



OFFICE OF THE  
PUBLIC ADVOCATE

Response to the Productivity Commission's *Review of the Disability  
Discrimination Act 1992, Draft Report*

February 2004

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# Inquiry into the Disability Discrimination Act

## Response from the Public Advocate in Victoria to the *Draft Report*

### February 2004

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#### **Introduction**

This submission from the Public Advocate to the Productivity Commission's *Review of the Disability Discrimination Act 1992 Draft Report* (October 2003) will address the following topics:

- Overview of the Report's general direction.
- Equality before the law (Chapter 6.2-6.4).
- Exemptions on the grounds of unjustifiable hardship in relation to Commonwealth Government laws and programs (Chapter 10.2)
- Exemptions because of Special Measures (Chapter 10.4)

#### **Overview**

Overall the Draft Report's recommendations and support for the DDA is to be commended. It is particularly pleasing to note that:

- The Draft Report has recognised the importance to people with disabilities and their supporters of a stand alone DDA (pp. xi; chapter 13.2.).
- The Commission found that resources provided to legal services and HREOC are inadequate to do the job and that such lack of resources undermines the effectiveness of the DDA (p. xli). It is the Public Advocate's view that these resources need to be significantly increased.
- The Draft Report's recognition of the limited negative impact that the DDA has on competition, and that in fact, it has 'net benefits';
- The objective of elimination of discrimination cannot be achieved without the DDA (p. xxxv).

#### **Equality Before the Law**

##### *Accommodation*

A major complaint of people who have a disability is the low priority their needs obtain when government determines its allocation of resources in the budget each year. It is unfortunate that the DDA is limited in its ability to challenge government decisions about provision of services (p.121). Therefore the DDA should be extended to require government, when planning its provision of services each budget cycle, to ensure that the needs of people who have a disability for accommodation and support services are met.

##### *An Accommodation Standard*

If an accommodation standard were to be developed, then care should be taken to ensure that minimum requirements are sufficient to meet the needs of all people with disabilities who

might require such a standard in a variety of settings. Any accommodation standard needs to address both physical access and the quality of accommodation provided.

A lack of affordable, accessible, long term, secure accommodation of ALL types for people with disabilities in the open market as well as appropriate levels of support means that some people are forced into supported and/ institutional accommodation that may be physically accessible but at the same time such settings are not homes.

Any accommodation standard should have timelines that are not excessively drawn out for the sole benefit of service providers to the detriment of people with disabilities (such as has occurred in relation to the transport standard).

### *Access to Justice*

The Public Advocate strongly supports Draft Recommendation 6.1. regarding a Commission of Inquiry into access to justice for people with disabilities and the development of practical strategies for protecting the rights of people with disabilities in the criminal justice system. As noted in the Draft Report (pp. 126-129), the Public Advocate in Victoria has long been aware of the particular vulnerability of people with disabilities to less favourable treatment when accessing the criminal justice system. The Productivity Commission might like to consult a report on this topic by the NSW Law Reform Commission (1996) entitled: *Report 80: People with an Intellectual Disability and the Criminal Justice System*, when determining its final recommendations and possible terms of reference for any Federal Inquiry.

### *Unjustifiable hardship defence available to the Commonwealth in the administration of its laws and programs*

The Draft Report recommends that the Commonwealth have a defence of unjustifiable hardship to a legitimate claim of discrimination. Two real arguments are put forward: -

- 1) It is the government that must decide where the community resources should be best deployed;
- 2) The Commonwealth would find it difficult to maintain such an argument because of its access to resources.

The difficulty with the first argument is that the political process by which government determines the allocation of community resources is not neutral. People who have a disability are not politically strong and their capacity to claim a sufficient share of government resources to improve their quality of life is very limited. To grant the Commonwealth this defence is to further disempower the constituents who have a disability making their advancement within the community more fragile than it is currently.

The second argument may be correct, but there is concern that if the Commonwealth is able to use this defence, it may exercise it when it is not appropriate. This could mean that plaintiffs with little experience in economics and budgetary strategies will be pitted against experts from Treasury regarding allocation of the community's resources. The possibility of long hearings and significant power imbalances between the parties on such matters is ludicrous and a further erosion of the rights of people who have a disability.

### *Special Measures*

The proposals in relation to restricting the availability of the special measures exemption are an improvement on the existing law in the DDA.

### **References**

NSW Law Reform Commission (1996). *Report 80: People with an Intellectual Disability and the Criminal Justice System*, Sydney.