Productivity Commission Inquiry into the DDA

Comment on the Draft Report

A Submission by the Disability Council of NSW

Contents

Executive Summary

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

This response comments on the structure of the report, some recommendations, and responds to some of the Commission's requests for information. It also comments on its disappointments with the reports findings, urges the Commission to reconsider its stated position on the 'social model' and makes comment on the consultation process.

It acknowledges the report's major strengths, being its use of quotations and its breakdown by Chapter and 'sub- sections' to deal separately with distinct though related issues and comments on 'repetitiveness' as a perceived weakness.

Council supports several of the Commission's recommendations, particularly 6.1, 6.2 and 9.3. Though Council still views the existence of 'unjustifiable hardship' with concerns as to its validity, recommendation 10.1 is supported as, if included, it is agreed 'unjustifiable hardship' should apply to all areas of disability discrimination under the DDA. Recommendation 10.2 is supported as the inclusion of 'community wide benefits' will address the interpretation that views the matter solely in terms of the impact on a respondent. Council agrees with the general thrust of recommendation 10.4, believing that, while there may be a health related basis to reject an applicant for visa, the status of being a person with a disability does not automatically provide a justifiable reason to refuse entry. The intent of recommendation 11.4 is supported though in certain circumstances Council argues 60 days is still insufficient.

Commenting on requests for information; Council believes that an accommodation standard, as presently conceived, is unworkable given the broad range of issues it might attempt to address, strongly supports the development of monitoring and enforcement mechanisms in some form, argues that the DDA should be amended to allow organisations to initiate disability discrimination complaints, and notes that a positive duty and co-regulatory approach combined might reduce disability discrimination though much work is yet to be done.

Reviewing findings of the report Council has two major concerns; these being dismissal of the 'social model' as unworkable and failure to address the poor quality of consultations.

Introduction

About the Disability Council of NSW

The Disability Council of NSW is the official advisory body to the NSW Government on disability issues and policy. The Council, appointed by the Governor and reporting to the Minister for Disability Services, operates under the Community Welfare Act 1987 and is

made up of a majority of members who have disabilities. In addition, there are members who have experience in the provision of services for people with disabilities, their families and carers.

The role of the Disability Council is to

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

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

The structure of the Response

For the sake of clarity the Disability Council of NSW has been referred to as Council, The Review of the Disability Discrimination Act 1992 Draft Report has been referred to as the report, Disability Discrimination Act 1992 has been referred to as the DDA, and the Human Rights and Equal Opportunity Commission as HREOC throughout this response. The Productivity Commission has been referred to as 'the Commission' to distinguish reference to it from reference to HREOC.

In this response Council will comment on the structure of the report before making comment on some of the Commission's recommendations. Thereafter input is provided relating to the Commission's various requests for information. Prior to concluding Council has commented on its disappointments with the report's findings, urged the Commission to reconsider its stated position and made comment on the consultation process.

Structure of the Draft Report

The Commission has clearly taken on a daunting task in this review and the Draft Report is, overall, a credit to their professionalism and ability to assess and report on a very complex and controversial set of issues. The report's major strengths lie in the appropriate use of quotations from Submissions to demonstrate the strength and diversity of views, and in its breakdown by Chapter and 'sub-sections' to deal separately with distinct though related issues.

The complexity of the issues has to some extent made a lengthy report unavoidable. Yet, at times, the report seems repetitive, partly due to the practice of 'boxing'. For instance, on page 67, the text notes there is a $50 filing fee to lodge a complaint with either the Federal Court or Federal Magistrates Service and the fee is again noted directly below the first reference in *Box 4.3 Federal Magistrates Service*. Similarly, boxes seem repetitive conveying similar information (compare information provided in Boxes 4.3 and 11.2). This seeming repetition however is not confined to 'boxed' information. For example commenting on the cost of making a complaint the Report notes *"26 per cent of complainants whose complaints were not conciliated stated that cost was the reason they did not proceed to the federal courts*…(and)…*almost 30 per cent of complainants who settled despite being dissatisfied with settlement terms did so because*…(of cost)" (p278). This is followed (pp279-280) with *"26 per cent of complainants whose complaints could not be resolved by conciliation stated that they did not proceed to the federal courts because the process would be complex*…(and)…*almost 30 per cent of complainants who settled even though they were not satisfied with settlement terms did so for this reason…".* The statistics and phrasing being so similar invites both confusion and scepticism.

Council suggests that this repetitiveness be addressed to ensure the final report is clearer and more succinct.

Draft Recommendations

Council supports the Commission's recommendations made to improve the clarity, internal consistency of, or extension of the coverage of the DDA. Not all these will be addressed in detail in this response. Yet some are thought to warrant comment as detailed below.

Draft Recommendation 6.1:

> ***The Attorney General should commission an inquiry into access to justice for people with disabilities, with particular focus on practical strategies for protecting their rights in the criminal justice system.***

Council has recently released its *Strategic Directions 2005* which listed 'Criminal Justice' as one of the 4 core priority areas for Council. Its publication, *A Question of Justice* details the experience of the criminal justice system of people with disabilities and clearly indicates a lack of commitment to address significant shortcomings in the treatment received by people with disabilities interacting wit the criminal justice system.

Council is therefore highly supportive of Draft Recommendation 6.1:

Draft Recommendation 6.2:

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

This recommendation is also strongly supported especially as it covers both access and the need for independent support. It may be advisable to reword the recommendation: …"to ensure the right to vote of people with disabilities is actualized" as non-accessible polling places do not infringe the right to vote but the ability to do so.
The need to vote raises an interesting dilemma for people assisting people with intellectual disability. A need to ensure people with intellectual disability are not unduly influenced by the person 'assisting' needs to be balanced against the person with intellectual disability's need to have a great deal more explained than how to fill in the voting form. For instance, people needing assistance may need to be advised of which party is being represented, or what values an individual candidate stands for. They may need more detail than can be expected to be provided by an independent assistant. For this reason some prefer a support person that they know. The Commission's views on the means to provide support required without exerting undue influence would be a valuable addition to the report.

Draft Recommendation 9.3 (dot point 3):

- ***place the burden of proving that a requirement or condition is reasonable 'having regard to the circumstances of the case' on the respondent instead of the complainant.***

Council particularly supports this recommendation in recognition of the regular imbalance of power between complainants and respondents. It is, in Council's view, more in keeping with the intent of the DDA to ask that a respondent prove they are not discriminating without reasonable grounds to do so than to ask a complainant both to prove that discrimination has occurred **and** that the means to remedy the situation is not unreasonable.

Draft Recommendation 10.1 & 10.2

In its initial submission Council argued that "(t)he existence of 'unjustifiable hardship' as a defence abrogates the responsibility to ensure citizens' rights to participation and equitable treatment" and recommended that 'unjustifiable hardship' be abolished as a defence under the DDA (p19). However, recognising that the Commission is of a different view, Council would support the widening of coverage of unjustifiable hardship to all substantive provisions of the DDA that make discrimination on the grounds of disability unlawful, as a means of ensuring consistency of scope. Recommendation 10.2 is

supported as, in Council's view, the inclusion of 'community wide benefits' among specified criteria used to determine 'unjustifiable hardship' will redress the legal interpretation in current use that views matters solely in terms of the impact of an action on a particular respondent.

Draft Recommendation 10.4:

> ***The exemption of the Migration Act 1958 … should be amended to ensure it:***
> - ***exempts the areas of the Migration Act that are directly relevant to the criteria and decision making for Australian entry and migration visa categories but***
> - ***does not exempt more general actions done in the administration of Commonwealth migration laws and programs.***

Council agrees with the general thrust of this recommendation as it attempts to reduce the number of actions claiming exemption under the DDA (s.52). It was noted in Council's initial submission (p19) that "people with disabilities are often discriminated against in applying for residency and visas are rejected on the basis of a person's disability as a matter of course". Council urges the Commission to consider the need to clarify "directly relevant" (as used in the recommendation) as it believes while there may be a health related basis to reject an applicant for visa (e.g. increased risk to public health) the status of being a person with a disability does not automatically provide a justifiable reason to refuse entry. Council would also welcome the Commission's comment on whether policies, developed to interpret the Migration Act 1958, should be exempted from coverage. Council believes that such policy development, like general actions done in the administration of Commonwealth migration laws and programs, should not be exempted.

Draft Recommendation 11.3:

> ***The Human Right and Equal Opportunity Commission Act 1986 (s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service.***

Council agrees that the time period for lodgement of such applications needs to be extended. As noted in the Report (p 302) *"28 days is often not enough time for the complainant to decide whether to proceed, particularly given the need to obtain affordable legal assistance".* Council would argue that 60 days may not be sufficient time if a

complainant has an intellectual disability, may need the assistance of a support person to ensure legal advice is understood and/or may process information more slowly than others. A similar argument might apply to applicants with acquired brain injury or, possibly, some psychiatric disorders. Therefore Council would urge the Commission to reconsider the appropriateness of the extension to 60 days in light of such potential circumstances. As an alternative, the Commission might suggest that the Federal Magistrates Service develop a disability action plan to ensure access to its services, including lodgement, is facilitated for people with disabilities.

Requests for Information

Council has not provided comment on all Requests for Information by the Commission. It has limited its comment to the issues of developing an accommodation standard, enforcing conciliated agreements, allowing organisations to initiate a DDA complaint, establishing 'positive duty' and the development of a co-regulatory approach between government and industry.

Development of Accommodation Standard

Council believes that an accommodation standard is unworkable as it is currently conceptualised given the broad range of issues it might attempt to address. It is noted in the report (p121) the standard on access to premises is sufficient to cover access to accommodation and the standard might best be structured to address the *quality* of accommodation. It is Council's understanding that the access to premises standard has focused on commercial and/or multiple residences, potentially including public housing or boarding houses. If this is the case it would be appropriate to widen its purview.

If the issue to be covered by a separate accommodation standard relates to specifying a minimum *quality* of accommodation it addresses an issue facing poorer groups without adequate funds to ensure desirable accommodation. From Council's view this is a social issue beyond the scope of the DDA. While many people with disabilities live in sub-standard accommodation the reason relates to their income and not their disability. Government might seek to address the issue of improving rental options by improving public housing stock, making it accessible or adaptable to meet the requirements of an access standard, subsidise improvements in nursing homes where many people with disabilities permanently reside (however inappropriately), require maintenance of boarding houses and even address the issue of homelessness, as each impacts on people with disabilities. The development of an accommodation standard will not address these issues for residents or homeless people without disabilities. Council would therefore support the view that more energy should be put into consultation and development, where supported, of disability standards. As only one standard has been adopted to date emphasis needs to be placed on addressing the others rather than investigating the potential of a further standard. Other *quality* issues not covered under

the access standard (eg the need of a person with an intellectual disability for assistance in making a complaint as a tenant) might be covered under a standard on access to goods and services.

Council does not wish to argue that an accommodation standard should not be considered but that, in Council's view, it is too poorly conceptualised at present to warrant attention; and that due process is best served by better funding and resourcing the current standards development process (see ***Consultation and Standards*** below).

Enforcing conciliated agreements

Council is aware through its networks of several conciliated agreements that were breached. At present little can be done to address breaches and it is up to the complainant again to seek redress when agreements are breached. Council noted, in its initial submission the need for a monitoring/enforcement role (p27) and recommended the establishment of a body to audit efforts to address ongoing disability discrimination and report annually to Parliament on progress made (Recommendation 10, p28). Such a body would be appropriate to monitor conciliated agreements and enforce these where necessary.

Council strongly supports the development of monitoring and enforcement mechanisms in some form. As noted by Commissioner Owens at the Sydney public hearing in Sydney,14 July 2003, (Spark and Cannon: Transcript of proceedings p1100) enforcement of legislation "could get people's backs up" and possibly create the wrong effect. While this may be true of demanding community wide legislative compliance it is a much wider role than merely enforcing a two-party agreement that has been breached.

Several options present themselves. It might be valid to write the terms of enforcement for non-compliance into the conciliated agreement. Such terms may take the form of a financial disincentive to the respondent or the act of making the wider public aware of the respondent's failure to comply. This second option might be a stronger disincentive to firms reliant on a good public image. Government may develop a role in 'selling' compliance in the language of demonstrating 'good corporate citizenship'. It might also be worthwhile, if 'co-regulation' is adopted, that the obligation to comply could be written into an industry Code of Conduct. Penalties might vary dependant on the nature of the breach. The point is that legislative enforcement occurs across boundaries and jurisdictions and if compliance requirements are easily understood the discriminator has an obligation to comply, though government has some obligation in sharing the cost of such compliance.

Allowing organisations to initiate a DDA complaint

Council supports the extension of the number of parties able to initiate a DDA complaint. Council supports the Report's Draft Recommendation 11.4 suggesting HREOC should be

permitted to initiate a complaint. Other organizations in the disability community would likewise, in Council's view, be appropriate bodies to initiate complaints on behalf of specific complainants or a specific group of complainants to which they relate. For instance: the Intellectual Disability Rights Service would have the advantage of having legal expertise 'at its fingertips', as would the Disability Discrimination Legal Centre (DDLC). Similarly organisations such as the Physical Disability Council of Australia, Spinal Cord Injuries Australia, the Brain Injury Association, Royal Blind Society or the Northcott Society for example would all have an interest in raising issues for their respective members or clients.

The extension of the numbers of groups allowed under the Act to initiate complaints is linked to the resources available to such groups. As many of these groups survive on government funding the extension of such funding will be a necessary cost to government if the option available (to raise a complaint) is to be feasible. Council would argue that increasing funding to these bodies (or covering their costs in pursuing a complaint) is a practical way of demonstrating government's commitment to people with disabilities seeking to redress discrimination.

Positive duty and a co-regulatory approach

It may even be practical (continuing from the last point) to permit (or induce) industries, not necessarily linked to the disability community, to initiate or finance disability discrimination complaints. An industry accepting a positive duty to improve its own policy and procedures to address disability discrimination may consider it worthwhile to promote its acceptance of positive duty and at the same time promote the right to substantive equality. Industry, accepting such duty, might draft and implement Action Plans as a practical means address industry wide policy and practice to reduce disability discrimination.

A positive duty to meet certain basic requirements might be made more palatable to industry if couched in terms of meeting social obligations. Council believes that it also, in some respects, could be imposed by regulation or regulations amended in consideration of the needs of people with disabilities. An example might be establishing a requirement for all owners of potential business premises with ground level access to ensure steps were removed, and the premises accessible, before a business could be registered functioning from their premises.

The acceptance of 'positive duty' would mesh well with the development of a co-regulatory approach to monitor disability discrimination. As noted above an industry Code of Conduct might include an obligation to honour conciliated agreements under the DDA.

Yet based on current practice Council is sceptical about industry's acceptance of such 'duty' or 'positive approach'.

In its initial submission to the Inquiry Council noted (p29):

"(e)ducation of government bodies, the business sector and the general public is but part of the solution…

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

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

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

It is Council's contention that before industry and government are able to negotiate a co-regulatory approach and industry accepts a 'positive duty' much work has yet to be done. As yet, an understanding still needs to be developed of what needs to be done to address discrimination effectively, what constitutes reasonable work place adjustments (for instance) and whose obligation it is to pay for these.

To a large extent this is an educative role and it might therefore be appropriate to extend the role (and funding) of HREOC to address such matters. Some policy decisions will be beyond their role but they may prove an important catalyst to begin discussion.

Review of Findings

Even a cursory glance of the report reveals a wide cross-section of opinion and the Commission has done an excellent job in weighting the various positions before deriving its conclusions. While Council is supportive of the report in general terms, and agrees with many of its findings and recommendations, two findings cause great concern. These being:

Draft Finding 9.2

The DDA is based on a 'social model' of disability discrimination but it uses a medical definition of disability. This is appropriate. A definition of disability based on a 'social model' is not practical.

and

Draft Finding 12.5

The disability community has had sufficient opportunity to consult and comment during the development of disability standards. The Disability Discrimination Act Standards Project is a productive way of engaging people with disabilities in this process but is not their only means for providing input.

The DDA and the Social Model

Council contends that the DDA is not based on the social model. Review of the Commission's argument in the report suggests the difference of opinion arises from differences in the weighting of three factors:

- the requisite definition of disability of the social model;
- the coverage of disability discrimination legislation;
- the right to substantive equity of all citizens.

The distinction between *impairment* as an individual attribute and *disability* as a systemic barrier is not merely one of semantics. Disability discrimination does not arise from individual attributes. While race discrimination is based on racial origin and sex discrimination on gender *discrimination* only occurs when substantive equality is not apparent.

The report implies that a definition of disability based on a social model might reduce the instances of discrimination which the DDA covers. (p210). No example is given within the text so Council is uncertain as to the nature of this argument. Yet, what it fails completely to understand is how an act of discrimination that is not based on structural attributes imposing disability can be classified as *disability* discrimination. Perhaps, if structural attributes imposing disability include stigma, vilification and other 'less tangible' barriers are included as social barriers, along with physical restrictions imposed by the social structure, some of those *instances* of discrimination not covered by a social definition would disappear. It is arguable that *if* there are other instances of discrimination not covered by this widened 'social model' they are not, by definition, instances of *disability* discrimination.

Failure to achieve equality of opportunity is not the outcome of individual impairment but a failure to address the right to substantive equity by ensuring the eradication of social barriers. The decision to develop discrimination that is complaints based (rather than rights based), like the decision to place the burden of proof on the complainant and the failure to support the complainant, morally and financially implies a lack of commitment to making the rhetoric of equal opportunity an actuality.

There is an argument that even though government has, for practical reasons, developed legislation which is instance based it is obligated to address the systemic nature of disability discrimination. Following this argument Council urges the Commission to consider means to address this systemic failing. These, as recommended by Council in its initial submission, include the commissioning of a social audit to identify broad capturing data and indicators of the prevalence of disability discrimination, extending the Commonwealth Disability Strategy to cover all business and all Australians, and improving public awareness of disability by financing public debate and discussion.

Consultation and Standards

Council noted the quote from HREOC on page 337 of the report with some concern. HREOC here noted that the suggestions that the funding conditions of the DDA Standards Project have required it to support the development of standards and the consultation options are restricted to federal peaks and the National Disability Advisory Council are inaccurate. Yet Paul Larcombe, National Co-ordinator of the DDA Standards Project advised Council that this **was** the case, and he acknowledged it as a clear restriction on his ability to elicit concerns re standards, when he met with Council on 19 December 2002. Pressed to explain how the DDA Standards Project could function as outlined in its objects, "*to reflect the views expressed by people with disabilities during consultations", (cf Report Box 12.4, p338)* if so restricted Paul agreed to take the question on notice. Council is still awaiting his reply.

Even though there have been several meetings to discuss development of standards with members of the disability community the *quality* of these consultations is suspect. This was, or so Council assumes, evident in the attachment to its initial submission to the Commission noting consumer dissatisfaction with consultation on the Employment Standard. As noted in the submission (pp 31-32):

> *The 'consultation' was conducted in a manner which angered participants from Sydney who felt their questions were ignored and debate stifled.*
>
> *This view was supported by:*
> - *the location for the 'consultation' not being advised to all participants until the morning of the 'consultation'*
> - *documentation accompanying notice of the meeting not being identified as being endorsed by the Attorney General, presenting contradictory views, and being too extensive to be read in the time span permitted*
> - *the parameters of discussion being restricted by the DDA Standards Project Team (who were seen as following a preset Agenda)*

- *the questions asked by the Sydney participants (and faxed to Canberra for inclusion in discussion) going unanswered.*

The quality of this 'consultation' is seen as indicative of most government consultations attended by members and staff of Council. This is a sad indictment and suggests an underlying desire to pay no more than lip service to the consultation process. Council recommended in its initial submission to the inquiry, that:

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

Given the differing opinions expressed in the HREOC submission, quoted above, and the views expressed by Mr Larcombe it would be wise to clarify the matter and advise the disability community. Such advice might best be provided in various fora addressing the shortfall in quality consultation on standards to date. The DDA Standards Project is clearly under-resourced as are consultations undertaken to date. There is a need to clarify and improve both reporting on standards and the consultation process to establish an effective dialogue with the disability community. Council therefore urges the Commission to consider the following recommendation of its initial submission, that:

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

Making comment on the consultation process may be seen by the Commission as outside the inquiries terms of reference. Yet it is an issue that, by its nature, gives rise to systemic discrimination. If we take the issue of input from people with intellectual disability as an example, it is rare that their views are gathered with appropriate respect for the value of their input. They are often advised of government policy and programmes affecting their lives in lieu of being consulted about them. The difficulty of obtaining their input can be explained by reference to the consultation process undertaken by the Commission in its inquiry. People with intellectual disabilities seeking to provide advice to the Commission needed a simplified version of the initial Discussion Paper to understand what the inquiry was and what it covered. Their input may have required assistance from support persons but such support must be solicited and gained at their own expense. This

puts a strain on their relationships or a drain on their purse, and is rarely achievable in the timeframes permitted.

The problem is compounded when their advice is sought on reports such as this one. If a plainer English version of the report is written it necessarily adds to the cost of the inquiry, may be still beyond the understanding of the person wishing to provide input or may be so simplified as to bear no resemblance to the original report it purports to simplify. Thus, to obtain input from people with intellectual disabilities, as from people with brain injuries or some psychiatric disabilities, is a costly exercise. Yet unless it is properly funded and supported it inevitably leads to tokenism.

It may be practical, given the complexity of the matter to hold meetings with specific groups (eg people with intellectual disabilities) rather than conducting all inquiries through public meetings. Such groups might require to be heavily resourced, with support persons and clear plain English. The matter has significant cost implications but ***real*** input, rather than a tokenistic gesture, requires such expense if this groups opinions are being seriously sought.

These additional costs must be met to effectively gather views on any government initiative. The disability standards, once adopted, will be essential to ensuring redress to discrimination. Standards development, above all other government initiatives must be premised on input from those whose lives they will affect.

Conclusion

In summary Council views the report as a thorough attempt to cover exceedingly complex issues and provide reasoned argument to amend, clarify and extend the DDA. It has documented the disparity of views and balanced these in drawing its conclusions. While Council does not agree on all points it sees the review as a well researched and well documented contribution to a contentious debate.