

Submission to the Productivity Commission Inquiry into the DDA

by Joe Harrison

Preliminary Remarks

About the Author

I was born with significant disabilities that cut short my secondary schooling and saw my first years in employment as a 'worker' with a 'sheltered workshop' of the Civilian Maimed and Limbless Association (now Access Industries). I spent my late teens and twenties as a recipient of the Invalid Pension (now DSP). I was in my thirties before I was made a permanent officer of the Commonwealth Public Service though I continued to receive discriminatory treatment in the workplace up until 1992.

Since 1981 I have worked as a lobbyist in the disability community, being employed at different times as an advocate, rehabilitation manager, policy officer and research officer. Beginning my tertiary studies as a mature aged student I now hold a BA (Honours), two post graduate diplomas and a Masters in Policy and Social Science.

I am currently employed as the Research Officer of the Disability Council of NSW. At the direction of a Council Working Group I will prepare Council's submission to the inquiry. As I have a keen interest in the area of disability discrimination I agreed to draft my preliminary submission to the Inquiry as a discussion starter to prompt debate. While I am as yet unsure of what differences there will be between Council's submission and my own I hope some of its content will be incorporated in the Council submission. I am in this job because I believe members of Council and staff are as firmly committed as I am to improving the recognition of the right of people with disabilities to equal participation in the community.

Structure of the Submission

For the sake brevity/clarity the Disability Discrimination Act 1992 has been referred to as the DDA, and the Human Rights and Equal Opportunity Commission as HREOC throughout this submission. The Productivity Commission has been referred to as 'the Commission' to distinguish it from reference to HREOC. The submission first addresses broader Social Welfare considerations before commenting on the impact of the DDA, ways to improve its effectiveness and other means Government might pursue to address discrimination.

Social, Welfare and Equity Considerations

Developing a clearer view of the social role of people with disabilities

People with disabilities are not a homogenous group. They are people of different ages, languages, races and cultures; different genders, experiences, lifestyles and choices. They have a diverse range of incomes, histories, and political and social commitments. They may understand, describe and identify with disability in different ways. Yet research shows that the majority of people with disabilities are in the lower socio-economic strata.

Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers: Summary of Findings, 1998*, found that 47% of people with disabilities were in the lowest two income groups, compared with 30% of people with no disability. It was also reported that the greater the degree of restriction experienced by a person with a disability (i.e. assistance needed or difficulty experienced in self care, mobility, communication, schooling and employment), the higher the likelihood they will be represented among low income groups.

These statistics suggest a strong correlation between disability and welfare so it is surprising that Morrow's research noted that:

...regional analysis has revealed that the incidence of disability has only a weak relationship to the incidence of the Disability Support Pension (DSP) ... (and) ... that DSP receipt could be modelled with 97% accuracy using unemployment age and education data.¹

Yet the opinion that the presence of disability and acceptance of welfare support is strongly correlated is widespread. Its consequence is that equitable treatment of people with disabilities is to some extent countered by the misconception that they are less productive and of less value to the commonweal.

There is a common perception that people with disabilities are to be pitied (or avoided). At a recent presentation I attended on Alzheimer's Disease one manager of a group home persistently referred to people residing in the home as 'my people'. While the room was full of professionals in the field no-one seemed disturbed by this description of those residents. They were his property, victims of care - not citizens.

Thus anti-discrimination legislation on the basis of disability is more contentious than that based on race and/or gender and several 'riders' (discussed below) have been added to the legislative framework that would not be countenanced in race or gender based discrimination. So, while equitable treatment is purportedly the cornerstone of all anti-discrimination legislation, the DDA accepts (albeit in limited circumstances) the inherent lack of equity it is intended to address.

¹Morrow I. (1998) *The Growth of Disability Support Pension Receipt among Australian Males: 1971-1996*, Canberra, Strategic Analysis and Evaluation Branch, Department of Social Security.

No complex statistics yet exist on the location and variation in occupation and/or support needs of people with disabilities. The ABS Report referred to above is a major source of research compiled at the national level on the subject and it fails to quantify the number of people with disabilities in open employment (either requiring or not requiring adjustments to the workplace), or the number in supported employment, state schools, special schools, requiring post school support or seeking open employment.

Without such statistics no measurement is possible on the extent of disability, or disability discrimination. Social modelling and/or 'microsimulation' (as carried out by the National Centre for Social and Economic Modelling, University of Canberra) is thereby extremely restricted. Until such statistics exist and a measuring tool is developed for the extent of unmet need and disability discrimination all attempts to determine the state of change are futile.

The Social Contract and Equity

Any assessment of the effectiveness of the DDA must be linked to the society's accepted definitions of equity and the rights of citizenship.

The Senate Legal and Constitutional References Committee has summarised citizenship as consisting of the following four linked elements:

- (demonstrating)... the quality of full membership and active participation;
- (occurring)... in a just, democratic and mutually supportive political community;
- including the individual and collective rights and responsibilities - legal, social, economic, cultural and environmental - that go with such membership; and
- (having)... the public and private policies and resources needed to sustain it²

People with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure such rights. Those who cannot read or write, or who require accessible formats, cannot complete registration forms, citizens who have had few educational opportunities, and /or who live in institutional settings, may have little support or assistance to register and exercise their right to vote. While they are, ostensibly, equally entitled, they are effectively disenthralled by the failure to recognise differential access and forms of participation as valid.

² Senate Legal and Constitutional Reference Committee 1995. *Discussion Paper on a system of National Citizenship Indicators*, Senate Legal and Constitutional Reference Committee, Parliament of the Commonwealth of Australia, p20.

Similarly, many are exempted from jury duty (though they may wish to act on a jury) when their disability will not allow them access to the jury box. In a courtroom a deaf or hearing impaired person is disadvantaged by their inability to hear a judgement or a defence, no hearing loop or interpreters being made available. Equity cannot be achieved for all citizens until it is recognisable as 'equity of outcomes'.

The extent of disability discrimination

Attempts to address the issue of discrimination require acceptance of the requirement to restructure the society to meet the needs of all. In addressing the needs of people with disabilities, this is often seen as making concessions to a 'special' group at a cost to the public purse. Equity of access and social participation are central to the notion of citizenship and that the aim of the government, and its citizens should be to ensure the social, attitudinal, architectural, medical, political and economic environment is sufficient to address the differences of all individuals. For a government to do otherwise is to abrogate its social obligation to its citizens.

Society discriminates against someone when it fails to meet this obligation. It discriminates against people with different impairments when, due to their impairments, their needs are not addressed. Without accurate measurement of the location and occupation of people with disabilities it is impossible to define how much discrimination relates to inaccessible accommodation, inaccessible information, inappropriate service delivery, or reduced educational or employment opportunity. Yet the reality of this inequitable treatment equates with the lived experience of all people with disabilities (ie people presented with such barriers to equal participation).

Defining Disability

The legislative definition of disability (and impairment) changes considerably from Act to Act and a consistent definition is required. The Anti Discrimination Act (1977) initially defined physical impairment and intellectual impairment but not disability³. Physical impairment was defined as *'a defect or disturbance in the normal structure and functioning of the body'* and intellectual impairment was defined as *'a defect or disturbance in the normal structure and functioning of the brain'*.

These definitions led to many difficulties in implementing the Act, disadvantaging the victims of discrimination it purported to protect. People with epilepsy or cerebral palsy for example needed to define themselves as having an intellectual disability in order to be covered by the Act. Many were unwilling to do this as they identified themselves as people with physical disability. The Act was therefore

³ It is interesting to note that this 'omnibus' legislation, enacted in 1977, did not include physical impairment as a basis for discrimination until 1981, nor intellectual impairment until 1982.

amended but remained within the medical model, now defining disability as '*a total or partial loss of a person's bodily or mental functions*' (among other things) attempting to align its definition to that of the DDA.

Though the DDA is far more encompassing in its definition/ coverage than this and other legislation it maintains the 'medical/deficit' definition of disability incorporated in other Commonwealth and State legislation. As such it locates the disability (rather than the impairment) with the individual rather than, as argued above, the society's inability to address difference. This definition of disability, along with lack of exposure to issues affecting people with disability allows many social myths and value judgements to be imported to the legal system where legislation, intended to protect/assist people with disabilities is used to legitimate abuses against them.

The Purvis case (Purvis v State of NSW (Department of Education and Training) (2002) FCA 503) is a case in point. It is a significant case as its findings go to the heart of the definition of disability accepted under the DDA and will set precedent for future cases.

HREOC's original findings (in favour of the claimant) were overturned on appeal by Justice Emmet (FCA 1199). An appeal to the Full Court of the Federal Court was dismissed. In dismissing the appeal the Full Court held that: "conduct that is a consequence of a disability within the meaning of s.4 of the DDA is not itself the disability". This restriction on the 'definition' sets precedent for future legal interpretation, establishing another hurdle to a person with a disability attempting to address the systemic barriers hinder equitable treatment.

(For further example of the restriction of legislative interpretation see discussion *Complaints Basis of the DDA* below).

The DDA and its impact

Determining the benefits of the DDA

There is no doubt that several social changes that have benefited people with disabilities have occurred as a direct result of the DDA. The existence of the legislation and the promotion of its objectives, the development of Action Plans and the publicity of its findings in specific cases have all informed the public discourse on disability. The Transport Standard, requiring accessible public transport within a specific timeframe, will benefit future generations of people with disabilities. Yet there are some social change that might be more appropriately attributed to the public profile and effective lobbying of people with disabilities.

Whether the matter is attributable to the existence of the DDA or wider lobbying of activists with disabilities there are unintended consequences of a 'stepless' society as mothers with prams and the elderly are better able to access the environment.

One great improvement on past legislation that is attributable directly to the DDA is the opportunity for associates of people with disabilities to bring cases of discrimination as 'companions' to the person with a disability who was discriminated against. In this way the DDA has recognised a wider social consequence of discrimination in that discrimination against one person will negatively impact on their associates. An example might be when two people decide to see a film, one being in a wheelchair, and the cinema is inaccessible. Both parties are discriminated against, and each is able to bring a case under the DDA, as in this instance being unable to enjoy the film together results from discrimination affecting both.

Further, the DDA's coverage of harassment of people with disabilities, and its coverage of both direct and indirect discrimination, have all positively contributed to the lives/ treatment of people with disabilities. Similarly the penalty for victimisation (DDA, Section 42 (1) and those covered under Part 5 *Other Offences* provides some punitive power to HREOC. Yet such powers need to be extended if systemic discrimination is to be effectively addressed. (see *Strengthening the Legislation* below). Its most powerful benefits can be attributed to the consequence of well publicised successful cases. Yet such benefit, being the vehicle for desired outcomes for *complainants* is also closely linked to one of its greatest impediments.

Structural impediments to the DDA's effectiveness

The complaints basis of the DDA

The DDA is limited by its complaints basis when used to counter ongoing systemic discrimination. The DDA is a response to specific, discrete acts of discrimination. The legal interpretation only acknowledges discrimination applying in a particular incidence and as such fails to address systemic discrimination and this may partly explain the limited number of cases pursued by people with a disability to the Federal Court.

Legal decisions seem incommensurate with the 'intent' of the DDA. An example in this regard is the case of *Moxon vs Westbus* in which Mr Moxon alleged discrimination as he was unable to board a Westbus bus (his wheelchair being unable to ascend steps). The court's findings, that he was discriminated against on the occasion he attempted to board the bus but needed to raise a further complaint each time he attempted to board a bus (the discrimination applying to the incident) failed to address the issue of systemic discrimination. It is impractical for Mr Moxon to raise a complaint each time he is unable to board a bus and the ongoing failure of Westbus to provide accessible transport goes unaddressed by the DDA. The development of the transport standard and its time limited, graded compliance process does little to address the present ongoing discrimination Mr Moxon (and others) currently experience. While he can clearly prove he is being continually treated differently than those members of the public able to board a bus or

coach his ability to prove it is unlawful is too difficult given the court's interpretation of the DDA.

The 'case by case' basis of the legislation is further restricted by a limited view on who can raise a complaint. At present, if a person unable to drive due to a disability sees such a position advertised as requiring a driving license when it is not required to do the job (ie the job calls for a willingness to travel rather than an ability to drive) they are unable to raise a complaint of discrimination **unless** they wish to apply for the job and can demonstrate that, without the criterion, they would be able to fulfill all requirements of the position. Thus the DDA is **not** effective as a tool to address the existence of the discriminatory practice but is merely an avenue of redress for an aggrieved individual.

A further problem of the complaints basis of the legislation is the plethora of case law and precedent. The numerous individual cases that are successfully mediated cannot affect case law or set precedent even when they are closely related to a case being contested before the court.

Unjustifiable Hardship

In accepting the defence of unjustifiable hardship (an attempt to reduce the cost of compliance) government has replaced the obligation to ensure equitable treatment of its citizens with a requirement to address 'special needs' and turned social participation from a citizen's right to a 'economic convenience'.

The existence of 'unjustifiable hardship' as a defence abrogates the responsibility to ensure citizens' rights to participation and equitable treatment. The DDA is the only anti discrimination legislation, within the suite of Federal protections in Australia, with coverage contingent on the costs to achieve its objectives. In neither the Racial Discrimination Act 1975, nor the Sex Discrimination Act 1984 would such a caveat be acceptable. Perhaps this is partly due to the desire to restrict public expenditure and acceptable because of society's (and the legislators') views of disability.

Exemptions

The granting of exemptions to coverage by the DDA has further compromised its integrity. As an example, the Immigration Act (and subsequent actions of the Department of Immigration and Multicultural Affairs in administering the Act) is exempt from the provisions of the DDA. Therefore, in terms of policy and practice, 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.

The rationale is that people with disabilities place an undue burden on the Australian community because our society does not have the necessary services, supports and equality of opportunity to reasonably expect people with a disability to be self supporting.

Similarly, provisions under the Social Security's Act 1991, while discriminatory, are not unlawful, being exempted under the DDA (Sec. 51 (1) (d)). The requirement

for a person entering the country with a pre-existing disability to wait ten years from the date of becoming a permanent resident to be eligible to apply for the Disability Support Pension discriminates against that specific group as those injured following the permanent residency being granted having to wait only two years.

A further anomaly relates to those being employed to carry out domestic duties within an individual's home being exempted from coverage under the DDA (DDA Section 15 (3)). Such an anomaly needs to be addressed as discrimination against an employee should be unlawful regardless of the 'type' or location of employment. Other employees within the home (eg contract workers, support workers and attendants) are covered under the Act, thus it is not merely the location but the 'type of duties' that are exempted.

The weakness of Action Plans

The DDA has authorised HREOC to retain Action Plans written by State and Federal Departments and other parties wishing to develop a partial defence against the charge of discriminatory practice. This has raised the profile of the DDA and awareness of disability. Yet, there is no authority to HREOC to ensure Action Plans are written to an acceptable standard or to educate departments in the drafting of Action Plans or the extent of discriminatory practice within the workplace. There are some Action Plans registered with HREOC that propose means to ensure management responsibility for review of practice and reduction of discrimination. For example, the NSW Attorney General's Action Plan where responsibility is tied to the duties of line management. Yet in the main they are poorly designed and in need of significant improvements.

Even so, there have been significant advances received through merely the threat of a "DDA Complaint". The requirement to develop Action Plans to address current discriminatory practice has had a positive effect. A number of providers have amended plans or redesigned their facilities without requiring an action or a successful action in the Commission. Changes have been made following the provision of advice that they could be in breach of the Act and therefore liable for action in the Commission.

Restriction of targeted legislation

Omnibus legislation has several advantages to over targeted legislation. Consistent terms of discrimination can be incorporated into the legislation making it clearer to all what constitutes unlawful discrimination (regardless of its basis: gender, race or disability).

There is also a tendency in interpreting targeted legislation to address the targeted group as a specific subgroup of the population with unique 'discrimination' difficulties rather than viewing discrimination itself as an anathema to a democratic society. The existence of 'unjustifiable hardship' as a defence to discrimination against a discrete group (not against all victims of discrimination) demonstrates this point.

Standards

A further difficulty with the creation of omnibus legislation is the existence of Standards under the DDA. The Transport Standard suggests several significant benefits to most people with disabilities. There are several difficulties with the standards process (discussed below) and difficulties, noted here, arise from their location in complaints based legislation.

The first practical difficulty is that there appears no actual (legal) compulsion for a provider to comply with a DDA Standard once it is adopted. The complaints basis of the DDA leaves the burden of proof that a standard is not being met with the complainant. If a complainant feels that a company is not meeting the quota for increasing the number of accessible transport services over the next 20 years (as an example) it has to be proven. Most complainants will not have the wherewithal to monitor progress on standards. The obligation remains on the individual to prove the Standard has not been met and again that it would not constitute an unjustifiable hardship to comply.

Process issues, their impact and consequence

Complexity

There are legal complexities in determining;

- responsibility;
- level of lawfulness;
- appropriate compensation, and
- an equitable outcome.

Each serves to reduce the likelihood of complaints being raised. While these complexities present difficulties for most complainants (ie all without legal training) these difficulties are compounded for those from Aboriginal Torres Strait Islander and Non English Speaking Backgrounds.

The role of HREOC in the conciliation of complaints is vital to the success or failure of the legislation to remove discrimination against people with disabilities in the community. Yet the process is currently so protracted that many people with disabilities choose not to lodge a complaint because it is considered that it would take too long to be heard. Others have felt that the onus of proof having to be so detailed and documented is a deterrent to preparing a case. Often the discrimination is manifested in such a way that the aggrieved is hurt or humiliated but is unable to put into the written word the actions that brought on this reaction. To expect a person to establish proof in these instances and then have it found that it would be justified to expect not to be discriminated under the circumstance is an overly harsh and an impractical way to address change.

This problem is compounded when a complainant seeks to present a representative complaint. The added legal difficulties in proving that the complainant is a true representative of the aggrieved population (specified in the DDA) make it yet more onerous to present a case.

Standards Development and Consultations

The Standards development process has been an extended exercise, with only one Standard adopted and appended to legislation to date. The disability sector has been highly critical of the process yet the voice of dissent is well muffled.

The Standards Project has been funded on the proviso that it progresses the development of standards. This is a profound restriction on its outlook as its members are unable to voice the opinion that a standard should not be adopted in a specific area (eg employment) though the majority of people with disabilities may hold that opinion. Thus to keep their funding they cannot be a representative voice of the disability community. Their consultation process too has been more a 'marketing exercise' than a genuine attempt to gain community opinion. The attorney General's restriction on who can be consulted (i.e. Commonwealth disability peaks and the National Disability Advisory Council) demonstrates little commitment to 'grass roots' input to the process, regardless of its impact on the lives of all people with disabilities.

It is also problematic that the Standards are negotiated with business and other financial stakeholders rather than adopted as a means of addressing society's failure to allow mechanisms for the participation of all citizens. The standards can be 'watered down' as businesses consider cost factors before the rights of citizens to participate fully in the wider society.

Improving effectiveness of the DDA

Extending HREOC's role

While HREOC is seen to have an educative role it is under-staffed and under-resourced. Further, as noted above, its role in the collection of Action Plans should be extended to include educating those providing Action Plans to improve their scope and quality.

Examples of current inadequacies in addressing legislative obligations include failure to meet building code or access standard regulations when purportedly designing/building accessible premises, making a ramp one in three gradient when the standard calls for one in fourteen, or providing 'accessible cabs' not properly fitted with safety harnesses or licensed to carry two passengers but unable to carry two with safety.

It would be worthwhile extending HREOC's role (or extending the coverage of the DDA) to provide this monitoring as such a role could include an educational component. Some

public buildings and services (required by the DDA to be accessible) are not so although an attempt has been made to provide access. In such cases there is a role for better monitoring by building inspectors and better education of building inspectors, architects and builders.

On other occasions there is a clear disregard for regulation and sometimes a pernicious misuse of power, ignoring the intent of legislation or exploiting the vulnerability of people with disabilities. To focus on the taxi industry as one area where such abuse is rife examples include:

- the demand for signed blank cab vouchers,
- the practice of signing vouchers on behalf of the person with the disability who is unable (due to their position in the cab) to see the meter,
- licensing taxis that do not fit licensing requirements (like the roof being too low or safety straps (seat belts) not being available,
- refusing to pick up a fare because the passenger is known to be too much bother,
- inappropriate use of accessible taxis for the most profitable enterprise (eg delivering flowers on Valentine's Day) when license restrictions note the licenses are provided principally for the purpose of transporting disabled passengers.

The owner of one major taxi company in Sydney, to restrict competition, has purchased a significant number of accessible taxi plates and put them in storage, effectively reducing the limited number of accessible taxis on the road. Complaints boards that are currently in existence fail to respond to complaints as the industry fails to see the issue in terms of human rights abuse.

Other instances of abuse can include physical or sexual abuse where the person due to their disability is unable to mount a successful complaint (eg the blind victim of abuse may not be able to identify the aggressor).

Strengthening the Legislation

Initially the DDA gave a three year exemption to any act being done in compliance with any existing Commonwealth, State or Territory legislation. This blanket exemption was repealed and Division 5 now specifies the legislation continuing to be exempted from compliance.

Yet the fact that certain legislation remains exempt from compliance indicates compliance with the DDA is less important to Government than compliance with the exempted legislation. This suggests a lack of commitment by Government to address all aspects of disability discrimination.

The instances of abuse (noted above) require policing, not merely monitoring, and a strengthening of the legislation, to require compliance (as with Occupational Health and Safety breaches) is arguably the best means of reducing such practices.

Consultation and the public discourse

Discrimination is everyone's business and Government needs to move proactively with public consultations addressing the need for Standards and (at least across the disability community) determining their support by public debate.

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.

Widening Government focus and developing a national awareness

The few cases advertised by HREOC over ten years and the limited number of Action Plans held are both telling indicators showing that systemic discrimination is not being successfully addressed. The Commonwealth Disability Strategy currently covering developments in the Commonwealth public sector must be extended to acknowledge the Commonwealth's commitment to work with industry to address discrimination across the nation.

Use of the Media in informing this debate is essential yet it might be preceded by education of the media (and the Government). The portrayal of people with disabilities as 'pathetic' is too clearly evident. Developing accurate statistical data may be a role for the ABS or NATSEM. It could be used to form the basis of a *State of the Nation Report* explaining the impact of disability at a social, ecological as well as an economic level and this might be well used to inform public debate and public policy.

Conclusion

In conclusion, the DDA has had a significant impact on the lives of people with disabilities over the past ten years and will continue to do so. One of its greatest benefits is that it has raised the profile of the rights of people with disabilities and expectations about those rights. However, it could have achieved much more had it been designed differently, had the inherent contradictions been removed and had it been "rights based" rather than "complaints based".

Broader strategies need to be seriously considered to implement the DDA and the further development of Standards, including the development of a monitoring role and sanctions against ignoring obligations. These strategies must, as their core aim, ensure the rights and opportunities for people with disabilities to receive barrier free services are upheld and not diminished. The consultation process also requires considerable attention and this is an area where greater resources need to be applied.