

SUBMISSION TO THE
PRODUCTIVITY COMMISSION
REVIEW OF THE
DISABILITY DISCRIMINATION ACT
1992

INTRODUCTION

Discrimination is one of the most significant factors preventing the majority of people with a disability from full participation in society. It is wide ranging and pervasive in nature, existing at all levels from social and economic policy, to the access of services, to the attitudes and actions of people who have no disability. The Disability Discrimination Act, 1992, (DDA) was introduced as a major national strategy to address discrimination and through this, improve the inclusion of people with a disability and their ability to access the same range of services available to people who have no disability.

Role of the DDA

The DDA is a pivotal part of a raft of Federal and State statutes, regulations and processes aimed at improving conditions for people with a disability. In Western Australia the DDA was preceded by the Western Australian Equal Opportunity Act (1984) which also makes discrimination unlawful. The DDA, however, is more specific and focussed than the state legislation and is pivotal in redressing discrimination because it provides:

- a statement of Federal Government commitment to the prevention of discrimination;
- pre-eminent legislation that ensures action against discrimination on a national scale;
- national leadership in the prevention of discrimination;
- the establishment of pre-eminent national standards as allowed under its legislation or via the mediation and arbitration processes;
- a national coordinating mechanism and the development of a consistent national approach via its standards and mediation processes;
- a national profile and heightened awareness of discrimination against people with a disability and the need to redress this; and
- a process for mediating or adjudicating complaints of discrimination, resulting in precedent which further reduces discrimination.

The DDA is essential legislation because it provides a national and unifying approach to redressing discrimination, including the provision of mechanisms such as standards.

Nature and Scope of discrimination

Discrimination is deeply entrenched and historically people with a disability have not been accorded equal rights. It affects the person with a disability, their families, carers, siblings and extended family and it has an impact on the broader society. People with a disability represent 19.9% of the population and this is estimated to increase to 22.8% by 2021 due to the higher incidence of disability with age. If the number of carers is included, 26% of the population is affected. Discrimination also

affects the broader community through increased needs for financial and other supports and less productivity stemming from lowered levels of employment.

Disadvantage has historically occurred in numerous areas including: social security benefits where the additional costs of having a disability are not fully

- the very limited access to Government and private premises facilities and services;
- negative perceptions and lack of acceptance by the community;
- employment where the participation rate of people with disabilities (56.1%) is less than people who have no disability (80.4%);
- significantly lower average incomes related to lower employment;
- equality before the law where people with disabilities are likely to receive more severe sentences and are less likely to receive parole or conditional release; and
- in education where the great majority of people with an intellectual disability are segregated and access to tertiary education has been severely limited.

Impact of the DDA

It is extremely difficult to quantify outcomes directly attributable to the DDA. There is no systematic national data collection of all people with a disability that has remained consistent over time and the DDA is only one of a number of statutes, regulations and processes aimed at eliminating discrimination. A sense of the impact of the DDA can, however, be gauged from the statistics available and research.

Its direct impact can be seen in standards, regulations and processes that have been established, significant among which are:

- standards for transport and tactile paving and interim standards for access to premises. The effect of these can be seen in the significant improvements in access to public premises and facilities with 97% of State Government agencies and Local Government authorities in Western Australia reporting they have made improvements to the level of access to their premises and facilities¹;
- establishment of voluntary standards for access to banking facilities;
- ensuring access to private education as a result of the outcomes of complaints. Enrolments in non-government schools have increased dramatically in the past fifteen years and this is in part attributable to the requirements of the DDA; and

¹ Report of the Review of Disability Service Plans Initiative 2001

- significant improvements in transport stemming from litigation taken under the DDA in 1996. Dramatic improvements have occurred in all areas including buses, rail, and water transport and in the availability of accessible taxis.

The DDA has also had a significant indirect impact. Its specific focus on disability discrimination and its associated procedures has created a climate that encouraged other actions to redress discrimination. In Western Australia, the DDA significantly influenced the:

establishment of Disability Service Plans (DSPs) which require State Government agencies and Local Government authorities to address how their services meet the needs of people with a disability. DSPs have led to a dramatic improvement in access to premises, facilities and services and a significant improvement in public awareness and recognition of the rights of people with a disability. Involvement of people with a disability has improved with 71% of Local Government authorities and 78% of State Government agencies reporting they consult with people with a disability and 57% of Local Government authorities and 55% of State Government agencies reporting having an advisory body with a membership that includes people with a disability²;

- Review of the Western Australian Education Act in 1999 which provided for more choice and inclusive education and resulted in greater integration of students with an intellectual disability; and
- current Review of Educational Services for Students with a Disability in Western Australia was specifically undertaken to assess the compliance of services and the Western Australian Education Act with the provisions of the DDA. As a result, all students with an intellectual disability who requested fully inclusive education in 2003 were granted it.

Despite this progress, significant discrimination still exists and historical attitudes remain entrenched in many areas. In particular very little improvement can be seen in the areas of employment and in equality before the law.

Benefits of the DDA

Though outcomes have not been able to be quantified at this stage, significant benefits are anticipated to occur with the elimination of discrimination. They include:

improvements in educational attainment;

increases in employment and therefore household income; decreased social isolation and enhancement of psychological well-being; building of social capital;

improved political and civil participation; reduced reliance on pensions and disability specific services; greater independence including less reliance on carers and familial supports; benefits for others for whom the previous barriers were also a restriction, for example, parents and frail aged who do not have a specific disability; and

² Report of the Review of Disability Service Plans Initiative 2001

economic benefits from realising the potential market inherent in people with a disability, from increased tourism and from greater productivity associated with increased employment.

Costs of the DDA

Capital and recurrent funding has been required to address discrimination. Capital costs are incurred in improving physical infrastructure while recurrent costs are incurred in improving access to services, for administration and for compliance. There are, however, no available aggregate measures of these costs.

Requirements for additional funding have been minimal because:

- a large proportion of funding to date has come from existing budgets;
- costs have been spread over time, thus allowing improvements to coincide with normal maintenance and improvement schedules; and
- use of the unjustifiable hardship clause.

Current requirements for additional funding are inflated by the need to address significant discrimination stemming from the lack of accommodation of the needs of people with a disability in the past. There will be a vastly diminished need for funding once this backlog is addressed.

Restriction on competition

The DDA ensures that people with a disability are accorded the same rights as others. From this perspective, where a cost is incurred, it is an extension of a social cost that is already provided to people without a disability. This applies particularly to government services where some of the more significant costs are being incurred.

It is argued that the DDA will have a very limited impact on competition because:

- the economic benefits stemming from addressing discrimination will potentially outweigh the additional costs. These benefits are anticipated to accrue from a number of factors;
 - the increased employment and the associated reduced reliance on supports and pensions;
 - the increased productivity from increased employment participation;
 - the increased economic activity related to expanded markets from the inclusion of people with a disability;
 - the benefits from increased tourism particularly to regional areas, stemming from the inclusion of people with a disability; and
 - the increased productivity related to the increased opportunity for carers to be employed. This stems from the increased independence of people with a disability and therefore their reduced reliance on carers.

- within any one industry, any impact on competition is going to be neutral or at least minimal as all services will be required to make accommodation for the needs of people with a disability; and
- costs have been and will continue to be covered largely by the redirection of funds within current budgets.

Measures to improve the DDA

- The DDA does not fully address the disadvantage of people with a disability. It is limited to requiring that people with a disability be given equal treatment and access to existing services and infrastructure. Full inclusion for all people with a disability, however, will require additional supports and or services.
- The importance of the DDA lies in it being pre-eminent legislation and its national scope, which positions it to provide consistency of standards, leadership and coordination. The potential scope to provide leadership and coordination has not been fully realised.
- The current complaints process requires an action to be initiated by or on behalf of a person who has been discriminated against. This limits the extent to which this mechanism is used. Consideration needs to be given to strategies that make the process less onerous and that allow organisations to initiate or undertake complaints.
- The ability to settle a complaint in confidence prior to it going to court limits the development of standards based on precedent. Consideration needs to be given to allowing these cases to still be used to establish precedent.
- Standards provide certainty for consumers and providers of services and are an effective strategy to redress discrimination. They are, however, a compromise between divergent interests. The standard may not meet the needs of the consumers, yet they are set for a period of time and compliance prevents court action. Consideration needs to be given to a mechanism for ongoing review and adjustment to standards to make them more dynamic and thereby overcome the objections of consumers to this strategy.
- If the above were to be accepted, there would be considerable benefit in expanding the range of areas in which standards could be set to include employment, provision of goods, services and facilities, accommodation and land, clubs and sport.
- Standards take time to develop and be approved. There is a need for mechanisms to establish interim standards or guidelines until formal standards are established. Voluntary industry standards are a potential strategy.
- Concerns have been voiced about the exemption of migrants and insurance on actuarial grounds. The denial of insurance has among others, implications for the employment of people with disabilities.

- Currently compliance with the DDA is based on self-regulation and complaints. There is also provision for voluntary plans under the current DDA. There is a need to consider other more localised compliance strategies such as the DSPs used in Western Australia.
- There would be concerns if industry self-regulation was adopted as an alternative to legislation to address discrimination. The attitudes and perceptions that underpin discrimination still exist to a sufficient degree to be concerned that self regulation without a legal framework would not redress discrimination.
- There are concerns that the disability specific focus and mechanisms of the DDA, which are so effective in redressing discrimination would be lost if the Commonwealth adopted omnibus legislation similar to that used by the states.

3. Discrimination in specific areas of activity.

3.1 Employment

- **What Australian and international evidence is available on the extent of employer discrimination towards persons with disabilities? Is there evidence of any-counter-productive effects of the DDA on employment of persons with a disability, at the firm, sectoral or economy-wide level?**

International research regarding some of the outcomes of the Americans with Disabilities Act (1990) demonstrates that 75% of employers endorse the intent of the legislation and acknowledge that people with disabilities require some level of intervention to access employment within the open labour market¹.

There is an extensive body of empirical evidence demonstrating both direct and indirect employer discrimination towards people with disabilities. Much of this research refers to employers' attitudes toward the 'employability' of workers with disabilities and, in particular, perceptions of limited worker capacity including:

- lower productivity comparatively to the workforce without disabilities²;
- increased workplace accommodation costs; and
- increased production costs incurred through disability and workplace restructuring.

Research on the Americans with Disabilities Act (1990) has demonstrated that the one-off costs incurred through workplace accommodation are marginal, with 51% of all accommodations being at no cost to employers and the median cost for the remaining 49% being less than \$500³. It has also been suggested that simple workplace adaptation can be more beneficial than expensive technology⁴.

While some of the research on the Americans with Disabilities Act (1990) indicates a correlation with lower employment outcomes for workers with disabilities since the Acts inception⁵, most of the research has not considered other macro factors impeding the labour market participation rates of people with disabilities. Such factors include:

¹ Kregel, J. & Tomiyasu, Y. (1994) Employers' attitudes toward workers with Disabilities: Effect of the Americans with Disabilities Act, *Journal of Vocational Rehabilitation*, 4(3), 165-173.

² See Baldwin, M. & Johnson, W. (1993) Labor market discrimination against men with disabilities, *Journal of Human Resources*, 29(1), 1-19 for evidence demonstrating the contrary.

³ Deleire, T. (2000) The wage and employment effects of the American with Disabilities Act, *Journal of Human Resources*, 35(4), p.693-729.

⁴ Hanson, N. (2002) On approval: the geography of disabled women and work, Paper presented at the *New Directions in Disability* seminar series, Centre for Disability Studies, University of Leeds.

⁵ Acemoglu, D. & Angrist, 3. (2001) Consequences of employment protection? The case of the Americans with disability Act, *Journal of Political Economy*, 109(5), 915-957.

- labour market fluctuations due to economic cycles⁶;
- increased labour market participation of women with disabilities relative to the declining participation rates of men with disabilities⁷;
- historical labour market segmentation for marginalised groups⁸;
- the movement of older male workers from the labour force to disability income support⁹; and
- the overall underemployment of people with disabilities¹⁰.

Structural factors that intensify the discrimination against people with disabilities and have not been addressed in the research, include:

- the generally low educational levels of people with disabilities;
- lack of accessible transport, hampering the ability to travel to and from work;
- the significant relationship between area of residence of people with disabilities and the relative lack of social and economic resources (including employment) for these areas¹¹;
- the relationship of those with the greatest needs, facing the greatest levels of discrimination, resulting in the lowest incomes¹² which further distances participation in jobsearch activities¹³.
- limited international recognition of the need for family friendly policies for carers of adults with disabilities¹⁴; and
- competitive/merit-based human resource recruitment strategies as they do not account for the historical disadvantage of marginalised groups¹⁵.

⁶ Yelin, E. & Katz, P. (1994) Labor force trends of persons with and without disabilities, *Monthly Labor Review*, 117 (10), 36-47.

⁷ Ibid. 5

⁸ Haggerty, M. & Johnson, C. (1995) The hidden barriers of occupational segregation, *Journal of Economic Issues*, 29 (1), 211-239.

⁹ Ibid. 4

¹⁰ Barnes, C. (1992) discusses the relationship of employer attitudes and structural discrimination and the effects on un/underemployment of people with disabilities.

¹¹ See Bradbury, B., Norris, K. & Abello, D. (2001) *Socio-economic disadvantage and the prevalence of disability*, Social Policy Research Centre for further discussion on this relationship particularly for people with disabilities.

¹² Fisch, J. (2001) *Towards a disability allowance: Offsetting the costs of disability - An analysis..* Physical Disability Council of Australia.

¹³ The Reference Group on Welfare Reform (2000) report discusses in detail the increased costs of economic participation and how this further hinders an individual's ability to seek employment p.27.

¹⁴ The OECD definition of family friendly policies only refers to those households with one or more adults living together with and taking the care and rearing responsibility of one or more children. In Department of Family and Community Services & Department of Employment and Workplace Relations (August 2002) *OECD Review of family friendly policies: the reconciliation of work and family life, Australia's; background report* p-7.

¹⁵ The University of Western Australia received the Prime Minister's Award in 2002 for positive diversity recruitment strategies, resulting in increased workforce participation of marginalised groups. See also Hanson (2002).

Further, these omissions, from the available evidence, almost negate the positive outcomes of employment for people with disabilities and their carers including:

- significant increases in household income;
- decreases social isolation and builds social capital;
- enhances psychological well-being; and
- >raises political and civil participation¹⁶

In light of the above, the Disability Discrimination Act (1992) requires strengthening to ensure that institutional and structural discrimination is also eliminated. Factors that need to be addressed include:

- recognition of the significant difference in employment outcomes for those with developmental disabilities (autism, intellectual disability, cerebral palsy, muscular dystrophy etc) comparatively to those who acquire a disability in adult life;
- market segmentation, under-employment and lack of career opportunities and in particular, the need for alternative organisational employment policies and practices; and
- debate on the merits of demand interventions (for example, employment quotas, employer levies, employment protection etc) similar to those implemented in Germany, Spain and other European nations¹⁷

❑ **How should the effectiveness of the DDA in eliminating employment discrimination be measured?**

The effectiveness of the DDA in eliminating employment discrimination can be measured through existing mechanisms such as:

- the Department of Family and Community Services *Annual Census Data*¹⁸ as this measures the overall increase (and on some occasions decrease) of people with disabilities accessing employment including; sheltered, supported and open employment; and
- the Australian Bureau of Statistics *Disability, Ageing and Carers Survey* provides labour market participation rates for people with disabilities and their carers¹⁹

¹⁶ Schur, L. (2002) The Difference a job makes: The effects of employment among people with disabilities, *Journal of Economic Issues*, 36 (2), 339–348.

¹⁷ Russell, C. (1999) *Employment and training papers 21: Education, employment and training policies and programs for youth with disabilities in four European countries*, International Labour Organisation, <http://www.ilo.org/public/english/employment/strat/publ/etp21.htm>

¹⁸ The Commonwealth Department of Family and Community Services publishes data annually on the labour market participation rates of people access funded disability employment services.

¹⁹ See Australian Bureau of Statistics (1999) *Disability, Ageing and Carers: Summary of Findings*, Australia (ABS Cat. No. 4330.0) for further information.

Macro data pertaining to the following indicators can also be used, such as:

- household income earnings and poverty levels, including dependency on government income support and the percentage of increased earnings through labour market participation comparative to the non-disabled population; and
- the United Nations *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*, measures illustrated for Rule 7: Equal Employment Participation refer to the significant structural barriers to employment that people with disabilities face.

While these instruments have the ability to measure the labour market participation rates of people with disabilities, they are unable to measure the effects of the additional structural barriers and demand factors discussed above. Thus, any form of measurement needs to include these macro issues as part of its analysis to fully understand the effects of the Disability Discrimination Act (1992) on employment outcomes for people with disabilities and their carers.

- ❑ **How have the eligibility criteria for the Disability Support Pension and employment support services affected incentives for people with disabilities in the labour force?**

In 1990, the Ronalds Report²⁰ found that one of the key barriers to employment was directly related to the income support system, in particular, income tests, fringe benefits (such as the health care card), and taxation. The report clearly demonstrated that the risk of losing the Disability Support Pension (DSP) and associated fringe benefits was one of the central disincentives to labour market participation. People with disabilities particularly value the fringe benefits associated with the DSP as it helps to cover the increased daily living costs of disability. These findings were also supported by the Social Security Review in 1988.

The Commonwealth Government subsequently restructured the income support pension to address these concerns. As a result, Australia has seen increased labour market participation of people with a disability²¹.

²⁰ Ronalds, C. (1990) *National employment initiatives for people with disabilities: A discussion paper*, Australian Government Publishing Service, Canberra.

²¹ Comparative analysis of Commonwealth Census Data between 1998 & 2000, demonstrates that there has been a significant increase of number of people receiving employment assistance moving from 39,684 in 1998 to 45,950 in 2000.

In May 2002, however, the Commonwealth Government proposed to tighten eligibility for the DSP as part of its welfare reform agenda. Among the proposed changes is a reduction in the threshold work hours so that people who work more than 15 hours a week (currently 30 hours) will lose their eligibility for the DSP and in turn, access to the Health Care Card and Pharmaceutical Benefits at reduced costs. If implemented, not only will these reforms have a negative effect on the labour market participation rates of people with disabilities, but will also result in increased poverty within the disability community. The link between poverty and disability is well established²². Changing the work eligibility criteria will create greater financial hardship²³.

Another fringe benefit component of the Commonwealth income support system that has had substantial negative effects of late, is the reforming of the disability employment services sector. As part of its disability employment reforms, the Commonwealth has begun implementing a new funding system. There is a range of funding anomalies for people with high support needs, creating disincentives for services to support their successful workplace transition. In addition, only 35%²⁴ of consumers registered with disability employment agencies achieved an employment outcome during the trial period. The low outcome rate is disturbing and creates great uncertainty for people with disabilities, further placing pressures on their families and communities.

²² Gleeson, B. (1998) Disability and Poverty. In R Fincher and J Neiuwenhuysen, *Australian poverty: Then and now*, Melbourne University Press: Carlton South.

²³ Abello, D. & Chalmers, J. (2002) *The drawing board: Disabling disability policy*, Sydney University Symposium, <http://www.econ.usyd.edu.au/drawingboard/digest/0206/abello - chalmers.html>.

²⁴ Commonwealth Department of Family and Community Services (2002) *Complete report Case based funding trial final evaluation report*, Commonwealth of Australia, Canberra.