Inquiry into the Disability Discrimination Act 1992
Submission by the National Council on Intellectual Disability (NCID) to the Productivity Commission, May 16, 2003

INTRODUCTION

We live in a society where our assumptions, beliefs, values – and indeed our LAW – say that we are an INCLUSIVE SOCIETY where individual human differences such as gender, sexual preference, age, race, and DISABILITY is not a basis for less favourable treatment.

The LAW is one thing – the MAJOR LIFE EXPERIENCES of people is another.

We submit that despite the law, or our beliefs, people with intellectual disability suffer various forms of discrimination on a day-to-day basis. We are not an inclusive society.

Students with intellectual disability are excluded from regular classrooms with their peers, and if they press their choice to be included they are confronted with substantial defensive strategies by government administrations and education providers to prevent them from making such a choice.

Workers with intellectual disability are excluded from the safety net of award minimum terms and conditions of employment, and when they press their right to equal pay and conditions they are confronted by government administrations and disability employment services who maintain this system of employment.

Adults with intellectual disability are excluded from accommodation and/or accommodation support to meet basic life needs – many still live in institutions or unsafe boarding houses – yet when pressed for change to have a home and basic life needs met, they are confronted with barriers from government administrations, and unscrupulous service providers.

We could go on and on - the poor treatment of people with intellectual disability in the justice system, the health system, the prison system, the sport and recreation system, etc., etc..

From our perspective we do not see how the current construct of disability discrimination law will meet its objectives[1] to *eliminate disability discrimination as far as possible*, and *to ensure and promote that people with disability have the same rights as other Australians*.

---

[1] The objects of this Act are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:

(i) work, accommodation, education, access to premises, clubs and sport; and

(ii) the provision of goods, facilities, services and land; and

(iii) existing laws; and

(iv) the administration of Commonwealth laws and programs; and

While the law remains primarily a complaint driven process, achieving such objectives could only be done at a painfully slow rate and at great personal cost to people with disability.

We consider that the inquiry presents an opportunity to consider the fragmented nature of anti-discrimination law in Australia. It is also an opportunity to consider a consolidation of law and complaint structures of both Commonwealth and State anti-discrimination laws. **It is also an opportunity to consider alternative methods of eliminating disability discrimination from our communities.**

Many statutory clauses and concepts of discrimination in the DDA have their counterparts in other Commonwealth anti-discrimination law (i.e. SDA, RDA) and in comparable state anti-discrimination law. The construct of discriminatory law is more or less the same. **It begs the question as to the effectiveness and efficiency of so many variations of the same law and complaint structures within and across jurisdictions, when a national single law and complaint structure could be established.**

Is there not a basis for having national anti-discrimination legislation that confirms the equal rights of ALL Australians, where human difference is not a ground for discrimination? And that such legislation act as cornerstone to other legislation regulating our institutions of education, work, health, justice and so on, and which obligates such institutions to be inclusive.

We are currently witnessing arguments that less favourable treatment is not due to a person's disability but other factors like the person's behaviour, health, or something other than disability. It is a clever, if not transparent defense. What it does, however, is distract our society from the actual poor treatment of a fellow member of our community and permit non-compliance.

It raises the question of whether it is sensible to have discriminatory law so co-joined with human characteristics. While it is true that characteristics such as gender or disability are often the motivation/grounds for discriminatory actions, is it important to establish this link? Is it not simply discriminatory behaviour by treating someone less favourably than other Australians? Do we need the grounds of disability, sex, or race?

By reorientating the question of discrimination to contextual areas (i.e. employment, education, health, immigration – society itself etc ...) rather than to the person's label, it changes the focus to a consideration of the capacity of our society and its institutions to be inclusive and welcoming of the broad diversity of humanness, be it colour of skin, race, creed, disability, learning difficulty, mental health, etc ….For this is indeed the motivation of anti-discrimination law –is it not?

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

The result of such a construct of the law would be that each discrete area such as employment, education etc., would need to consider how its fundamental structures and features need to ensure compliance to the law of anti-discrimination.

For example, in the DDA, the education section 22 does not actually say a lot – the main message is that it is unlawful to discriminate on the ground of a person's disability in terms of admission, access, or any benefit provided by the education provider. The draft education standard developed a set of obligations with respect to enrolment, participation, curriculum, support services, and harassment and victimisation.

There is nothing particularly startling about the education standards for it looks at the main components of education provision and sets out what the provider is obligated to do to ensure compliance to anti-disability-discrimination law.

But one could easily replace "student with disabilities" and "student without disability" and replace them with "indigenous student" and "non-indigenous student" and achieve an education standard for the RDA. There is nothing particular to disability in the standards as the construct is primarily to do with "education on the same basis as students without disability". Is it not that we want a society that "education for any "label" (ie disability, indigenous, female, etc.) is provided on the same basis as the others without the 'label'.

In another example, the Workplace Relations Act 96, provides a set of anti-discriminatory features; links to international employment covenants and International labour organization rulings, and includes an obligation to "*take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 relating to discrimination in relation to employment.*"

A significant benchmark for the WRA is the safety net wage which applies to all awards and agreements. Nobody is permitted to receive conditions less that the safety net. This provides both an anti-discriminatory and quality feature of the industrial relations system. For workers with intellectual disability the Commission must also provide a supported wage system for workers with disability that is linked to the safety net.

The point here is that in the area of industrial relations a number of anti-discrimination features are built-in. This sets an expectation of behaviour of employers and employees about workplace relations as opposed to leaving such to discrete discrimination law. Why do we not have such built-in provisions in education acts, etc.

Recommendation:
A national anti-discrimination Act which would; (i) set out the principles of anti-discrimination as per international obligations, (ii) require all Federal and State Legislation to include anti-discrimination provisions consistent with the national anti-discrimination Act, and (iii) require Federal and State governments to produce an anti-discrimination regulatory impact statement before any draft legislation is presented to parliament.

THE PERSONAL AND FAMILY COST OF SEEKING JUSTICE

NCID considers that the personal and financial cost of making a complaint under the Disability Discrimination Act is too high and prevents people with disability and their families from speaking out about disability discrimination.

The National Children's and Youth Law Centre NCYLC report[2] on disability discrimination in schools provides a valuable profile of the general fear of making a complaint and willingness to tolerate discrimination.

The NCYLC report found that of the 1307 responses from parents of a child with a disability of compulsory school age, 1220 reported some form of discrimination based on disability, and most of these believed that discrimination based on disability was endemic and systemic to education systems in Australia.

"Of particular concern was the experience of making formal complaints under the DDA. Complaints were found to be costly and time consuming with long delays involved. For example one case involved 13 months of protracted negotiations with the education system only coming up with a workable proposal days before the scheduled hearing. Complaining direct to the school was negative for a large majority, with students discriminated or forced to leave school as a result. Three parents were threatened with defamation action by schools."

Of the 1307 responses, 301 had lodged a complaint about discrimination under either Commonwealth or State anti discrimination legislation. Only 2 were satisfied with the outcome. All 301 respondents indicated that they would never lodge a complaint again, no matter how bad things got.

A further 1300 responses indicated that they had not made a complaint for various reasons, including the cost and time, no access to legal assistance, knew someone who had, or did not want to harm their relationship with the local community.

Our knowledge is that students and families consider the complaint process to be a distinct disadvantage. Even if one considers the current high court case of Purvis vs NSW Education Department, the student in this case is still seeking a satisfactory outcome after six years.

The NCYLC research notes that students and families would rather put up with many insidious forms of discrimination rather than make a discrimination complaint.

The major point we wish to make is that the decision to make a complaint through the HREOC and the Federal Court system is a daunting decision for people with disability and their families to make. There has been enough experience to date to suggest that even a win will be achieved at considerable emotional and financial cost. In the area of education,

---

[2] Flynn, Christine. April 1997. *Disability Discrimination in Schools.* National Children's and Youth Law Centre. Sydney.

the critical loss of development for students with disability at the most crucial years of their lives can be devastating.

THE COST OF JUSTICE

In the NCID submission to the Senate regarding the introduction of *Human Rights Legislation Amendment Bill (No. 1) 1999* we submitted that the costs rule severely limits the capacity of people with disability to pursue a disability discrimination complaint.

The main criticism of the current system is the Federal Court's costs rule effectively denies access to justice to persons on low income who seek to pursue a discrimination claim, and in particular a disability discrimination claim.

The problem is an economic one, which in one guise or another, affects most people on low income seeking to access the justice system. It so happens that most (but not all) people with disabilities are on low income. Thus to impose major financial barriers to the prosecution of disability discrimination claims disproportionately effects people with disabilities. The same no doubt applies to race and sex discrimination claims to one degree or another. The existence of the potential of an adverse costs order is very often an insurmountable barrier for low income people in accessing courts and tribunals.

Previous studies

The issue of access to justice for all people in the community, and in particular those on low income, has been the subject of repeated "inquiries" over the last 30 years. Essentially, the same barriers to justice have been repeatedly identified, including the costs rule and excessive court fees. The Scales of Justice (ACTCOSS Jan 1994) summarises the contents of these reports numbering over 20 in this period. There have been two major studies on the topic since this publication being the Australian Law Reform Commission's Report 75 (1995): Cost Shifting - Who Pays For Litigation" and the Sackville Report on Access to Justice.

Notwithstanding the many millions of dollars spent over the last 30 years reidentifying the same barriers, there has been almost no reform of any significance on the topic. It is simply inconceivable that the Attorney General and his Department are unaware of these studies and recommendations.

The present system is in contradiction to the whole thrust of the recommendations arising out of the previous studies. This indicates that the present proposal is polemically driven, based on some notion of the deserving nature of the wealthy to access to justice and the undeserving nature of those on low income.

The fact that no reform has occurred in the past following the plethora of studies and reports is largely due to the differing vested interests. In particular the legal profession has

consistently lobbied against the abolition of the traditional costs rule in opposition to consumer groups.

The reason is obvious, with no access to a costs order against the unsuccessful party, lawyers are concerned that low income clients may not be able to pay their fees. The issue is one of lawyers' fees. The legal profession often argues that the result would be that lawyers would not act for low income clients if their fees were not secured via the potential for a costs order.

Low-income people can still obtain representation from Legal Aid, community legal centres, on the pro bono scheme, para-legal representation from an advocacy service or by self-representation.

Whilst this may not be ideal, it is far more preferable than the current system, which precludes low-income people from access to Federal Court for discrimination claims even if they can obtain representation.

In the Family Court, and the Federal Court in the exercise of the powers it inherited from the former Industrial Relations Court, the general rule is that each party bear their own costs and costs orders are made only in exceptional cases (see below for further discussion). The NSW Residential Tenancies Tribunal regularly has lawyers seeking leave to appear. Leave is rarely given and if leave is granted the party retaining the solicitor must bear their own costs irrespective of the out come of the matter unless both parties are legally represented then an order for costs may be made. The same is true of the Administrative Appeals Tribunal and various other courts and tribunals.

A recent example: The AAT ruled in a particular matter that the power in the Discrimination Act (ACT) which permits programs to meet the special needs of people with disabilities to be developed and run without thereby committing an act of discrimination against people without a disabilities, also had the effect that people and agencies providing these special services to people with disabilities cannot be guilty of an act of discrimination in the delivery of these services no matter what their conduct. There is an equivalent provision in each of the Commonwealth and State discrimination legislation. The guardians of the individual concerned are seeking to appeal the decision to the ACT Supreme Court but upon being told that if the appeal was lost they may have to pay the ACT Government's costs, the guardians withdrew their instructions. The guardians had a house and were not prepared to risk it to an adverse costs order.

A petition was sent to the ACT Government to give an undertaking that they would not seek costs if the guardians were unsuccessful in the appeal on the basis of the compelling public interest in the matter.. The ACT Government solicitor declined to give the undertaking.

The appeal could not proceed. Only recently and following intense lobbying with the other parties in the Legislative Assembly did the ACT Government change its position and give the undertaking. The important points to emerge from this example are: (a) the person with the disability could find pro bono representation (b) the impediment to proceeding with the

case was the fact that we could not guarantee success and could not guarantee that no adverse costs order would be made (c) the guardian had a house and some assets at risk to an adverse costs order (d) even an alleged model litigant like the ACT Government was most reluctant to give an undertaking not to seek costs if the appeal was lost, the chances of obtaining such an undertaking from a private sector respondent is nil.

Costs orders are not permitted at common law and are entirely a creature of statute, as such Parliament can fashion the costs provisions as it sees fit. They may be wholly prescriptive or wholly discretionary or a combination of both.

The most common form of costs order leaves costs to the discretion of the court. Over the years the courts have refined this discretion with guidelines. The main such guidelines which has developed is that, prima facie, the costs follow the cause i.e. the loser pays the winners costs irrespective of the merits of the loosing parties case and any uncertainty surrounding the law and facts.

The court may, and only occasionally does, exercise its discretion to depart from the usual order where there is something exceptional in the nature of the case. The most common such exception is where the successful party has engaged in unfair conduct that has unreasonably increased the costs of the proceedings. The frequency of such departures from the usual costs rule in civil proceedings is so small that such exceptions are irrelevant for present purposes.

More recently there have been some endeavours to carve out an exception to the usual orders in the case of public interest litigation i.e. the unsuccessful litigant in the public interest should not be ordered to pay the successful party's costs. The High Court in Oshlack –v- Richmond River Council (25/2/98) upheld a decision of the NSW Land and Environment Court to decline to award costs against an unsuccessful objector to a development application.

The majority of the court (Gaudron, Gummow and Kirby JJ) held that the public interest nature of the litigation was a relevant factor in exercising discretion to depart from the usual costs order but expressed various views to the effect that such cases would be rare. The minority of the court (Brennan CJ and McHugh J) would not even admit that the public interest was a relevant consideration in departing from the usual costs order.

The Full Federal Court in Hollier –v- Australian Maritime Safety Authority (18/8/98) reviewed Oshlack and confined it to those species of legislation, which expressly provided for public interest involvement such as planning legislation. The Full Court held that neither the public interest, the impecuniosity of the unsuccessful party nor any uncertainty surrounding their case were relevant to determining a costs order and the usual order should apply. The view of the court in Hollier shows how entrenched the usual rule is and how little attention the court gives to the issue of peoples right to access to the courts to have disputes resolved in a civilised fashion.

Even if the court were a little more enlightened and had regard to the public interest, there can be difficulties in determining the true motivation of an applicant and public interests

can be inextricably interwoven with private interests as is demonstrated by the Federal Court decisions in Guide Dog Owners and Friends Association Inc –v- Guide Dog Association of NSW (21/8/98) and Botany Bay City Council –v- Minister For Transport (9/2/99).

The Australian Law Reform Commission (ALRC) considered the issue of costs in public interest litigation in its Report No.75 Cost Shifting- Who Pays For Litigation and recommended that courts be directed to consider the public interest involved in the litigation in determining whether to impose costs on an unsuccessful litigant. Recommendation 45 reads:

"A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that · the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community · the proceedings will affect the development of the law generally and may reduce the need for further litigation · the proceedings otherwise have the character of public interest or test case proceedings. A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter."

Even if this recommendation were followed it would only be a partial solution, as the potential litigant does not know in advance whether he/she will obtain the benefit of such an order if unsuccessful in the litigation.

Another form of costs order is the type which provides that each party bear their own costs unless the court finds that a party's case was frivolous or vexatious (e.g. the Federal Court in the exercise of its jurisdiction inherited from the former Industrial Relations Court, the AAT and the Residential Tenancies Tribunal).

One problem with such orders is the difficulty in proving the requisite mental element in frivolity or vexation. As a consequence the opponents of such orders allege that costs orders of this type actually encourage frivolous and vexation applications. If this were the case then we would expect to see many frivolous and vexatious applications before the courts and tribunals, which operate under this type of costs rule. We are unaware of any empirical or anecdotal evidence to support such allegations.

In any event a potential applicant before the Federal Court in a discrimination matter would need to retain a lawyer or para legal to assist and we cannot see either of these professionals being prepared to waste their time assisting with a frivolous or vexatious application.

There is however some justification in the criticism of the frivolous and vexatious rule in that it sets too extreme a test on awarding costs. We favour the approach that costs should only be awarded against the unsuccessful litigant where they have not demonstrated "an arguable case" to the court. It is neither fair to the other party nor in the public interest to allow people to litigate cases which do not have a reasonable arguable basis in fact and/or law.

We propose that the President of the Commission, after attempting conciliation, may furnish a report to the Federal Court on the matter. It may be that Law could authorise the President to report to the Court on whether either party had an arguable case in which case the "no costs" rule should then apply.

The advantage of this approach is that the President has had the opportunity of hearing the parties in conciliation, may be able to use his/her power of reporting on costs as a lever during conciliation, and the parties would know the position with costs in advance of the Federal Court hearing.

Section 117 Family Law Act is a variation on this theme and is another potential model. It reads:
(1) Subject to subsection (2) and section 118, each party to proceedings under this Act shall bear his or her own costs.
(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsection (2A) and the Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.
(2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:
(a) the financial circumstances of each of the parties to the proceedings;
(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
(f) whether either party to the proceedings has, in accordance with section 117C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and (g) such other matters as the court considers relevant.

Section 118 relates to frivolous and vexatious proceedings.

The general rule is that each party bears their own costs unless the court orders otherwise. Section 117(2A) lists relevant factors in determining whether to make a costs order, these factors include the financial capacity of the parties and the merits of their case. The Family Court adheres closely to the general rule of parties bearing their own costs and so potential litigants know what is to be expected. We are unaware of any body of opinion or studies alleging that the Family Court has become a forum for frivolous or vexatious actions.

The role of the financial capacity of a litigant to pay an adverse costs order was addressed by the ALRC in Recommendations 40-44. It recommends that costs should not be awarded against an unsuccessful litigant if to do so would inflict "substantial hardship" and thereby

materially and adversely affect their capacity to litigate. The ALRC made recommendations concerning what should constitute “substantial hardship”, which included: (a) being forced to vacate a home (b) losing a motor vehicle reasonable necessary for domestic or work purposes (c) losing employment (d) being made bankrupt.

To this list we would add the potential for income to be intercepted (garnisheed) such that the person and those dependant on him/her cannot eat, pay electricity bills, catch buses and the like.

One justification advanced by the bureaucracy for retaining the usual cost rule in the Bill is that there is alleged to be no precedent in the federal jurisdiction for an order of the kind where, prima facie, parties bear their own costs. If such an argument has been advanced then it is patent nonsense. Firstly, section 117 of the Family Law Act is of such a kind. Secondly the Native Title Act 1993, section 85A states that: "...each party must bear his or her own costs." Thirdly, section 170CP Workplaces Relations Act 1997 replicates the provision applying in the former Industrial Relations Court and now applies to proceedings in the Federal Court itself concerning unfair dismissals. It reads:
(1) Subject to this section, a party to a proceeding under section 170CP must not be ordered to pay costs incurred by any other party to the proceeding unless the court hearing the matter is satisfied that the first-mentioned party: (a) instituted the proceeding vexatiously or without reasonable cause; or (b) caused the costs to be incurred by that other party because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding. (2) Subsection (1) does not empower a court to award costs in circumstances specified in that subsection if the court does not have the power to do so. (3) In this section: "costs" includes all legal and professional costs and disbursements and expenses of witnesses.

Fourthly, all of the Commonwealth tribunals are no-costs jurisdictions. Fifthly, none of the equivalent state legislation imposes costs on litigants. In fact if it comes to an issue of precedents, the lack of precedent is for imposing the costs orders on welfare/human rights legislation and in this sense the onus should be upon the Minister to justify this measure.

KNOWING THE LAW AND YOUR RIGHTS

NCID submit that there is a poor understanding of the Commonwealth DDA, its complaint process, and how it could be used to address disability discrimination. We make this point for it is incorrectly assumed by many that the very presence of a law or regulation will cause compliance by individuals and groups in our society. Compliance to the DDA still requires the making of a complaint. Given the potential personal and financial cost in seeking a judicial decision we believe that there at least should be a depthful understanding of the law that is their to serve people with disability and their families.

In particular NCID would like to note that the considerable effort to produce draft Education Standards for the DDA as a positive development that requires resources to

educate students with disability and their families to become familiar with their importance and use.

We consider that these Standards offer students with disability an opportunity to pursue education without discrimination if students and their families are informed and empowered on what the Standards are, what obligations they require of education providers, and what capacity or opportunity they provide to eliminate disability discrimination.

Clearly there is some education of the DDA, but this appears to be at best an introduction to a small segment of the community. The opportunity of the education standards, when legislated, is for a concerted effort to inform a target audience ie students with disability and/or their families, and the setting up of regular annual orientation to new students and families.

EXEMPTION UNDER THE ACT – STATE LAWS AND REGULATIONS

Section 47 (2) allows the Attorney General to table regulations in Parliament, which effectively exempts a Commonwealth or State Law, or Regulation from compliance to the DDA.

In 1999 the Attorney General prepared such a piece of delegated legislation following consultations with state and territory governments. There was no consultation about the preparation of the legislation or a public discussion about the merits of such legislation.

NCID did urgently attempt to have the Senate disallow the regulations but this motion was defeated.

Eight pieces of state legislation/regulations were allowed to be prescribed under section 47 (2).

When one considers that these regulations sought to protect state laws which permitted the exclusion of workers with intellectual disability from the same rights as other workers contained in state law, and sought to protect decisions by a state to order students with disability to attend a segregated school – it is difficult to fathom how people with intellectual disability and their families are expected to seek an equal status in our community when those in power water down the very legislation attempting to eliminate disability discrimination.

This act of political power underscores that rights obtained by statute are at best tenuous are raises the question as to why such rights are not fundamental to our constitution to prevent irresponsible attorney generals from deciding who is to have equal rights and who is not.

The passing of this legislation remains a ‘dark day’ in the vision of a society that believes in equal rights of all its citizens despite individual human differences.

EXEMPTION UNDER THE ACT – SPECIAL MEASURES

A number of court decisions raise a serious issue concerning the rights of consumers of disability services to bring disability based discrimination actions against service providers.

There is an urgent need to review the special measures exemption under section 45 of the Act to make it plain that the provisions are to facilitate affirmative action and special needs programs and not to limit the rights of people with disability.

The special measures provision has its counterparts in the anti-discrimination legislation of other jurisdictions.

The concern is that there have been decisions[3] which have held that once a service is characterized as a service for the purpose of meeting the "special needs" of people with disability or an affirmative action program, then nothing done by the service provider in the course of that program or service can constitute an act of discrimination on the ground of disability even if the same action would be an act of discrimination in a similar context of a person without a disability.

It is our view that the interpretation of the 'special measures' section is being used to limit the rights of people with disability to bring disability based discrimination actions against service providers. Consumers of disability services will remain without an enforcement of their rights when disadvantaged through discriminatory conduct by service providers.

One alternative is to follow the US approach of legislating to require service providers to deliver their services in the "least restrictive environment" and with "maximum integration" within the community.[4]

The federal court in Commonwealth v Humphries (1998 EOC 92-951) heard and rejected an argument to the effect that such a positive duty of integration was to be found by implication in the Commonwealth Disability Discrimination Act. If the reasoning of this decision continues to hold way, then maximum integration requirements will need to be imposed by statutory amendment.

The point however is that the traditional comparative approach to discrimination has its shortcomings when dealing with special needs and affirmative action programs. The inclusion of a maximum integration clause in the DDA and its counterparts would be a substantial step forward in the rights of people with disabilities.

---

[3] ACT Adminstrative Appeals Tribunal. ACT Health and Community Care Service and Hill, Vella and ors (98/14, 4/11/98);

Victoria Court of Appeal. Colyer v State of Victoria 2/3/98

[4] See regulation 35.130(d) Americans with Disabilities Act 1990 (42 USCA 1261-12213) which provides that service providers: "…shall administer programs and activities in the most integrated setting appropriate to the needs of the qualified handicapped persons".

DISABILITY DISCRIMINATION IN EMPLOYMENT
Disability discrimination in employment is illegal.

Approximately 17,000 workers with disability are employed in businesses funded by the Commonwealth where employment terms and conditions are less favourable than conditions enjoyed by workers with disability. These terms and conditions fail to meet the basic requirement of the safety net conditions as set out in the Workplace Relations Act 1996. We are talking about wages from $0 to $2 per hour. A situation that has been present in our society for many decades and continues to receive succor by Government administrations.

Disturbingly, many such employees have tried to have such discriminatory conditions certified by the Australian Industrial Relations Commission. Many succeeded until NCID together with other advocacy groups raised the awareness of the AIRC to the disadvantage and discrimination being suffered by workers with disability.

NCID has tried to use the provisions of the DDA and found them to be unnecessarily slow to deal with issues of systemic employment discrimination. NCID has also tried to utilise the AIRC to raise the issue of discrimination but have also found this process to lack the competence to address manifest exploitation and protect the vulnerable from unscrupulous employers and poor agreements. This is despite the fact that the AIRC is obliged to take into account the principles of the DDA.

***Intersection with Disability Services Act 1986* and the Workplace Relations Act 1996**
The Productivity Commission has asked to receive information about any intersections of the DDA with other forms of legislation.

In employment such intersections occur with the Disability Services Act 1986 (DSA) and the Workplace Relations Act 1996 (WRA).

Section 93 of the WRA requires that:
"In the performance of its functions, the Commission shall take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 relating to discrimination in relation to employment."

Importantly decisions by the AIRC regarding awards, enterprise agreements or Australian workplace agreements are exempt under the DDA from complaint (see section 47). We believe that this area severely disadvantages workers with intellectual disability due to the inherent disadvantage they suffer in being able to bargain their terms of conditions of employment.

The principles and objectives of the DSA, which were published in the Commonwealth of Australia Gazette, (No. S 118. Tuesday, 9 June 1987), require that:

> Principle 2. (2) "*People with disabilities, whatever their origin, nature, type, and degree of disability, have the same basic rights as other members of Australian society.*"

The regulations of the DSA require that:

> *Each person with a disability enjoys working conditions comparable to those of the general workforce.*

We have found that although the basic rights of workers with disability are extolled by the DSA in principle, service standard, and through government departmental audit, that manifest and systemic discrimination of workers with disability continues unabated.

NCID also believe that the Attorney General should have to account to people with disability as to why the Government has not persisted to develop a DDA employment standard. We recognise that the first attempt was a 'disaster', yet the sector is much more wise to the construction of standards since those times, and has learnt much about the relationship between the DDA and standards. Considering that discrimination in employment is a major running sore, we believe it would be propitious to re-convene parties and efforts to constructing DDA standards in employment.

Attachment: Joint NCID / DEAC submission to the safety net review of the AIRC

DISABILITY DISCRIMINATION IN EDUCATION

Disability discrimination in education is unlawful.

A key element of success in education is the ability of teachers to meet the physical, social and developmental needs of all students in the learning environment.

The practice of inclusive education, where all students, including students with disability, are included in the learning environment, requires teachers to be competent in teaching to a diversity of individual difference, be it disability, race, cultural or gender related.

UNESCO has, over a lengthy period of time, promoted the need for "education for all" and "inclusive education". The UNESCO Salamanca Statement in 1994 stated that:

> *"regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; more over, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system."*

In 2001 UNESCO released a conceptual paper, which restates international commitment to inclusion in education.

> "Inclusive education as an approach seeks to address the learning needs of all children, youth and adults with a specific focus on those who are vulnerable to marginalisation and exclusion. The principle of inclusive education was adopted at the Salamanca World Conference on Special Needs Education (UNESCO, 1994) and was restated at the Dakar World Education Forum (2000)."

The paper reaffirms that at the core of inclusive education is a human right to receive an education that does not discriminate and a means of bringing about personal development and building relationships among individuals, groups and nations.

The internationally recognised policy is that education systems should be moving towards policies and practices of inclusive education. We know of no contrary policy direction.

Key Legal Considerations

We know from Brown v. Board of Education, [347 U.S. 483 (1954) (U.S. Supreme Court)] that segregation in education is inherently inferior, discriminatory and "*generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone*".

We know from the Dalla Costa v The ACT Department Of Health (1994) EOC 92-633, that the provision of a segregated service - because of it being innately exclusionary - is discriminatory per se.

We have also learnt from Hills Grammar School v Human Rights & Equal Opportunity Commission [2000] FCA 658 (18 May 2000) that the Commonwealth Disability Discrimination Act 1992 is designed to eliminate the perceived social evil of discrimination and that we should have regard to the many variegated and ingenious ways in which discrimination can be achieved.

These legal precedents indicate that segregation is innately discriminatory and incur losses to the children we represent. This enhances the imperative and urgency for systems preparing teachers to have skills and competencies that support inclusive teaching practices and approaches for the educational benefit of all students, including students with intellectual disability, and to prevent discrimination and its subsequent educational and social detriment.

Key educational research considerations

We know of no educational research that shows superior results that would warrant the systemic, large scale segregation of students with (intellectual) disability or the teaching of such practices to education professionals.

We know the educational research indicates equal or superior outcomes academically and socially for students with disability being included in regular classrooms with their peers in comparison to the congregation of students with disability in special classrooms and schools.

We also know that there is no pedagogical basis for separating students with disability, whether based on disability, the impact of disability, or learning capacity. Rather, the history of segregated education for children with disability mirrors the treatment of women in a previous century where education decisions to exclude or teach poorly were based on prejudice and other non-educational rationales.

We know that the parallel systems of segregated "special education" and "mainstream education" did not grow out of educational research but rather out of flawed historical, at times charitable and at other times discriminatory, social responses to exclude students with disability from mainstream education.

We know of no research that contradicts this knowledge.

International policy, education research and human rights instruments support the direction of inclusion in education.

The right to inclusion of students with intellectual disability in schools and other learning environments requires that teachers need to be equipped with the necessary skills and knowledge to teach all children well and together.

The UNESCO Salamanca Statement stated that:

> "every child has unique characteristics, interests, abilities and learning needs,"
> And that;
> "education systems should be designed and educational programmes implemented to take into account the wide diversity of these characteristics and needs."

The Salamanca Statement points to the need and importance of building professional capacity to ensure that teachers can teach the student diversity contained within the student population.

NCID cannot locate any research that supports the basis for separating students on the basis of 'disability' or why you would <u>not</u> teach inclusive education pedagogy and practices to all (trainee) teachers.

Despite the overwhelming research and evidence on inclusive education, children with intellectual impairment and their families are still directed and encouraged to attend separate and segregate education settings either separate from regular schools or in "special units". The Recent Senate report on students with disability failed to adequately address the need for change to permit a student with disability to pursue an education rightfully alongside their peers. While there is some tentative recognition of inclusive education, the dominant paradigm of separation is supported by governments and their administrations.