has not had actuarial or statistical data but has relied on prejudicial assumptions related to disability such as increased risk of accident. The problems we have experienced relate particularly to income protection insurance and mortgage insurance. We accept that it is reasonable for the industry to exclude a person's current condition from giving a right to payability. However, the difficulties of obtaining this type of insurance prevent people who are blind or vision impaired from securing their financial security in the same way as people without a disability.

Recommendation 1

That section 46 of the DDA be amended to remove the reference to "other reasonable factors". The purpose of this amendment is to oblige insurance companies to obtain actuarial and statistical data to support exclusion or higher premiums.

The exemption in relation to migration is expressed in too broad terms and in its current form facilitates and protects discrimination. Blind people who seek to migrate to Australia and who have business and professional skills

that they could use productively in Australia, are consistently refused entry on account of their blindness, notwithstanding that they meet all other eligibility criteria for the visa for which they are applying and do and are able to give guarantees of financial independence. No doubt the same situation is true for people with other sensory or physical disabilities. Accordingly, we would recommend that the exemption in relation to migration should be amended to bring it into line with the objects of the DDA so that where a person is eligible for migration to Australia the fact that the person has a disability or has a dependent family member or spouse with a disability should not operate to prevent migration.

Recommendation 2

That section 52 of the DDA be amended along with necessary sections of the Migration Act 1958 to ensure that where a person is eligible for migration to Australia, the fact that a person has a disability or has a dependent family member or spouse with a disability, should not operate to prevent migration.

In relation to section 47, Acts Done Under Statutory Authority, Blind Citizens Australia has long been confused as to how this section is to be interpreted. Although the section appears to enable a complainant to lodge a complaint against an action or decision made in direct compliance with a law as long as it is not a prescribed law and the action or decision was not made within three years of the commencement of the section. The three-year exclusion period has long expired. It has nonetheless been impossible for Blind Citizens Australia to date to lodge a complaint where compliance with a not prescribed law has been in issue. HREOC has maintained that it is not possible to make a law the subject of a complaint and that it is not possible to use section 29 in this context because it is not the administration of the law which is at issue. It should be made clear that complaints can be lodged against a decisions or action in direct compliance through a government department Secretary or a complaint be lodged against the Commonwealth.

Recommendation 3

That section 47 of the DDA be amended to make it clear that only prescribed laws are exempt from the operation of the DDA. Section 29 should be amended or a new section added to ensure that discriminatory provisions in laws can be challenged with the Commonwealth named as the appropriate Respondent.

2.1.2 Definition of Disability Discrimination

It was recognised in the community consultations in relation to the development of disability discrimination legislation that discrimination on the grounds of disability raises a different set of threshold and practical issues

compared to discrimination on the grounds of sex and race and it was therefore more appropriate to explore new avenues of definition. It was also recognised that the uniqueness of disability meant that the existing models for sex and race discrimination (which require that persons be in the same or similar, not materially different, circumstances), would be inappropriate for disability discrimination.

Our experience with the use of disability discrimination legislation and the narrow and legalistic interpretation of the comparative test of discrimination by the Federal Court seems to bare out the problems of the comparative approach in its application to the specific circumstances of disability discrimination. Blind Citizens Australia often experiences the dilemma of knowing that treatment is unfair and has discriminatory impact but not being able to pursue it through the DDA because we are unable to compare the circumstances of a person with a disability to the circumstances of a person without the disability. Accordingly, we would recommend that the definition of "disability discrimination" invoke the right to fair treatment rather than require a satisfaction of a test of comparability with others. Moreover, the inclusion of the words "because of the aggrieved person's disability" in section 5 has led to extremely narrow situations in which the case of direct discrimination can be made out. There are situations in which the aggrieved person's disability is material to the unfair treatment but it still cannot be said that treatment is the cause of the aggrieved person's disability. This can force the situation of trying to be overly creative in developing an argument for indirect discrimination.

Recommendation 4

That there be a review of the comparator definition of disability discrimination to evaluate its usefulness in meeting the objects of the DDA.

2.1.3 Unjustifiable Hardship and Reasonable Accommodation

It is Blind Citizens Australia's view that the Productivity Commission has vastly overstated the right to reasonable adjustment in the workplace as evidenced by the Humphries decision. Blind Citizens Australia also disagrees that the DDA requires positive discrimination by requiring reasonable adjustment. In fact, Blind Citizens Australia strongly disagrees with the term positive discrimination since all that it is trying to be achieved is a level playing field. Reference to adjustments is made in the context of a respondent making out a defence to discriminatory treatment but does not actually require that adjustments be made.

Recent jurisprudence from the Federal Court indicates a narrow interpretation of the definition of disability discrimination in areas such as employment, and indicate that unless a person is treated less favourably because they have a disability, such as less favourable terms and

conditions of employment, a complaint will not be made out. There is jurisprudence to suggest that there is no right to adjustments to the workplace. The situation is exacerbated by the comparative definition of disability in which circumstances cannot be compared with a person without a disability.

When the DDA was first enacted, Blind Citizens Australia considered the concept of unjustifiable hardship an advance in comparison to what existed in comparable State and Territory legislation. Blind Citizens Australia does not believe that the definition requires further clarification. If the DDA was amended to include a positive obligation to provide reasonable adjustments then the term would need to be defined and should include adjustments which do not result in an unjustifiable hardship.

The costs of reasonable adjustments in the employment context are currently being met by either the employer, by government subsidy or by the employee with the disability. Blind Citizens Australia believes that discrimination in employment is rife and that people with disabilities do not frequently request that adjustments be made for the fear of not gaining employment, creating trouble in the workplace or being dismissed. This can of course affect the productivity of the worker and the business. Blind Citizens Australia believes government subsidies for workplace modifications should increase to make it easier for workers with disability to express what they need to perform the job. See Appendix A for examples of the types of equipment used by people who are blind.

Blind Citizens Australia does not believe that unjustifiable hardship should be applied to the administration of Commonwealth laws and programs because we believe that the Commonwealth should be under an increased onus of ensuring that the widest possible population can access and benefit from government programs. We believe that the concept of unjustifiable hardship is unnecessary in section 28 dealing with sport as the exceptions are appropriate. The emphasis in sport should be on the widest possible participation. Skills rather than costs are going to be more relevant to participation.

Recommendation 5

That the DDA be amended to include a positive obligation to make reasonable accommodations.

2.1.4 Harassment

Blind Citizens Australia has attempted to run an harassment and/or victimisation argument on a number of occasions. We have not found it a very easy concept to work with. Frequently educational and workplace environments contain what we would describe as a hostile environment

which is usually exacerbated when a person with a disability attempts to achieve various adjustments in the workplace. Blind Citizens Australia would prefer to see the concept of a hostile environment introduced into the DDA to replace or further define harassment.

2.1.5 Requests for Information

Blind Citizens Australia would like to point out that there is no such thing in the DDA as a request for information provision. It is true, however, that it would as a general rule be unlawful to ask a person with a disability to provide information which would not be required from a person without that disability. Blind Citizens Australia has advocated in situations in which a person with a disability has been asked questions which would not be asked of a person without a disability and yet which could arguably be said to be going to whether the person could carry out the inherent requirements of the job. Blind Citizens Australia, however, has found that potential employers are generally fairly aware of not making overtly discriminatory comments. It is still the case that they are unlikely to offer the job to the person with the disability especially if they are aware in an interview context that adjustments are required.

2.2 Measuring the Effectiveness of the DDA

We believe that the effectiveness of social legislation such as the DDA can be measured and that this can be best done in terms of the DDA's impact on social attitudes and practices.

In relation to access of blind persons with guide dogs to premises and facilities, while it is true that there is still a significant amount of discrimination, as measured by numbers of complaints, there is now a greater awareness of the role of guide dogs and the rights of guide dog users.

Access to information remains a significant area of discrimination for blind people. However, the DDA has had a strong impact in increasing public awareness of and compliance with requirements to make information accessible. The successful outcomes in the cases brought by Bruce Maguire against the Sydney Olympic Games Organising Committee (SOCOG) have been seminal in improving the ability of blind people to access information in their preferred accessible format. In particular, the outcome of the web site complaint has created an impetus for people to ensure the accessibility of their web sites. Such an impetus would not have been possible without the Commonwealth DDA as a vehicle through which to assert the right to equality of access to information.

Blind Citizens Australia has been largely successful in using the DDA to bring actions against Government agencies and private service providers,

(including providers of financial, telecommunications and gas and electricity services), for bills, statements, correspondence and public issue documents to be provided in accessible formats

We continue to pursue disability discrimination complaints in conjunction with consultations with tertiary educational institutions to enable blind students to access their study materials and achieve their educational potential.

2.3 Effectiveness in Achieving Objectives

2.3.1 Equality Before the Law

Over the last couple of years Blind Citizens Australia has received requests for advocacy support from people in prison who lack access to or have inadequate access to rehabilitation programs and education. We have had complaints from prisoners who have more limited opportunities to participate in recreational activities and who have problems accessing audio and braille reading material. We have also had complaints from people who are blind who have been denied access to their long cane and have been told to rely on other prisoners to access areas in the prison. Prisoners who are blind or vision impaired face additional problems in terms of privacy. They frequently need to rely on another prisoner to write down letters and information they dictate because there is no-one else who can perform this role. We have had instances of very inadequate access to medical treatment which has caused permanent aggravation of a disability. Many of these issues cannot be argued in the context of the DDA although it is true that many blind and vision impaired prisoners receive less favourable treatment. These kinds of cases do not lend themselves to the comparative argument of a prisoner with a disability compared with a person without a disability. Moreover BCA is not aware of any precedent which secures the right of a prisoner to make a complaint under section 24.

We are also aware that frequently blind and vision impaired people are discouraged from participating in jury service. Blind Citizens Australia believes that juries should be sourced from the widest possible pool.

The DDA is also relevant to access to the justice system in terms of access to information in alternative formats and to opportunities to provide information such as statements in alternative formats, and access to the physical environment, for example, defined paths of travel and improved lighting levels in courts.

Recommendation 6

That the Productivity Commission recommend that prisons be required to develop Action Plans outlining how prisoners with disabilities can expect to access rehabilitation and education opportunities.

2.3.2 Recognition of Rights of People with Disabilities

We believe that one of the most important contributions which the DDA has made to the social advancement of people with disabilities in general and blind people in particular has been its contribution to the promotion and recognition of the rights of people with disabilities. In addition to the impetus created by the decisions in complaints the DDA has resulted in the adoption by the Commonwealth of the Commonwealth Disability Strategy. Though the implementation of this Strategy across the range of Commonwealth government activities has been patchy, to say the least, it has provided another basis on which we have been able to assert the rights of blind people to equal access to Commonwealth Government information and services, and in particular to the provision of Government information in accessible formats.

The DDA has literally increased the visibility of people with disabilities. Since the introduction of the DDA, increasing accessibility has enabled people with disabilities to become more active as employees, consumers and as social, political and cultural participants in the community. A recent example is the introduction in January 2002 of a requirement for selected signage to be provided in braille and tactile formats. This change has meant that in new and refurbished buildings, each toilet sign has braille written on it. This reinforces to the community that people who are blind are active in the community and are likely to want to use the same resources as them. It is arguable that it is this visibility, more than anything else, which has had the greatest impact on community attitudes to people with disabilities, and the introduction of the DDA, and the shift to a rights based approach to access for people with disabilities which it represented, was fundamental to this.

The Commission asks what measures might be used to assess the effectiveness of the DDA in promoting the recognition and acceptance of people with disabilities. Blind Citizens Australia suggests the development of measures to assess the extent to which:

- people with disabilities and their advocates report using the DDA as a lever in negotiations with the providers of goods and services;
- the providers of goods and services report considering the requirements of the DDA when planning or reviewing their operations/products; and
- the providers of goods and services consult with people with disabilities, including the stage at which the consultation occurs and the degree to

which they measurably affect outcomes, that is, lead to substantial changes in the design of a good or service.

2.3.3 Other Influences

In claiming for the DDA a contribution to the welfare of people with disabilities and an achievement of its key objectives, we do not discount the contribution of other factors, in particular the strong advocacy of people with disabilities on their own behalf and the contributions of State and Territory discrimination laws. However, the Commonwealth DDA has had a particular influence in those areas of Commonwealth responsibility such as telecommunications and information access. Even in areas which are primarily a State or Territory responsibility, e.g. transport and education, Commonwealth requirements for co-ordination mean that Commonwealth legislation such as the DDA has a significant role in shaping the way in which services are provided and thus in determining the degree to which those services are or are not accessible to people with disabilities in general and blind people in particular.

2.4 Competition and Economic Effects

The competition and economic effects of disability discrimination legislation are most harshly felt when the principles of non-discrimination and equality of access which the legislation proclaims do not form part of routine business practice. The cost of building accessibility features into a web site prior to its establishment is much less than the cost of defending a DDA complaint and modifying that web site at a later date. The cost of including in a budget for provision of information in accessible formats is less than the cost of defending a DDA complaint for failing to do so and then later having to find the funds to produce alternative formats of documents. The cost of including automated audible announcements and tactile ground surface indicators in a transport facilitator at the design stage is considerably less than the costs of adding these features to a transport facility once it is established.

Businesses, government and community sector organisations have had ten years to review their products and services to ensure that they are accessible to people with disabilities and compliant with the DDA; ten years to research the most cost effective way of meeting their obligations, introduce changes as services and stock are routinely reviewed and/or upgraded, and to plan the gradual introduction of higher cost modifications. Most increased costs as a result of compliance should have been identified and absorbed during this period. That this has not occurred reflects poorly on the capacity of organisations to forward plan.

There are of course exceptions to this and many businesses have realised the commercial advantages of providing accessible goods and services,

and have traded on this in the market place. For example, companies which have improved the readability of information provided on their products have promoted this among networks of people who are blind or vision impaired. In addition, as more services become accessible, the few that do not meet their obligations become more noticeable and suffer in the market place as a result. This is evident in the case of accessible streetscapes. Anecdotal evidence suggests that shopping areas which have introduced clear access for people who are blind have become more attractive not only to this group, but also to others including parents with strollers or prams, people who use mobility aids, and the elderly.

The DDA has had a noticeable impact on education services with those facilities with a reputation for being accessible tending to attract higher numbers of students with disabilities. Government funding models should be designed to “reward” these institutions to ensure they are not disadvantaged for meeting their obligations.

2.5 The DDA and Other Legislation

The experience of our advocacy is that there are no adverse effects of the coexistence of Commonwealth and State/Territory disability discrimination legislation. The problems from the co-existence and parallel operation of Commonwealth and State legislation, in some areas, are due to difficulties in bureaucratic relationships between Commonwealth and State officers rather than the co-existence of legislative powers. Often it is necessary to bring a matter under State/Territory legislation because of the constitutional limitations of HREOC in enforcing its own decisions.

2.6 Regulations, Standards and Other Instruments

The question of the advantage and disadvantage of mandatory Disability Standards has been discussed since the Standards development process first commenced. BCA believes that HREOC Guidelines, Industry self-regulation and incentives to develop Action Plans are all likely to further the objects of the DDA. They are not, however, law and it is unfortunately the case that compliance is best achieved through legal obligation.

BCA has seen through the ad hoc adoption and implementation of the Australian Banking Association’s Disability Standards that these documents are often considered aspirational rather than mandatory. Moreover, there is no guarantee that industry standards will actually comply with the DDA. Even when HREOC is involved in the development of such Standards, the same risk applies in terms of the watering down of obligations under the DDA, as exists in the development of mandatory Standards.

BCA is convinced that it is only through the draft Education Standards becoming law that the endemic discrimination against students with

disabilities can be successfully challenged. BCA believes that the current draft which is now subject to a cost/benefit analysis successfully demonstrates how issues such as how prescriptive or flexible Standards should be can be balanced.

Within this context BCA strongly supports the development of Disability Standards in all of the areas outlined in section 31.

We agree that Disability Standards should include independent monitoring and reporting procedures. We do not think the Commission has given enough information about what it means by an independent enforcement mechanism. (Does it mean independent from a complainant, independent from HREOC?) If there was an enforcement mechanism which did not rely on an individual complainant taking a matter to the Federal Magistrate's Court then Blind Citizens Australia believes that would be good thing.

Given that the process for developing Disability Standards, as Regulations, must necessarily be a slow and complex one, HREOC's Guidelines and Advisory notes are of value in expressing and clarifying requirements of disability discrimination laws and creating an impetus for compliance with non-discriminatory and equal access principles.

2.6.1 Industry Self Regulation

Blind Citizens Australia supported and strongly participated in the process leading to the development of the Australian Bankers Association's voluntary industry standards with respect to ATMs, EFTPOS, phone banking and internet banking. The process itself was a positive one and had an inherent value in bringing the participants together to discuss the issues. However, we would not support the amendment of the DDA to facilitate industry self-regulation by the certification of voluntary industry codes as being in compliance with the DDA. Such a provision would amount to a substantial undermining of the rights of people with disabilities under the DDA to non-discriminatory treatment. If voluntary Standards or Codes are to be negotiated, the best interests of people with disabilities are served by using the rigour of the DDA to bring the parties to the negotiating table and allow for the negotiating of voluntary standards against the strict benchmarks of the DDA rather than against any lesser benchmarks which will ultimately be dictated by the relative strength of the negotiators.

Recommendation 7

That the Productivity Commission recommend that mandatory Disability Standards be developed in all areas listed in section 31.

2.7 Complaints

Firstly, Blind Citizens Australia strongly disagrees with the statement in the Issues Paper that unless the Federal Magistrates Court regards a case as frivolous or vexatious, a complainant can usually expect to have to pay only their own costs, even if they lose. Recent cases have made it clear that costs will flow in the usual way unless there are exceptional circumstances, such as an extremely significant public interest component.

Blind Citizens Australia's experience is that although many people are willing to make complaints to HREOC, most people are unable to take a matter further if it is not conciliated because of the risk of costs being awarded against them.

This is certainly one of the advantages of an overlapping State or Territory complaints system as it is still the case that costs are less likely to be awarded in State/Territory systems than in the Federal Magistrates Court.

One of the other advantages of the overlapping State and Territory and Commonwealth complaints systems is the ability to use the State's legislation in circumstances where the matter is clearly covered by State law and the remedy is enforced under State law. This is important given the limitations on the enforceability of HREOC's decisions as a consequence of Constitutional requirements for separation of executive and judicial powers.

Blind Citizens Australia has generally found that it is as useful to lodge an individual complaint as a representative complaint and certainly individual complaints are easier to manage.

Blind Citizens Australia would like to see the DDA amended to allow organisations to initiate complaints. As to whether HREOC should have the power to initiate complaints, Blind Citizens Australia believes it is more appropriate that HREOC utilise its power to initiate inquiries into matters of public interest. It could be argued that HREOC having the power to initiate complaints could compromise its investigation and conciliation role. The reality is that most complaints settle through the conciliation process and the capacity for individuals to lodge complaints and have them investigated and conciliated is in Blind Citizens Australia's opinion HREOC's most important function.

Recommendation 8

That the Human Rights and Equal Opportunity Commission Act 1986 and/or other relevant legislation be amended to clarify that the costs are only to be awarded against a complainant when a complaint is judged to be frivolous or vexatious.

2.7.1 Confidentiality

Blind Citizens Australia accepts that confidentiality is an important feature of the investigation and conciliation of complaints. Individual complainants are more likely to achieve a result if the outcome of a conciliation remains confidential. Confidentiality is one of the carrots complainants can use to improve the outcome. Confidentiality also encourages frank disclosure during the conciliation process. Where possible, particularly in cases where the conciliated outcome is likely to benefit other blind people, BCA pushes for a confidentiality clause which protects the respondent against any negative publicity but enables the dissemination of information regarding any change in the way services are going to be delivered.

2.8 HREOC Education, Public Policy and Inquiry

Blind Citizens Australia would generally regard HREOC's education and public policy activities in relation to disability discrimination as effective. HREOC's effectiveness in these roles could be improved if it had additional resources. However, Blind Citizens Australia would emphasise, particularly in the current climate, that HREOC should not be required to give priority to its educative function at the expense of its complaints handling role. While community education with respect to disability discrimination is important, there is no escaping the fact that the real advances for people with disabilities have come from successful outcomes of strategic complaints.

Blind Citizens Australia has participated in a number of inquiries initiated by HREOC and supports the inquiry process as a means of raising disability discrimination issues, facilitating discussion by stakeholders, and creating openings for the resolution of issues. As the outcomes of the inquiry process depend on the willingness of participants to move from articulating a position to negotiating a solution, it is not possible to suggest ways in which the current inquiry process can be improved.

2.9 Looking to the Future

The Issues Paper correctly points to: ageing of the population, genetic screening, medical developments and community attitudes as future influences on people with disabilities and the DDA. It is clear that amendments will be required to the DDA to meet some of these challenges of the future. In particular, Blind Citizens Australia would recommend that the DDA be appropriately amended to address discrimination against people with disabilities arising from the use of genetic screening. Many causes of vision impairment have a genetic basis and the potential for blind people to be subject to discrimination on the basis of genetic screening is great, particularly in the areas of employment and insurance.

Another social trend with implications for disability discrimination is the increased use of psychometric and other forms of pre-employment testing,

particularly by large Government and corporate employers. There is a need for the DDA to be amended appropriately protect people with disabilities from the discriminatory application of pre-employment selection testing.

2.10 Interaction of Corporations Law and Disability Discrimination

Another current issue for people with disabilities in their interaction with service providers is the manner in which the Corporations Law operates and is used by service providers to limit participation by people with disabilities in the corporate governance, policy and service provision activities of service providers. Managers of service provision organisations often rely on the corporate structure of the organisation, perceptions of good corporate governance and assertions of Directors duties under Corporations Law to restrict the access of representative consumer organisations to positions on Boards and Committees, and to information relating to the organisation's corporate governance and corporate management policies. While it is recognised that these issues are substantially related to the operation of the Corporations Law and community perceptions of people with disabilities, rigid application of Corporations Law principles can exclude people with disabilities from effective participation in the services which they require and this exclusion can amount to a denial of their rights in this regard. We would recommend that there be an investigation of the interaction of the Corporations Law and the DDA to ascertain how the DDA can be amended to minimise the discriminatory application of the Corporations Law on the participation of people with disabilities in the management of their services.

3.0 Discrimination in Specific Areas of Activity

3.1 Discrimination in Employment

3.1.1 Introduction

Employment discrimination on the grounds of a person's blindness or vision impairment constitutes the majority of the workload of our individual advocacy service. This is due to both the numbers of incidents brought to our attention and the intensity of the work involved in assisting the complainants. Employment discrimination cases are the most resource intensive in terms of financial and human commitment and the most difficult to resolve.

3.1.2 Factors Affecting the Employment of People who are Blind

Systemic factors substantially impact on the capacity of a person who is blind to seek and retain employment. The most important of these is the inaccessibility of public services and infrastructure. However, trends in employment creation and technological changes are also making employment more difficult to attain. Employment growth is primarily

occurring in industries and occupations which are not well suited to people who are blind, for example, retail.ⁱ In addition, positions which should be available to people who are blind, such as call centre work, are often not because of barriers such as inaccessible technology.

Other structural changes which are adversely impacting on the employment of people who are blind include:

- The increasingly visual nature of work, for example, the rise in the use of touch-screen technology and graphical images.
- A reduction in the number of entry level positions in organisations and an increased emphasis on multi-skilling.
- The concentration of employment growth in the small business sector which is the sector least likely to be able to afford the accommodations needed to employ a person who is blind.
- The reduction in employment in the public sector, the sector best able to afford accommodations for people who are blind.ⁱⁱ

Increased outsourcing of recruitment is arguably nullifying attempts by employers to address discrimination, as recruitment companies are not being contractually required to take positive measures to encourage people with disabilities to apply for positions. In fact, BCA has experience of recruitment agencies failing to recommend a person with a disability for a position for fear of losing the employer as a client. We have advocated for blind people who have been sent back to the recruitment agency because the employee has a disability. Similarly, there is evidence that government funded employment agencies are failing to meet their obligations to people with disabilities. In 2002, only 2 of the 196 Job Network Providers utilised the Workplace Modifications Programme, a program which funds the installation of adaptive equipment and technology.ⁱⁱⁱ

3.1.3 Measuring the Effectiveness of the DDA

These systemic trends and barriers make it difficult to isolate and measure the effect of employer discrimination on the employment of people who are blind. This is particularly the case because employer discrimination is often indirect. For example, an employer may not advertise vacant positions in media that are accessible to people who are blind or may unnecessarily place positions out of the reach of a person who is blind by requiring applicants to hold a driver's licence.

These influences make us sceptical of the Issues Paper suggestion that any change in the unexplained portion of the difference in employment and wage outcomes for people with disabilities since the enactment of the DDA be used as a measure of the effectiveness of the legislation. Arguably a better assessment of the efficacy of the DDA would be gained by

considering successful complaint outcomes and by conducting research into shifts in community attitudes to disability.

A simple measure of direct discrimination by employers would be gained by comparing the rates at which people who are blind are offered interviews by employers according to whether or not they disclose their disability in the application. However, the effectiveness of a measure such as this would be undermined by the fact that few positions are advertised^{iv} - a trend that entrenches the disadvantage experienced by blind people already excluded from the labour market.

A more relevant measure may be the extent to which employers assist a person who acquires a disability to remain in employment. The majority of people with a disability who are working aged have acquired the disability as an adult and are likely to be in employment at the time. Overseas data shows that 70-90% of unemployed blind people were employed before they lost their sight and most left their employment involuntarily.^v Therefore, an assessment of the extent to which people with disabilities are compelled into early retirement might provide a measure of discrimination. Again however, this measure would be made more complex by the need to take into account both the impact of systemic discrimination and the emotional impact of acquiring a disability.

A list of some research which may assist the Commission in this area is provided at Appendix B.

3.1.4 Possible Adverse Impacts of the DDA on Employment

The OECD Report, **Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People** (2003), suggests that anti discrimination legislation may have improved the employment retention of people with disabilities but acted as a barrier to their employment. This claim is disputed however, even if it is true, the fact that most working aged people who are blind will acquire their disability as adults and will therefore already be in the workforce, makes this a worthwhile approach.

3.1.5 Social Support and Labour Participation

Blind Citizens Australia rejects the concept of a linkage between labour market participation and eligibility for and payment of the Disability Support Pension. Given the pervasiveness of disability discrimination and the strength of the social, economic, community and workplace factors mitigating against the employment of people with disabilities, minor tweaking to the eligibility criteria and payment levels for the Disability Support Pension will not produce a significant improvement in the employment and earnings of people with disabilities. We point out that for

people with disabilities, the interaction of these factors and poverty mean that the assumptions about the incentive and disincentive affects of social welfare support on labour market participation cannot be drawn as readily as they might be able to be drawn for other groups of social welfare recipients.

Blind Citizens Australia would suggest that if the social security system is to support the participation of people with disabilities in the labour market, it must acknowledge and treat separately their need for income support and for support to meet their disability related costs. Income support payments for people with disabilities must be supplemented by a cost of disability allowance set at a rate sufficient to enable people with disabilities to meet the costs of participating in the community and the labour market. In order to maximise the positive impact of such an allowance, it should be both tax free and means test free.

It is a straightforward assertion that improved access to public transport is likely to have a positive impact on the ability of people with disabilities to enter the labour force. The costs of getting to and from work are a major barrier to workforce participation for people who are blind and vision impaired. But we point out that the increased accessibility of public transport will not in isolation have a significant positive effect on labour force participation of people with disabilities.

Recommendation 9

That the Productivity Commission recognise that systemic discrimination in employment is the most important factor which affects the participation of people with disabilities in the labour market.

3.2 Education and Training

Over the past couple of years requests for advocacy support in relation to access to education have increased markedly. Most complaints relate to access to tertiary institutions. We have found again that the Issues Paper has made a number of incorrect assumptions about what the DDA requires of educational institutions, with the inference that education providers are meeting their legal obligations.

Although some institutions provide in general a good level of service, many institutions have not put in place processes to ensure that blind students get access to course materials in a format that they can read at the same time as students who are not blind receive their course materials. Many blind students receive course materials up to halfway through a semester and sometimes not at all. Frequently practical classes are not accessible and supports are not sufficient to ensure that blind students get access to more than just the required reading. Many blind students have extremely fraught

relationships with support staff such as Disability Liaison Officers, who are often under resourced.

Outsourcing of alternate format production has decreased since one of the main providers of this service, the National Information Library Service, started charging on a full cost recovery basis rather than the previous token free. This has dramatically increased the cost of obtaining a high-quality product in some formats. We are experiencing situations in which blind students are being encouraged to use formats which are not the most suitable, but are cheaper. Educational institutions have turned to in-house production, but this is often inferior. Blind Citizens Australia finds that blind students spend much of their study time formatting materials for themselves and relying on friends and family members to assist with transcription and reading from texts. Although some publishers are very approachable in relation to making texts available in an accessible disk format, others are still very concerned about copyright implications.

Difficulties in accessing course materials affects the educational outcomes of blind students. We have experienced students pulling out of courses because of access issues and experiencing depression and loss of self-esteem.

In relation to primary and secondary education, Blind Citizens Australia has concerns that blind students do not receive the appropriate amount of visiting teacher support. In addition, as full cost recovery pricing for transcription services is applied to the primary and secondary school sector, Blind Citizens Australia has grave concerns about the future of braille which is the primary literacy tool of students who are blind. Many parents are unwilling to take DDA complaints against schools because of internal pressures and complaints which are lodged are generally settled before Hearing. Consequently, there is no useful precedent available which indicates the level of support a blind student can reasonably expect at primary or secondary school.

Blind Citizens Australia believes it is crucial that Disability Standards in the area of education are developed. The lack of support for the development of Education Standards by the States is an indication that students with disabilities have generally been under resourced to date. The States are concerned about the costs of implementing Education Standards. Blind Citizens Australia's position is that these are costs which should already be being expended if the States were complying with their legal obligations.

Being involved in DDA complaints is time-consuming and exhausting for the complainant and frequently results in the breakdown of relationships on which the student is obliged to rely for the remainder of their studies.

Disability Standards in education should reduce the need for complaints to be lodged. It should also lead to greater consistency between educational institutions in terms of the level of service provided.

3.3 Access to Public Transport

Blind people have noticed improvements in some aspects of access to public transport since the enactment of the DDA, and it is readily apparent from our advocacy work in this area that the catalyst for these improvements has been the imperative of the DDA and the need to comply with its requirements. The DDA Standards process has been crucial in bringing people with disabilities, transport operators and Governments together to work collaboratively to improve transport access for people with disabilities.

However, transport is an area in which gains in some areas have been offset by losses in others. For blind people, there have been gains in the areas of access to timetable information and ticketing and audible announcements on trains. However, other trends in transport services are making public transport less safe and thus less accessible for blind people. For example, transport operators are reducing staff at railway and bus stations without providing other means to assist blind travellers.

3.4 Access to Public Premises

The DDA has been the impetus for the introduction of changes which have dramatically improved access to the physical environment for people with disabilities. Though improvements in accessibility have been predominately to access for people with physical disabilities, we have been able to use the DDA to support our advocacy for measures to create an accessible physical environment for blind people including the provision of tactile ground surface indicators, audible announcements on public transport and braille and tactile signage. Though there is still much to be done to achieve an accessible physical environment, we can confidently assert a contribution of the DDA to an increased recognition of the needs of blind people with respect to an accessible and safe physical environment and the implementation of requests for accessibility improvements.

This said, we are still at the tip of the iceberg in terms of the number of public premises which we would consider accessible. There is, unfortunately, no precedent in terms of what could be considered unjustifiable hardship. There is no precedent in relation to the kind of access issues faced by people who are blind at all. In fact we cannot be sure that a complaint in this area would be successful if it went to the Federal Magistrates Court. This is largely because there is no positive obligation to provide reasonable adjustments in terms of access to premises and the absence of the kind of adjustments required by blind

people might make access more difficult but not necessarily inaccessible. It might therefore be possible that a complaint of indirect discrimination cannot be made out.

In this context we believe that it is imperative that Disability Standards for Public Premises be developed. We believe that it would dramatically improve access outcomes for blind people compared with the very piecemeal approach which occurs now through individual complaints.

3.5 Access to Good, Services and Facilities

We have achieved some of our most successful outcomes in the area of access to goods, services and facilities. Although, most of our successes have been achieved through individual complaints, we have been able to use the precedents set by conciliated outcomes to achieve greater access. Many of our complaints are to do with access to information in accessible formats. Blind Citizens Australia has run DDA complaints against a number of utilities to ensure that blind people are able to read their accounts in the same way as sighted people. We have also run cases against all of the major banks, for example, in relation to access to ATMs and other banking services. These DDA complaints have provided impetus for broad industry reform such as the development of Banking Standards. Blind Citizens Australia has also run a number of complaints against businesses and government agencies which operate inaccessible web sites.

There is still an enormous amount of discrimination in relation to goods and services and much work to be done. The DDA has certainly provided a mechanism to get services to change entrenched practices. Blind Citizens Australia would be interested, however, in the development of Standards which would certainly raise the profile of discrimination in this area. We also believe there is a role for the development of industry-based codes of practice in area such as telecommunications and publishing, especially if HREOC is involved along with other interested parties.

One of our current cases lodged in the Federal Magistrates Court in Western Australia against a publishing company is a good example of the sometimes limited value of individual complaints. The complainant in this case requested a German/English dictionary in an accessible disk form because she cannot access the hardcopy dictionary. If the dictionary is in an accessible disk form the complainant would be able to use adaptive software to access the dictionary. Although it was made clear to HarperCollins that making the dictionary accessible would probably cost between 1000 and \$2000, the publishing company decided that the cost was too great. BCA tried to argue that the product would be useful for other blind people and people who have difficulty manipulating the hardcopy document and could actually result in an increased market for the product.

The company is aware of the DDA but is not prepared to provide an additional service to the complainant unless other publishing companies are obliged to do the same. HREOC and other stakeholders are currently trying to change industry practice in this area but progress is extremely slow. Some publishing companies, especially in relation to educational texts, do make accessible disk is available. Other companies are more perturbed about copyright implications and cost.

3.6 Accommodation, Land, Clubs and Sports

Blind Citizens Australia has run a number of complaints in relation to access to accommodation and sport. Discrimination in the area of access to accommodation can be very difficult to prove and is an area that would benefit from the development of a Disability Standard. Nonetheless it is still likely that people with disabilities will struggle to be considered equally in terms of access to accommodation especially if adjustments need to be made to the accommodation to facilitate access. The costs of adjustments in relation to the needs of blind people are generally very minimal and should easily be borne by the landlord. Many agents and landlords are very disinclined to rent premises to blind people especially if a person has a guide dog. Discrimination by motel owners and managers is relatively frequent.

In relation to sport, BCA believes that the law is adequate

3.7 Commonwealth Laws and Programs

The DDA has had a significant positive affect on discrimination against people with disabilities in the administration of Commonwealth Government laws and programs. Blind Citizens Australia has been able to effectively use the Commonwealth Disability Strategy to raise and resolve instances of discrimination in the administration of Commonwealth laws and programs in particular with reference to the provision of information to blind people in inappropriate and inaccessible formats. On other issues, in particular, accessible voting and discrimination in migration, insurance and superannuation, there has been little progress and we would suggest that one of the hindrances to progress in these areas is the breadth of the applicable exemptions in the DDA.

As stated earlier, the implementation of the DDA and the Commonwealth Disability Strategy remains extremely patchy across the Commonwealth. A much higher rate of employment of people with disabilities by government agencies is essential and discrimination against people who are currently employed is still all too frequent.

Blind Citizens Australia would not support there being a reasonableness test applied to access to Commonwealth laws and programs. The reality is

that most discrimination occurs because the access issues of people with disabilities have not been considered when a program is developed. The costs of ensuring access at the program development stage are extremely minimal compared with the costs of remedying an inaccessible program once a discrimination complaint has been lodged.

The Commonwealth is supposed to be a model provider of services to the community and is obliged to provide services to all of the community who are eligible for those services. It should not be able to rely on poor planning to avoid obligations under the DDA. The Commonwealth has failed to fully embrace its own Disability Strategy and the absence of a defence has at least ensured that some access issues have been rectified. Blind Citizens Australia refers in particular to the inaccessibility of the Australian Taxation Office's web site which made it very difficult for blind people to lodge BAS statements online as can sighted people. The Commonwealth should not be able to claim ignorance of its own laws.

Equipment

Examples of the types of adaptive equipment and technology that people who are blind need in order to access basic information in the labour market include:

• braille note taker	\$8,000
• computer	\$2,000
• screen reading/screen enlarging software	\$2,000
• internet connection	\$30 per month
• closed circuit television	\$1,885
• scanner	\$175

In addition, this equipment will need to be upgraded and repaired. The cost of this can range from approximately \$150 for the servicing of a manual braille writer, to around \$1,500 for the upgrade of computer software.

Appendix B

Studies on the experiences of people who are blind in the workplace:

Dryden, G. (2001) "Employment Retention: The Need for a Systematic Approach", **Employability Enhancement of Visually Impaired**, <http://www.unss.sk/english/ec2001/topic20.htm>.

In this research, Dryden provides data on the differing rates of employment among the blind population and argues that the use of a single rate masks extensive variation. Young blind people tend to have a much higher rate of employment (58%), while older blind people have a lower rate (27%). In addition, women who are blind tend to have lower rates of employment.

American Foundation for the Blind (AMF) (1996), **Employment Statistics for People who are Blind and Visually Impaired**, 16 July 2002, <http://www.nfbnet.org/weblist/4alabama/msg00485.html>, page 2.

This research indicates that the mean monthly earnings of blind employees are approximately 20% lower than employees without a disability.

Smith, T. (1999), **How Vision Impaired People Cope in the Workplace**, unpublished thesis

Smith provides case studies of the experiences of Australian's who are blind in employment (Blind Citizens Australia can put the Commission in contact with the author if required).

References

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ⁱ Australian Bureau of Statistics, 2002, **Year Book Australia 2002**, <http://www.abs.gov.au>, accessed 28 January 2002.

ⁱⁱ Kryger, T. (2000), **Small and Big Business Contributions to Employment Growth**, Department of the Parliamentary Library, Australian Parliament House, <http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn32.htm>, accessed 28 January 2003.

ⁱⁱⁱ Verbal report from Marian Pettit, Director of Job Seeker Assessment & Referral, Intensive Support Operations & Intensive Support Group, Department of Employment and Workplace Relations 7 November 2002.

^{iv} NSW Department for Women (2002), **New Research Shows Way Forward for Women Job-Seekers**, media alert issued 8 March, <http://www.women.nsw.gov.au/media/orange.html>, accessed 17 February 2003.

^v Dryden, G. (2001) "Employment Retention: The Need for a Systematic Approach", **Employability Enhancement of Visually Impaired**, <http://www.unss.sk/english/ec2001/topic20.htm>. These figures compare unfavourably to recent Australian Bureau of Statistics figures that showed that 67% of people who had been retrenched in the previous three years had found employment (Australian Bureau of Statistics (2002), **More Back in Work After Retrenchment**, press release issued 2 August 2002 (no. 101/2002))