



Productivity Commission Inquiry
into the
Disability Discrimination Act 1992

Submission by the
New South Wales Council for
Intellectual Disability

The NSW Council for Intellectual Disability (NSW CID) is the peak organisation representing people with intellectual disability who live in NSW.

It is estimated that approximately 3% of the Australian population are people with an intellectual disability. Importantly, people with intellectual disability have had their disability since birth, which is in contrast to the pattern across all other disability groups where approximately 74% of people identified their disability at adult ages or older.¹ This has important ramifications for ensuring that participation in society, full acceptance and a non-discriminatory environment exists from birth for people with an intellectual disability as a discriminatory environment will have a negative compounding effect across the lifespan and preclude forming the necessary larger social networks and gaining life skills prior to the onset of disability.

At the outset of this submission regarding the social impacts of the DDA on people with an intellectual disability and on the community as a whole, NSW CID would like to highlight to the Productivity Commission that **the DDA has failed to meet all three of its objectives with regard to the needs and rights of people with an intellectual disability**. Unfortunately many of these failings with regard to the implementation of the Act are a result of the lack of financial commitment that is required to make adjustments in delivering services and education to people with an intellectual disability and the community as a whole. Of necessity, due to the fact that systemic changes are required to secure protection of the human rights of people with intellectual disability, almost any finding of discrimination will have resource implications. If the financial ramifications of the changes required in service provision and education to guarantee human rights protection is going to impede the delivery of decisions in favour of people with disabilities in general and people with intellectual disabilities in particular, the elimination of discrimination and equality before the law will not be realised.

NSW CID believes that quality of life for people with intellectual disability is achieved through truly supported and inclusive living, and recreational, study and work situations which are as typical and normal as possible - situations which provide people with intellectual disability opportunities to be not only physically and socially located within communities, but to be contributing members of such communities. This can only be achieved in a non-discriminatory society.

This submission will highlight briefly how the DDA has failed in its objectives for people with an intellectual disability. NSW CID is happy to provide additional evidence to the Commission during the public hearings in Sydney.

¹ Australian Institute of Health and Welfare, *The Definition and Prevalence of Disability in Australia*, 1997.

DISCRIMINATION AND PEOPLE WITH AN INTELLECTUAL DISABILITY

People with intellectual disability are a marginalised and vulnerable group who experience discrimination in all spheres of their lives: employment; education; accommodation; recreation; access to public transport; and access to goods services and facilities. The complexity of issues which people with intellectual disability face results in them experiencing frequent discrimination and unfair treatment due to their disability from birth through to adulthood. Reasons for this include community attitudes which exclude and marginalise people with intellectual disability; a greater than average interaction with multiple services; reliance on paid support services to meet personal and social needs; and isolation. The life experiences of many people who have intellectual disability are unfortunately very different to those who do not have a disability.

Like any person, people with intellectual disability want to be treated with dignity and have a satisfying, autonomous and valued life, including the following:

- a safe, secure, supported and pleasant place to live;
- to be welcomed in the workplace, school and general community;
- to have a job that pays at least a living wage and is interesting;
- to be free from overt abuses of human rights, such as physical and sexual abuse, and neglect; and,
- to be free from subtle abuses of human rights, such as no control of choice in what school to attend, who to share a house with, recreational activities, what meals to eat.

Unlike the advances and positive changes that have started to occur for many people with disability in Australia, some as a direct result of the DDA, the situation has not changed substantially for people with intellectual disability. This could be due to the fact that intellectual disability is not as easy to define and conceptualise responses to as some disability groups. The Accessible Transport Standard is an example of this (discussed later). As mentioned above, people with intellectual disability are still marginalised and experience frequent discrimination and unfair treatment:

- many people with intellectual disability still live in institutions (large residential centres) due to the slow pace of closing those centres - currently in NSW there are still over 2000 people with disabilities living in institutions, a significant proportion continue to be children;
- exceptionally low rates of employment of people with intellectual disability in the employment market, and those people with intellectual disability who do work tend to be employed in business services (sheltered workshops), many receiving wages as low as \$23 per week for full-time work;
- education which includes students with and without disabilities together is not available for many children and adolescents. In NSW only 30% of school-aged children and adolescents with disabilities attended Government primary and secondary schools in 1999. More than half of these children and adolescents with disabilities were not receiving education in classrooms alongside their peers without disabilities;

- people with intellectual disability are grossly over-represented as people who have crime perpetrated against them, particularly crimes of assault, sexual assault and harassment, and fraud. For example, it is estimated that women with disability are assaulted, abused and raped at a rate of at least two² to four³ times greater than women without disability, and for women with an intellectual disability this rate is even higher⁴. Despite this over-representation, these crimes are rarely reported, and frequently fail in prosecution⁵;
- people with intellectual disability are grossly over-represented in the juvenile and criminal justice systems as offenders and alleged offenders.⁶ According to the NSW Law Reform Commission, people with intellectual disability are incarcerated at a rate 4 times greater

² Frohmader F. *There Is No Justice – There's Just Us. The Status of Women with Disabilities in Australia*. Hobart; 2002, p.22.

³ Muccigrosso M. Sexual Abuse Prevention Strategies and Programs for Persons with Developmental Disabilities. *Sexuality and Disability* 1991; 9(3): 261-271.

⁴ Frohmader F. op cit

⁵ Reasons for this include the following: people committing crimes target people with intellectual disability who seem vulnerable; the person committing crimes may be someone who is known to, and in an unbalanced power relationship with, the person with intellectual disability; people with intellectual disability are often in situations where they are unable to protect themselves from crime, or to remove themselves from the situation (domestically and geographically), or to reduce the impact of the crime; people with intellectual disability may be unaware of the signals that alert other people to the possibility that a crime is about to occur; when a crime has been committed upon them, people with intellectual disability are unlikely to be aware of their rights or of how the criminal justice system might assist them; people with intellectual disability may have difficulty realising that particular events constitute a crime; people with intellectual disability may have difficulty communicating the fact that a crime has been committed, or in providing proof of the event; lack of and poor quality support results in people with intellectual disability being more vulnerable to criminal acts being perpetrated against them.

⁶ People with intellectual disability are not inherently prone to commit criminal acts. Research and experience shows that their over-representation in the juvenile and criminal justice systems is due to many reasons, including: more likely to be arrested, questioned and detained for minor infringements of public order law (because of "visibility", and a lack of understanding about how to protect themselves from false incrimination); more likely to come before the courts due to the combination of the misconstrued or misunderstood actions of a person with intellectual disability and an association of aggressive behaviour and people with intellectual disability; people with intellectual disability may experience prejudice and therefore be charged for an offence that they did not commit; people with intellectual disability may not have their "rights" - such as the right to silence - explained in a way they can understand; people with intellectual disability may be convicted more easily as they tend to confess to the offence charged rather than plea bargain; people with intellectual disability may be more often refused bail, perhaps as a result of previous breaches of conditions, or lack of support and resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements; people with intellectual disability may receive more custodial sentences, for example, because of the lack of alternative placements in the community; people with intellectual disability tend to serve longer sentences or a greater percentage of their sentence before being released on parole; people with intellectual disability may be placed in maximum security facilities in order to have access to "protected" custody; people with intellectual disability who are convicted are also likely to be manipulated by their peers while serving their sentence, leading to a loss of privileges and parole opportunities; people with intellectual disability are at high risk of extended sentences and are also more likely to be abused and assaulted in the prison system.

than that of the general population.⁷ A similar situation of over-representation is occurring in the local courts: 14-38% of the people appearing before the local courts on criminal charges have intellectual disability.⁸

While many of these aspects of discrimination are covered by the DDA (eg. employment, education etc) some of these are not. Specifically, the disproportionate over-representation of people with intellectual disability in the criminal justice system and the high rate of people with intellectual disability experiencing abuse are both situations that result from discrimination, inadequate services and support and community attitudes about intellectual disability.

While NSW CID acknowledges that both these situations require complex responses, some of which would be covered by the Act in its present form, NSW CID believes that the DDA needs to be amended in such a way that the Act would seek to redress these situations in a more comprehensive form.

RECOMMENDATION 1

The objects of the DDA need to be broadened in such a way that the Act would seek to eliminate the high rates of abuse experienced by people with intellectual disability and the over-representation of people with intellectual disability in the criminal justice system.

EFFECTIVENESS IN ACHIEVING OBJECTIVES

➤ Eliminating discrimination

NSW CID believes it is currently difficult to estimate whether there has been a reduction in the level of discrimination towards people with an intellectual disability. According to information available to NSW CID, rates have not increased with respect to the employment of people with an intellectual disability and inclusive schooling of children with an intellectual disability. Figures that have been quoted to demonstrate a reduction in discrimination should therefore be treated with caution. For example, the reduction in the number of complaints lodged with HREOC could be attributable to difficulties with the complaints-based process, long waiting times and reduced funding of HREOC and not because of a reduction in discrimination. Additionally, the DDA only deals with the resolution of individual incidents of discrimination and does not deal with systemic problems, thereby reducing the capacity of the DDA to eliminate discrimination at a rapid and effective rate.

NSW CID believes that in order to truly measure changes in the rates of discrimination, participatory outcomes, for example, could be used as a measure of the success or failure of DDA legislation in the achievement of its objectives. Examples of such outcomes would be: improved rates of

⁷ NSW Law Reform Commission, *People with Intellectual Disability and the Criminal Justice System*, NSW Law Reform Commission Report 80, December 1996.

⁸ Ibid.

employment and inclusive education; lower incidence of people with an intellectual disability in the criminal justice system; and lower reported rates of abuse of people with an intellectual disability.

Additionally, NSW CID believes appropriate methods and tools need to be developed to measure the incidence and impact of disability. The statistics quoted and meaning extracted from ABS data reproduced on page 17 of the *Issues Paper* is grossly misleading for people with disability in general, and for people with an intellectual disability in particular. The figures quoted and interpretation attached suggest a situation in Australia which currently does not exist, especially for people with intellectual disability.

➤ **Ensuring equality before the law**

The DDA has been criticised for its inability to achieve change and its inaccessibility for many people with disabilities. These criticisms include: people with disabilities are often unaware of the Act and what it means for them; people with disabilities may not have the financial or social support resources to follow this course of action; there is a failure to accommodate persons who depend on the discriminator; and the emphasis on conciliation ignores the inequality of bargaining powers on the part of people with disabilities.⁹ For people with an intellectual disability all these criticisms are valid: there is difficulty with regard to access to information about how to lodge a complaint and the process involved; and no support is provided to assist people with intellectual disability throughout the process. This lack of access to information and support has resulted in people with intellectual disability being unable to assert their rights as outlined in the DDA.

Specifically, for people with intellectual disability as complainants in allegations of discrimination, as the onus of proof is placed on them to prove that the discrimination occurred, rather than on the defendant to show discrimination did not occur, this has prevented many people with intellectual disability from lodging a complaint.

As stated above, complainants with intellectual disability find the legal complexities involved in lodging a complaint difficult without support and assistance. NSW CID argues that there is little in the way of reasonable accommodation to make the complaints process accessible to people with an intellectual disability. Without a change to the process (for example: shifting the onus of proof; shorter period of time between lodging and hearing a complaint; providing support staff; and the manner in which details of the allegation are documented and used throughout the process) people with intellectual disability will not assert their rights under the DDA. The DDA will continue to fail to achieve its objectives for this group of people.

⁹ Jones and Bassar Marks, above, p. 60.

GENERAL ISSUES

➤ **Definitional issues**

NSW CID believes there are problems with the definition of disability in the DDA in that it does not clearly include behaviour (including disturbed behaviour) that is a result of disability. While this may have been the intention of the wording in “(g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour” this is not how the definition has been interpreted by the courts.¹⁰

RECOMMENDATION 2

NSW CID recommends that the definition of disability be amended to include behaviour that is a result of disability.

➤ **Effects on competition**

NSW CID believes that a holistic perspective should be taken in debate about the elimination of discrimination for people with an intellectual disability and the resultant costs and effects on competition for service providers and the community. Far too frequently the financial costs and negative effects on productivity are raised as negatives to redressing discrimination for people with intellectual disability. However, the positives also need to be highlighted. Seen as a whole, a different picture emerges. The potential economic outcomes for the community as a whole include benefits:

- to people with intellectual disability by providing opportunities to contribute financially and socially to community life;
- to people with intellectual disability by providing opportunities to apply skills and earn money;
- to people with intellectual disability by providing opportunities of life choice and to contribute meaningfully;
- to society by everyone participating together; and
- to society by reducing direct dependence of people with intellectual disability on government.

As mentioned in the introduction, almost any effort to implement systemic change will have financial ramifications. With respect to costs and effects on competition, these could be subsidised by the government (direct financial subsidies and reimbursements) in addition to favourable incentives (eg. tax incentives, financial incentives) to businesses in order to increase the rate of employment of people with disability and for schools to enrol and support appropriately students with intellectual disability.

With respect to increasing the rate of employment of people with intellectual disability, NSW CID believes that new strategies need to be implemented in order to increase employment rates. One suggestion would be to implement a quota system as a ratio of total number of employees hired within each business or organisation. In addition, as mentioned previously, some people with intellectual disability are paid as little as \$23 per week for full-time work.

¹⁰ *Purvis v State of NSW (Department of Education and Training)* [2002] FCA 503 (24/04/02)

NSW CID believes legislation should be introduced to ensure that people with intellectual disability receive the living wage as the minimum wage for full-time work.

RECOMMENDATION 3

NSW CID recommends that a quota system be introduced in order to increase the employment rate of people with intellectual disability.

RECOMMENDATION 4

NSW CID recommends that legislation ensure people with intellectual disability receive the living wage as their minimum salary for work performed.

RECOMMENDATION 5

NSW CID recommends that Federal and State governments devise a strategy to assist employers to cover costs associated with employing people with intellectual disability and provide employers with financial incentives to employ people with intellectual disability.

➤ Exemptions

NSW CID believes that the existence of the ‘unjustifiable hardship’ qualification undermines the objectives of the DDA by providing a loophole and abrogating responsibility so that people with an intellectual disability may be left shouldering the burden of discrimination and unable to participate as fully in society as “people without a disability”. NSW CID accepts, however, that the exemption may need to remain in certain ‘justifiable’ circumstances. The current problem is that ‘justifiable’ and ‘unjustifiable’ have not been sufficiently defined in order to provide guidance to businesses and organisations as to what these terms mean.

In addition, NSW CID believes that the DDA needs to define clearly who should bear the costs of ‘justifiable’ and ‘unjustifiable’ hardship, if the discrimination is to be rectified. A method needs to be devised whereby, for example, individual businesses do not need to bear the cost independently but the costs are shared by the government and community as a whole.

RECOMMENDATION 6

NSW CID recommends that ‘unjustifiable hardship’ be clearly defined and the Act stipulate who is to bear the costs, if any, associated with findings of ‘justifiable’ and ‘unjustifiable’ hardship.

THE DDA AND OTHER LEGISLATION

➤ Disability Standards

NSW CID is concerned that the Standards are developed without proper consultation with people with intellectual disability. For example, with regard to the Accessible Transport Standard, only people with physical disability and sensory disability were included in the consumer reference group. As a result, the Standard contains very few provisions to address the needs of people with intellectual disability, in particular access needs, in order to enable people

with intellectual disability to travel independently. Examples of needs not addressed include: timetable information; the manner in which announcements are made; written information; information displayed at key transaction points; handling of face-to-face enquiries; training for staff; etc.

NSW CID also recommends that the DDA be amended to allow Standards to include independent monitoring and enforcement arrangements. Furthermore, while NSW CID accepts that 'unjustifiable hardship' could remain in the Act, NSW CID believes that this should be removed from the Standards if the Standards are meant to reflect the minimum benchmarks. The Standards should not water down the objectives of the DDA. NSW CID is concerned that this may occur if the 'unjustifiable hardship' exemption remains. NSW CID believes it is very important that the Standards are reviewed regularly to reflect changing community standards.

RECOMMENDATION 7

NSW CID recommends that people with disability be consulted in the development of all Standards.

RECOMMENDATION 8

NSW CID recommends that Standards include independent monitoring and enforcement arrangements.

RECOMMENDATION 9

NSW CID recommends that 'unjustifiable hardship' be removed as an exemption from the Standards.

RECOMMENDATION 10

NSW CID recommends that the Standards be reviewed regularly to reflect changing community standards.

➤ HREOC guidelines and advice

A recent analysis of the number of applications lodged with HREOC by people with disabilities indicates that rates have been falling since 1995.¹¹ The same study revealed that the level of funding to HREOC has also decreased.¹² Barriers inhibiting the lodgement of applications by people with intellectual disability and decreased levels of funding mean that the operations and objectives of HREOC are being compromised and the rights of people with intellectual disability are not being protected.

Another significant problem is that HREOC decisions are difficult to enforce.¹³ Williams suggests that the decision in *Brandy* highlights the difficulties facing the Commonwealth in finding informal, speedy, and cost-effective means of resolving human rights complaints.¹⁴ As there is now a federal magistrate's court it may be feasible to resolve complaints more efficiently there.

¹¹ Handley, above.

¹² Ibid.

¹³ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁴ Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 204.

The focus on remedies to individuals rather than systemic solutions is particularly problematic¹⁵ in seeking to eliminate the discrimination which is occurring on such a wide scale for people with intellectual disability. Furthermore, conciliation findings and findings by the Commission do not set a precedent for expected behaviour. NSW CID believes that outcomes from both these processes need to be given more weight in order that advances are made more rapidly.

RECOMMENDATION 11

NSW CID recommends that the DDA be amended to allow representative complaints, eg by disability organisations on behalf of individuals and groups of people with disabilities.

Making a complaint or going to court can be intimidating, particularly for people with intellectual disability. In addition to HREOC mediating complaints under the DDA in the first instance, NSW CID believes that generalist legal centres need resources to gain the requisite skills to support people with intellectual disability making complaints under the DDA. This is essential given the current chronic state of under-resourcing of HREOC.

RECOMMENDATION 13

NSW CID recommends that resources be provided to generalist legal centres to provide support to people with intellectual disability making complaints under the DDA.

CONCLUSIONS

People with intellectual disability are still being denied the opportunity to participate and contribute to our society and to be seen as full citizens because their forms of participation are not seen as valid and the support required to participate is denied. This lack of support is the result of discriminatory attitudes and lack of funding commitment.

The DDA has been of limited assistance in achieving attitude change for people with intellectual disability to date. Amending the DDA along the lines suggested in this submission and providing the requisite resources would be one step towards this goal.

¹⁵ Jones, M, and Basser Marks, LA, "The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992 (Cth)", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with Disabilities: Legal and Institutional Issues*, 1998, p. 60; Handley, P, 'Caught Between a Rock and a Hard Place': Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act", (2002) 36 *Australian Journal of Political Science* 515.