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Productivity Commission Inquiry into the *Disability Discrimination Act 1992:*

A response from

The Physical Disability Council of Australia Ltd

May 2003

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RECOMMENDATIONS

1. PDCA recommends that the Productivity Commission initiate discussion with a view to re-formulating the definition of disability used in the DDA. The Act should be driven by a definition of disability that is drawn from a social model of disability rather than a medical model of disability. (Section 2)

2. PDCA recommends that the concept of structural or institutionalised disability discrimination should be added to the DDA or incorporated within the existing definition of indirect discrimination. (Section 4.3)

3. PDCA recommends that ability to apply for temporary exemptions be reviewed. Temporary exemptions should only be a mechanism for accelerating or managing change (from discriminatory behaviour to non-discriminatory behaviour) by providers of goods or services and should only be granted when an Action Plan has been supplied complete with time frame for reporting on actions. (Section 5)

4. PDCA recommends that there needs to be a much clearer separation of three concepts within the DDA:
   - disability discrimination;
   - reasonable adjustment; and
   - defence against or mitigation of a requirement to make a reasonable adjustment, of which "unjustifiable hardship" is but one type of defence. (Section 6)

5. PDCA recommends that the DDA should be amended to introduce a duty to make a reasonable adjustment. This duty should apply to all providers of goods and services, including employment and access to premises. (Section 8)

6. PDCA recommends that anti-discrimination laws remain distinct and separate but share a common commitment to eradicate discrimination in whichever way it is made manifest. (Section 12)

7. PDCA recommends that the role of people with disability within the processes for developing DDA Standards be enhanced on all levels. (Section 13)

8. PDCA recommends that mandatory monitoring requirements be incorporated within all DDA Standards. (Section 13)

9. PDCA recommends that Disability Action Plans become a mandatory requirement placed on most legal entities. (Section 15)

10. PDCA recommends that Mandated Disability Action Plans be offered as an alternative to a Standard

11. PDCA recommends that no temporary exemption (if they continue to exist) should be granted to an applicant that does not possess a Disability Action Plan. (Section 15)

12. PDCA recommends that a national agency, perhaps, HREOC be adequately resourced to establish and sustain a monitoring regime of Disability Action Plan implementation. (Section 15)

13. PDCA recommends that there should be no change to the DDA to permit self-regulation. (Section 16)

14. PDCA recommends that HREOC be charged with a duty to become an advocate for the protection of the right to live free from disability discrimination, relinquishing its role as a mediator if necessary to eradicate conflict of interest. (Section 17)

15. PDCA recommends that HREOC be empowered to initiate complaints and make recommendations in Public inquiries. (Section 16)

16. PDCA recommends that the Productivity Commission advise that the DDA Standards Project funding of $120,000 should be increased to take into account the additional costs mentioned in this submission.

17. PDCA recommends that the Productivity Commission advises commencement on the production of an Employment Standards and an Accommodation Standard to replace the work of the Transport Standard and the Education Standard when it reaches Parliament.

About the Physical Disability Council of Australia Ltd (PDCA)

PDCA was established in 1995 by five individuals who sought to find a way to ensure the representation of people with physical disability in Australia. At that time, there was organisation representing the physical disability sector, yet there were organisations representing other disability specific areas. The Federal Government encouraged the establishment of PDCA, and set about encouraging key people in the Eastern States (and later the Western States) to establish the national disability peak organisation.

Today, PDCA is a well-respected national organisation, run by and for people with physical disabilities and works to represent the interests and views of all people with physical disabilities across Australia.

PDCA is linked to a network of State and Territory Physical Disability Councils, (PDC's) who nominate two representatives to the national Council. Each representative must be a person with a physical disability. PDCA is funded under the national secretariat programme by the Department of Family and Community Services (FaCS) to be the national voice of people with physical disability.

The overarching aim of PDCA is to advocate at a Federal level, for the rights and interests of people with a physical disability, their families and significant stakeholders such as those providing essential support. All activities undertaken by PDCA include a strong consumer voice and involvement and are based on the following Objectives:

1. Represent the rights and interests of people with physical disabilities, their families and carers across Australia

2. Advocate on issues impacting on people with physical disabilities, their families and carers.

3. Work towards securing equitable outcomes for people with physical disabilities, their families and carers.

4. Co-ordinate policy advice to the Federal government and relevant peak bodies on the impact of policy and legislation affecting people with physical disabilities, their families and carers.

PDCA aims to collaborate and work with a broad range of people and organisations to represent the interests of people with a physical disability. This includes working with:

- organisations providing services to people with physical disabilities

- the disability sector and relevant peak bodies.

Who is covered by the DDA?

PDCA supports a broad definition of disability. We feel, however, that the current definition in the DDA is inadequate.

The Act defines disability in terms of functional impairment based on a medical model of disability. We favour a definition based on a social model of disability.

Erroneously, we feel, the Act defines and locates the concept of disability, which is a social construct, as matter of individual "physical, intellectual, psychiatric, sensory, neurological or learning" impairments. These impairments are real rather than socially constructed. The fact of impairment is not synonymous with disability.

The definition used in the DDA must be re-formulated to respond more appropriately to the lived experience of people with disability, now and in the foreseeable future. The definition of disability used by the Act sits, in one sense, at the core of its being or purpose. The Act should, therefore, be driven by a definition of disability that is drawn from a social model of disability rather than a medical model of disability.

We recommend that the Productivity Commission initiates discussion with a view to re-formulating the definition of disability used in the DDA. We believe that a substantial body of theory exists to support our call for the re-formulation of the Act's definition. In particular, we draw the attention of the Commission to definitional work that has been carried out by the Union of the Physically Impaired Against Segregation. We paraphrase their approach thus:

> ***Impairment*** *means lacking all or part of the functional capability of a limb, organism or mechanism of the human body*.
>
> ***Disability*** *means the disadvantage or restriction caused by a contemporary social organisation, which takes no account or little account of people who have impairments and the functional or behavioural consequences of those impairments, leading to social exclusion or resulting in less favourable treatment of and discrimination against people with impairments.*

Therefore people with disability are people with impairments who are disabled by barriers in society. Our central theme in this definition is that disability is external to the individual and is a result of environmental and social factors.

A re-formulated definition of disability in the DDA would be based upon the social model definition cited above.

Statistics of people with Physical Disability in Australia

According to the Australian Bureau of Statistics *'3.6 million people in Australia had a disability (19% of the total population* in 1998. *A further 3.1 million had an impairment or long-term condition that did not restrict their everyday activities. Of those with a disability, 87% (3.2 million) experienced specific restrictions in core activities, schooling or employment.*

Self care, mobility and communication are fundamentally important activities underlying all aspects of everyday life. Most people with a disability (78%, or 15% of the total population) were restricted in one or more of these core activities. Depending on the level of assistance needed or difficulty experienced, restriction in core activities was profound (3% of the total population), severe (3%), moderate (4%) or mild (6%) (table 2). Participation in education and the labour force contributes to personal development and independence. Of those with a core activity restriction, 47% (1.3 million) people were also restricted in schooling or employment. A further 327,900 people without a core activity restriction were restricted in schooling or employment. [a]

[2] ABS Catalogue No. 4430.0 Disability, Ageing and Carers 1998

PDCA's links to the DDA

We believe PDCA has in-depth knowledge of the DDA itself, its relevant projects and committees, as we have consistently been involved with the DDA, the Standards Development process, the Federal Attorney Generals Department and the DDA Standards Project (DDASP) funded by the Federal Attorney Generals Department. PDCA also encourages members to use the DDA and the relevant complaint mechanism where discrimination occurs and has been a major stakeholder in any education process undertaken by HREOC such as the 10 Year Anniversary of the DDA, and the National Forum hosted by HREOC in December 2001.

PDCA's Executive Officer, Sue Egan, was Deputy Convenor of the DDASP for 2 years before becoming the Convenor of the Project for the past 2 years.

The President of PDCA, Maurice Corcoran was involved in lodging the first complaint regarding the lack of accessible transport in South Australia, and followed this by becoming one of 3 disability sector representatives on the National Taskforce that developed the Transport Standard. He also worked as Coordinator of the DDA Standards Project for over two years. Maurice was also one of 4 recipients of a Human Rights Award on December 3 2001 for their work on the Transport Standard over a period of 8 years.

Maurice is still involved with the Transport Process being one of 2 disability sector representatives on the National Accessible Transport Standards Committee set up to monitor the progress of the Transport Standard and any ongoing issues.

What areas are covered?

The Disability Discrimination Act ("the DDA") provides for the Attorney-General to make "disability standards" (subject to approval or amendment by Federal Parliament). It will be unlawful not to comply with a disability standard.

Disability standards under the DDA may be made in the areas of employment, education, accommodation, provision of public transportation services and facilities, and the administration of Commonwealth laws and programs.

Provision in the DDA for making of disability standards has two major purposes:
1. to set legislative deadlines for achieving equal access for people with disabilities in the areas covered by the DDA; and
2. to provide more definite and certain benchmarks for accessibility and equality than is provided by the general anti-discrimination model.

The anti-discrimination provisions of the DDA, which are already in force, contain very broad ranging requirements for equality of access and opportunity for people with disabilities. However, the open ended and flexible nature of this type of provision, while having many advantages, may also limit its effectiveness in achieving equality for people with disabilities in some areas. (www.hreoc.gov.au)

We urge the Productivity Commission to recommend the end to all areas of exemption to the DDA. Specifically we call for exemptions to cease in the areas of:

- Superannuation and insurance;
- actions taken under prescribed Acts;
- infectious diseases;
- charities;
- telecommunications services;
- pensions and allowances;
- migration;
- combat duties;
- peace keeping services by the Australian Federal Police; and
- housing.

In arguing for these exemptions to be ended we do not advocate 'blanket' application of unrealisable outcomes. We propose, instead, a shift of paradigm for the DDA.

We believe strongly that civil society in all its aspects and manifestations should regard anti-discriminatory practices and demonstrable commitment to equality of opportunity as the 'default values' of social organisation. There should be placed on all social actors an assumption or impetrative of anti-discriminatory behaviour. Any and all variations should be considered on a case-by-case, individualised basis within the provisions of a DDA that is comprehensive and holistic.

Omnibus legislation

PDCA sees no practical benefit in the Commonwealth adopting omnibus legislation. We feel strongly that discrimination is not monolithic. It takes many forms and manifests itself in many ways. Sex, race, disability, age and other forms of discrimination may share some antecedents and characteristics. But there are subtle (and not so subtle) differences. Complex, long-standing and deeply entrenched prejudices, social forces and economic circumstances have combined to create discrimination in its modern, complex, multi-faceted manifestations. In our view, complexity and subtlety require a no less complex and subtle set of corrective laws, clearly defined by and defining the challenges they seek to address. In short we feel strongly that Federal Law should continue to apply the principle of horses for

course. Anti-discrimination laws should remain distinct and separate but share a common commitment to eradicate discrimination in whichever way it is made manifest.

Inadequacies of the DDA Standards Process

From experience, PDCA is in a prime position to report that the DDA Standards Project operates within the confines of a lack of resources, and operates within the uncertainty of funding from one year to another.

Funding consists of $120,000 to pay for an office, payment of an Executive Officer, at least one Steering Committee Meeting (10 committee members plus representatives to the Standards all attend) to attend some of the Standards meetings (for the Coordinator) and for required consultations including through mail outs and e-mail, as well as maintenance of a website.

The DDASP therefore lacks significant resources to consult with an estimated 19% of the Australian population who may be affected by discrimination at one time or another, so relies heavily on community sector organisations who themselves often experience lack of funds and resources. In the past the DDASP Coordinator has had to be paid from the funds of the auspicing organisation (Blind Citizens Australia) as the funding provided by the Attorney General's Dept. was not forthcoming at the pre arranged time.

The DDA Standards Project has also found, through the experience of the Transport Standard and currently with the Education Standard, that there is no funding to develop a cost-benefit analysis in order to challenge the industry perspective's. Instead the DDASP has to rely on the good will of volunteers such as Dr Jack Frisch for Access and Transport, and Peter Vintilla from WA; and other authorities for the Education Standard.

The Attorney Generals Working Group holds meetings twice per year, which is specifically to gauge the progress of the DDA Standards Process and to discuss any issues of significance. It must be said that as part of the Working Group, PDCA's Executive Officer spends much of her time these days justifying the workload of the DDA Standards Project and being consistently confronted with the information that there is little money in the Attorney Generals budget. Finally, because of lack of resources, The DDA Standards Project can only work on 1 or 2 Standards at a time.

Standards under the DDA

Transport - completed.

The Transport Standard was legislated in October 2002 and took over eight (8) years to reach this stage. Most of the delay can be directly attributed to the lobbying from significant stakeholders in the industry. The DDA Standards Project could not offer the same extent of lobbying to government departments and Ministers. However an extensive community campaign undertaken by PDCA called WE WILL RIDE proved to be a useful lobbying and empowerment tool which enabled the disability sector to write and email their local politician.

This campaign came at a cost in dollars, time and effort contributed by our organisation.

Education

Currently the draft Education Standard awaits the results of consultations on cost benefits, which will go forward for consideration before the Standard can be presented to Parliament. This Standard has been over 5 years in preparation to date.

In a survey during the preparation of the Draft Education Standard, 1220 of the 1307 responses 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.

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

Access to Premises

The Access to premises Standard is at the Working Group Stage with the last round of consultations expected early in 2004 and a forum held throughout Australia late last year. This Standard has already taken over 2 years and it is expected to be another full year before reaching the Parliament stage.

Access to premises is a large area of concern for PDCA, where discrimination occurs for people with physical disability and is a major barrier to employment and general inclusion in society for those with a mobility impairment. (

Without a Standard that can provide certainty to designers and builders as well as people with disability, there will remain a chasm between people with disabilities and an inclusive society.

Comments on areas for potential Standards (section 31)

Employment

A Draft Standard in Employment was attempted earlier but was not successful because there could not be a consensus of opinion reached at the time. Given that this was in the early days of the DDA and the DDA Standards Project, little was known and understood about Standards and how they could assist in preventing discrimination whilst ensuring certainty for providers at the same time.

At the time there was much resistance by the Employer Industry and conversely resistance from the disability sector who believed that rights under the DDA would be eroded if a Standard in Employment were to be developed. Subsequently there is no Standard on employment, nor is there any intention at the time of writing this submission to commence work in this area.

However, this is a major area of concern for the sector and for the Human Rights and Equal Opportunity Commission. There has been very little reform that benefits the individual and there is a widely held belief that the government and employment stakeholders are not concerned with the genuine employment needs and outcomes of people with disability. It is also believed that this will not change while business service employers interested in the status quo of poor employment outcomes, dominate the reforms. Evidence of the decline in numbers of valued roles can be seen in the decline in numbers of people with a disability working in Public Service roles.

Areas under scrutiny from the HREOC[2] website include:

- Duties,
- Job descriptions
- Past illnesses
- Adjustments on the job
- Refusal of applications
- Termination
- Defence force dismissal
- Dismissal after diagnosis'
- Accommodations
- Adjustments
- Employment agencies
- Adaptive technology

The area of Employment is of particular concern to PDCA as the Federal Government moves forward with Australians Working Together and 'Mutual Obligation' for people with disabilities who receive a Disability Support Pensions.

[3] www.hreoc.gov.au

PDCA is of the belief that without an Employment Standard people with disabilities will not be able to be included as valued members of society and work in equitable workplaces with the potential for promotion and award based wages. People with a disability will continue to be underpaid and work in poor conditions and will be exploited by unscrupulous employers or discriminated against to the extent that they are not employed at all.

We believe that by developing an Employment Standard, the process can bring together all stakeholders (employers, government, people with disability) in a positive way and provide a way forward in the Australians Working Together Process.

Accommodation:

Ten years after the development of the DDA legislation there is still no attempt being made at an Accommodation Standard. Consequently we still have thousands living in institutions, nursing homes, unsuitable hostels, boarding houses and doss houses. There are no specific Disability Standards for accommodation in emergency accommodation facilities, hotel/motel and holiday accommodation which results in either very poor levels of access or none at all. For example if you look into the holiday apartments that are accessible along the Gold Coast where are thousands of apartments, you actually find there are virtually none that comply with the Australian Standards for access. Most of these apartment buildings do not even have access into their reception and common areas.

The 1993 Burdekin Report in its findings exposed a crisis in the community for people with mental illnesses, particularly those with severe mental illness, yet no work has taken place on a suitable accommodation Standard.[3]

Complaints of discrimination from the HREOC website have been around:

- Hostel accommodation
- Holiday access
- Housing Units
- Hotel Access
- Leasing arrangements [4]

Commonwealth Laws and Programmes

Complaints and concerns centre around

- Employment agency access
- Taxation documents
- Information access
- Communication access
- Audio tape provision of information
- Polling booth access;

As can be seen by the above list, the complaints cover all areas of disability. The issue of Polling Booth access has still not improved despite their being a public inquiry and an Action Plan in the making by the Australian Electoral Commission. A standard would help to ensure the certainty in provision of government Laws and programmes.

[4] Burdekin Report. (1993), *Human Rights and Mental Illness. Report of the National Inquiry into Rights of People with Mental Illness – Vol. 11*, Human Rights and Equal Opportunity Commission, Australian Government Printing Service: Canberra

[5] www.hreoc.gov.au

Action Plans

PDCA supports the position that where there is no Standard, there should be a Mandated Action Plan. We also argue that Industries would then have the option of developing a specific Standard or accept a Mandated Action Plan, which would establish certainty for all parties including people with disabilities.

All incorporated bodies and legal entities such as limited companies, co-operatives, partnerships, trusts, government agencies (essentially every legal personality except sole traders) should be required to submit a disability action plan. Failure to develop a mandatory disability action plan (two years after the introduction of this new duty) would be a factor admissible in mediation and / or proceedings relating to a complaint of disability discrimination.

Why have relatively few businesses submitted voluntary action plans? Because this is a voluntary process. The luxury of not planning for change to a non-discriminatory future should be removed from all social actors of the type described above.

If a decision is taken to continue to allow temporary exemptions it seems to be unreasonable to grant any exemption if no disability action plan exists.

Monitoring progress is a critical component of all planning. Without an effective monitoring mechanism or regime it is impossible to know how well the plan is working (or not working). The absence of a mandatory monitoring regime is a serious flaw in the processes of disability action planning under the terms of the DDA. PDCA believes that mandatory monitoring should be introduced for all Disability Advocacy Plans. HREOC or some other, autonomous body, should be given the responsibility and resources to manage and provide a robust Disability Action Plan monitoring regime.

Temporary exemptions

Our view on this question is the same as PDCNSW. We believe that there is no purpose served by temporary exemptions. They are not a mechanism for accelerating or managing change (from discriminatory behaviour to non-discriminatory behaviour) by providers of goods or services.

We understand that HREOC has taken the view that temporary exemptions are sometimes required and/or desirable to protect the interests of service providers from unreasonable, unjustifiable or malicious complaints during a period of transition. HREOC has indicated that the existence or development of a credible Disability Action Plan would be (or almost be) a necessary corollary of granting an exemption.

PDCA believes that temporary exemptions are unnecessary and unreasonable. They delay actions that might occur more quickly. We feel strongly that providers of goods and services are adequately protected from unreasonable, unjustifiable or malicious complaints by provisions elsewhere in the Act. The concept of “unjustifiable hardship” alone provides sufficient protection for any and all providers.

Temporary exemptions have not shown themselves to encourage or facilitate change. There is clear evidence, however, that they can be and have been used as delaying or avoidance measures by providers who could have acted or could now act in a non-discriminatory way but choose not to.

The examples of the temporary exemptions granted to the Olympics Roads and Transport Authority and to Kendall Airlines illustrate the weakness of current HREOC policy with regard to temporary exemptions. Neither of the exemptions resulted in an acceleration towards non-discriminatory behaviour or practices. No barrier to accessible transport was removed by either exemption. They served only to negate and undermine a key objective of the DDA: the eradication of discrimination.

Industry self-regulation

Almost by definition, if an industry was self-regulating its genuine commitment to non-discriminatory best practice no legislation would be necessary. We need legislation because industries have been and are woefully inadequate at regulating themselves. The must be no amendment to the DDA to facilitate self-regulation

Complaints

It is abundantly clears to everyone that the loss of jurisdiction that saw complaint resolution removed from HREOC and returned to the Federal Court has had a dramatic and dramatically bad effect on the raising of complaints. The facts of the matter are stunningly simple. The Federal Court is a costs jurisdiction. People with disability are very reluctant to pursue complaints vigorously to the logical conclusion when the very real risk of being required to meet the respondent's costs weighs heavily on their minds.

This is not to argue that people with disability have raised bad or unwinnable case. We merely observe what everyone knows. The scales of justice were tipped in favour of respondents when the end of the complaints' journey became the Federal Court.

Most complainants are people with disability who are not lawyers and cannot afford legal fees. Most respondents have much easier access to legal advice and they make use of that advice. The risks of losing, perhaps on a legal technicality, have become much, much greater. Anyone can see that a respondent committed to taking no action need do little more than assert, "see you in the Federal Court", to stall or end a complaint. The risks to people with disability have simply become too great.

We believe that profound changes need to be made to the complaints mechanisms of the DDA. These might include:

- HREOC could be given Federal Court powers but as a cost free jurisdiction.
- Discrimination law could be defined as a cost neutral matter (i.e. each party understands at the outset that each party is responsible for their own costs and the Court bears its own costs unless an action is deemed mischievous).
- HREOC or its complaints / legal section could cease to be a mediator in DDA complaints and become the legal advocate for complainants, bearing the costs of advocacy and, therefore, considering the chances of success before acting on behalf of a complainant in Court system. We envisage here a role not unlike the Crown Prosecution Service. Another agency or another part of HREOC would then adopt a role not unlike the police service.
- HREOC could receive powers not unlike the Ombudsman.
- HREOC would be empowered to initiate complaints.

We feel strongly that no one agency, in this instance HREOC, can or should be educator, adviser, guide and mediator. There must be a more distinctive role for HREOC. The key missing element is what one might call a level playing field with regard to complaints resolution and determination of decisions. The Productivity Commission must, in our opinion, set new directions for these matters consistent with the aim of the DDA to eradicate disability discrimination.

Measuring effectiveness

The Productivity Commission itself should take responsibility for analysing the effectiveness of both the DDA and of HREOC. If any agency is well placed to compare and contrast different Commonwealth Laws and agencies it must surely be the Productivity Commission with its role, defined by Parliament

Comparing the DDA: It is clear that two types of comparison might be possible.

- Comparison with Australian legislation such as the Sex Discrimination Act and the Racial Discrimination Act and State instruments.
- Comparison with overseas legislation. In particular we suggest the Americans with Disability Act and the UK Disability Discrimination Act.

Comparing HREOC:

Comments received from individuals with experience of making complaints through HREOC suggest that serious questions must be asked of the effectiveness of HREOC and, consequently, whether or not it has the resources and managerial skills necessary to be the best complaints resolution service possible. Some comments we have received include these observations:

- Complaints handling takes a very long time.

- HREOC seems to lack the skill required to gather, analyse and make use of documents deemed to be essential to understanding issues that lie at the heart of a complaint.

- There often appears to be a lack of consistency or common understanding between the Complaints unit and the Policy unity inside HREOC.

- A tension exists between the duty placed upon HREOC by the DDA to eradicate discrimination and its role as a mediator. By definition, mediation requires that the mediator be neutral and be seen to be neutral. Eradication of discrimination requires HREOC to be an advocate for the rights established by the law. Some of the inertia that we observe in the complaints handling role of HREOC may be attributable to complexities and inherent conflicts of the role of HREOC as currently constituted.

Clearly there are obvious points of comparison in the State agencies charged with fulfilling similar roles to HREOC.

Finally, PDCA's formal and informal communication with the staff at the Disability Rights Unit has generally been most helpful. It has, in our experience been most beneficial to consult with the Acting and Deputy Commissioners on a great number of issues to do with disability and discrimination and we would like to acknowledge this great assistance from a very small team within the Commission.