Physical Disability Council of New South Wales

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

a response from the Physical Disability Council of NSW

May 2003

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PDCN Recommendations

1. PDCN 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. PDCN recommends the end to all areas of exemption to the DDA. (Section 3)

3. PDCN 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)

4. PDCN recommends that temporary exemptions be abolished. They are not a mechanism for accelerating or managing change (from discriminatory behaviour to non-discriminatory behaviour) by providers of goods or services. (Section 5)

5. PDCN 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)

6. PDCN 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)

7. PDCN 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)

8. PDCN recommends that the role of people with disability within the processes for developing DDA Standards be enhanced. (Section 13)

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

10. PDCN recommends that "unjustifiable hardship" be removed from DDA Standards because its inclusion undermines the intention that DDA Standards be seen as minimum requirements. Unjustifiable hardship would remain a concept recognised within the DDA. (Selection 13)

11. PDCN recommends that the current conflict of interest between HREOC roles as a source of formal guidance and a complaints mediator be terminated. (Section 14)

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

13. PDCN 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)

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

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

16. PDCN 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)

17. PDCN recommends that HREOC be empowered to initiate complaints. (Section 16)

1. About the Physical Disability Council of NSW

PDCN is the peak body representing people with physical disability in New South Wales. We are part of a network, which makes up the membership of the Physical Disability Council of Australia. At least 75% of the members of PDCN must be people with a physical disability. We believe, therefore, that what we say and the representations we make to Government are based on the direct experience of people with disability. We are, we believe, an 'expert organisation'.

PDCN operates democratically as part of an effective network of disability sector organisations. We work collaboratively with agencies that share common goals. We strive to bring about significant, permanent and positive changes in the circumstances of people with disability. Our goal is to secure equal civil and human rights for people with disability.

- PDCN assists people with physical disability to represent themselves and express their own points of view to decision-makers in all sectors.
- PDCN helps to keep people with disability informed of developments of all types that might affect the lives of people with disability.
- PDCN represents the views and interests of people with disability to government and non-government decision-makers.
- PDCN works to educate members of the general public about the needs and aspirations of people with disability.

Membership of PDCN is open to individuals with a physical disability living in NSW and to any person or organisation with a commitment to consumer rights and the empowerment of people with disability. PDCN's Management Committee has twenty-one members, most of who are people with physical disability. Parents of children under 16 years of age are members of our committee. One third of the committee places are reserved for people with physical disability who are not resident in greater metropolitan Sydney.

The NSW Department of Ageing Disability and Home Care fund PDCN. We employ four members of staff, based in our office in Glebe.

2. Who is covered by the DDA?

PDCN 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. For the purposes of clarity of interpretation the Act would be required to articulate and specify the impairment types deemed to be covered by the Act. These would not be diagnostic specific but broader categories not unlike those currently used in the DDA

3. What areas of activity are covered?

PDCN takes the view that there ought to be a whole of society approach to the prohibition of disability discrimination. We can see no justification, therefore, for exemption of any aspect of civil society from anti-discrimination legislation.

By arguing for the ending of the current, partial application of anti-discrimination legislation we are not seeking to adopt a fanciful, unrealisable or absurd position. We are not arguing, for example, that completely blind people have a right to be bus drivers or that C5/6 quadriplegics have an entitlement to be front line troops in the Australian Defence Force. With regard to the latter example, however, it is clear to PDCN that a similar prohibition would not be justifiable with regard to all people with disability.

We believe strongly that, in circumstances akin to those we describe here, there would be job-related determinants, such as non-discriminatory essential selection criteria, for specific employment tasks. These would permit the correct balance to be struck between the rights and responsibilities of all stakeholders.

Similarly, if actuarial evidence exists to support a view that an individual, by virtue of her or his impairment alone, is likely to be more costly to insurers or superannuation providers we would expect that an acceptable defence could be constructed by providers to justify different treatment of particular people with specific impairments

As a consequence of the above 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.

4. Discrimination

PDCN welcomes the recognition and definition by the DDA of both direct and indirect discrimination. We believe that the Act needs to be strengthened, however, with the inclusion of definition of what might be termed 'structural', 'systemic' or 'institutionalised' discrimination.

4.1 Direct Discrimination

There is a clear requirement for the concept of direct discrimination. No person or organisation should be permitted by law to treat people less favourably by virtue of their physical, intellectual, psychiatric, sensory, neurological or learning impairment.

In some senses this type of behaviour has become less prevalent, less often cited by people with disability and less manifest in civil society. In making such an observation we do not wish the Productivity Commission to understand us to be saying that there is less disability discrimination around than there has been in the past. We assert, rather, that the forms taken by discrimination are more subtle, less easy to pin down and may not always lend themselves easily to illustration through demonstrable behaviour.

So, while there remains an undiminished requirement for the concept of direct discrimination to exist, it may be less and less common to find discriminators asserting, verbally or in writing, examples such as:

- We do not admit people who use wheelchairs to our cinema.
- We do not serve patrons with an intellectual disability.
- Guide dogs are not permitted in this establishment.
- We do not employ people who use crutches and callipers.

PDCN notes with particular concern, however, the current legal dispute between Purvis and the NSW Education and Training Department. The State's defence, in

which the specified impairment of the person with disability is not an issue but behaviour attributable to that impairment justifies grounds for legal less favourable treatment, is deeply troubling. The Court will decide whether or not this argument is consistent with a technical interpretation of the letter of the law of the DDA. It seems manifestly clear to PDCN, however, that the State's position amounts to a flagrant disregard of the spirit of the Act and intention of Parliament when it passed the DDA

4.2 Indirect Discrimination

PDCN supports the inclusion of indirect discrimination within the DDA (noting, for example, the contrast with similar legislation in the UK, which does not admit the concept). We feel strongly that people with disability benefit from the recognition by Australian law of indirect discrimination.

It can often be more likely that the effects of indirect discrimination rather than direct discrimination will disadvantage people with disability. A few examples help to illustrate our point.

- It is still true that most job vacancies are not filled through public advertising. 'In-house' or 'word of mouth' recruitment practices still operate across large swathes of employment (particularly in the private sector). Historically and comparatively people with disability have been excluded from and disadvantaged within the employment market. In-house and word of mouth recruitment practices perpetuate an unequal status quo even though both may appear to be value free or disability discrimination neutral. This type of indirect discrimination needs to be challenged more vigorously.

- Allegedly neutral policies, which purport to treat everyone in the same way, can discriminate against historically marginalised groups. For example, if a university faculty issues learning materials to all students on the same basis it may indirectly discriminate against students with a visual impairment if no alternative format is available. Similarly, the requirement

that jurors are the only people allowed to sit in a jury room may discriminate against people with physical disability with a need for personal assistance or hearing impaired people who communicate through an Australian Sign Language interpreter.

4.3 Systemic or Institutionalised Disability Discrimination

In addition to direct and indirect discrimination, PDCN believes that structural, systemic or institutionalised discrimination exists. The lives of people with disability are unreasonably, sometimes unwittingly or unintentionally, constrained by such discrimination. The concept has been described in relation to various forms of discrimination, often in relation to race and gender. PDCN believes that structural or institutional discrimination blights the lives of people with disability in similar ways.

Institutionalised discrimination may be described thus:

> *The collective failure of an organisation to provide an appropriate and professional service to people because of their physical, intellectual, psychiatric, sensory, neurological or learning impairment. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and stereotyping which disadvantage people with disability. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such discrimination it can prevail as part of the ethos or culture of the organisation.*
>
> (Based on a definition of institutionalised racism articulated by the report of Sir William MacPherson's inquiry into the murder of Steven Lawrence, Stationery Office, UK. 1999)

PDCN believes that the concept of structural or institutionalised disability discrimination should be added to the DDA or incorporated within the existing definition of indirect discrimination.

5. Temporary exemptions

Our view on this question is straightforward. PDCN believes 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.

PDCN 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.

6. Reasonable adjustment and unjustifiable hardship

PDCN strongly believes 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.

Currently, it appears that these distinct concepts have been conflated by HREOC (and by the Courts) as if they were three aspects of some indivisible PDCN recommends whole. We believe this to be an error of policy and practice that undermines the intention of Parliament when it enacted the DDA.

We strongly believe that in every instance or complaint each component must be assessed separately.

- Has disability discrimination occurred? Yes or no.
- Is there a reasonable adjustment that the respondent can and must make? Yes what is it or no and here's why not.
- Why is an adjustment not reasonable? Here's a defence (it might be "unjustifiable hardship").

Such separations would remove the current confusion of interpretation and eradicate the potential for conflict of interest that arises within HREOC.

7. Determining that disability discrimination has occurred

PDCN is strongly of the view that some agency, we suggest HREOC, should be charged with forming a view that discrimination has occurred (or not), regardless of any subsequent consideration of what might be a reasonable adjustment or whether or not unjustifiable hardship might become a factor in determining the course of action that results from identifying discriminatory behaviour.

8. A new duty to make reasonable adjustment

PDCN believes that the DDA lacks clarity with regard to positive action to avoid discrimination. It is clear that the DDA requires providers of goods and services not to discriminate. This requirement cannot be tested, however, unless and until an act of potential discrimination occurs and a complaint is lodged by an aggrieved party. As a consequence, the DDA has become a reactive tool rather than a genuinely enabling piece of legislation.

PDCN believes strongly that the concept of 'reasonable adjustment' should be clearly articulated and defined within the DDA.

We would go further, however, than merely articulating and defining what is meant by 'reasonable adjustment'. The DDA is deficient (when compared to similar legislation internationally) because reasonable adjustment is neither defined nor required. Consequently, we believe 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.

We draw to the attention of the Productivity Commission the duty placed on legal entities to make reasonable adjustments in The Disability Discrimination Act 1995 in the United Kingdom.

Part II, section 6 of the UK DDA places a duty on employers to make reasonable adjustments.

Duty of employer to make adjustments.

6. - (1) Where-

(a) any arrangements made by or on behalf of an employer, or

(b) any physical feature of premises occupied by the employer,

place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.

(2) Subsection (1)(a) applies only in relation to-

(a) arrangements for determining to whom employment should be offered;
(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.

Part III, Section 21 of the UK DDA places a duty to make reasonable adjustments on the providers of goods and services.

Duty of providers of services to make adjustments.

21. - (1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.

(2) Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to-

(a) remove the feature;
(b) alter it so that it no longer has that effect;
(c) provide a reasonable means of avoiding the feature; or
(d) provide a reasonable alternative method of making the service in question available to disabled persons.

With regard to both areas, a test of reasonableness is applied. It is not unlike the Australian concept of unjustifiable hardship. However, that test is more appropriately located with the context of the duty that turns the legislation from a passive Act to a pro-active tool

We strongly urge the Productivity Commission to view favourably our recommendations that:

a. Reasonable adjustment should be explicitly articulated in the DDA.
b. Reasonable adjustment should be defined in the DDA.
c. A new duty to make reasonable adjustment should be introduced to the DDA.

It is abundantly clear from the experiences of Americans and Britons that reasonable adjustments and a duty to make such adjustments

- are not prohibitively costly,
- do not inhibit competition and
- are not a burden upon or restriction of trade.

Indeed, it is possible to argue that the duty to make reasonable adjustment can act as a stimulus to competition and trade. Two examples help to illustrate the point.

- Building Regulations in the UK were changed in 1999 to require all new private dwellings to be at least “visitable”. The housing market neither collapsed nor was trade restricted by the new duty. There is some evidence from the UK and other European jurisdictions (Sweden, Norway and Holland have been cited) that greater accessibility in housing design heightens market competition, not diminishes it.

- Requirements for low-floor, wheelchair accessible bus designs (in Australia, the UK, the USA and elsewhere) have stimulated demand for new products (new styles and configurations of buses) as well as competition between providers to enter previously marginalised markets resulting in increased passenger use and progress towards more environmentally sustainable transport options.

In short, we strongly believe that a duty to make reasonable adjustment is wholly consistent with the trend towards ‘triple bottom line’ evaluation in business.

9. Unjustifiable hardship

We wish to make two comments with regard to unjustifiable hardship.

Firstly, it seems reasonable to assert that greater emphasis must be placed on the unjustifiable hardship experienced by people with disability living in the sometimes hostile environment in which their needs are not met and their rights denied. The status quo is not cost-free for people with disability in particular and society in general. A few examples help to illustrate this point.

- In education: School transport remains mostly inaccessible to wheelchair users. One consequence of that fact is that State Government Education Departments inappropriately use tax dollars to fund alternative transport measures at a cost to the Education Budget.

- In disability specialist services: Much of the community and generic service system is inaccessible to many people with all types of disability. Health centres, community centres, employment providers, transport, etc, etc, are not accessible to or inclusive of the whole of society. As a consequence of failures in the 'mainstream' an entire industry of disability specialist services has been developed, financed or provided by State Governments and non-government, not-for-profit agencies. In NSW, alone, the Department of Ageing Disability and Home Care has an annual budget in excess of $1.4 Billion. A substantial proportion of this amount (perhaps unquantifiable at this stage) is tax-financed expenditure. It is required to compensate for inequality of opportunity and the discrimination inherent in mainstream and generic services, which have failed to make reasonable adjustments.

The costs of dealing with these types of systemic failures must feature more strongly in consideration of the unjustifiable hardship borne by the whole community for disability discrimination.

Secondly: it is essential that the concept of unjustifiable hardship be located within a proper context. For as long as there is exists no duty to make reasonable adjustment, unjustifiable hardship will remain ill-defined, lacking a counter-balancing concept (in law) of what might be deemed reasonable.

PDCN does not oppose, per se, the idea of unjustifiable hardship. In its current, un-reconstructed form, however, it lacks the precision necessary for good judgement to operate as all stakeholders strive to fulfil the objective of the DDA to eradicate disability discrimination.

10. Eliminating discrimination

We agree with the Productivity Commission that "measuring levels of discrimination is very difficult". We would add, however, that when something looks like an elephant, walks like an elephant, sounds like an elephant and smells like an elephant, the chances are that what you're standing in front of is an elephant. In short, we know that people with disability experience disability discrimination every day and in every aspect of life.

In Box 3, page 17 of the Productivity Commission Issues Paper there are clear, verifiable measurements of substantial disadvantage described using reasonable and easily understood indicators of disability discrimination. We would add similar observations from a range of sources:

- 80% of people with disability live on fixed incomes, predominantly the aged pension or the disability support pension.

- 33% of all people with disability are 65 years of age or over and not, therefore, in the labour force.

- 53.5% of adults with disability of working age (15 – 64) are not in the labour force. This is double the rate for the population as a whole.

- 21% of people with disability who are in the labour force are unemployed. This if almost 4 times the unemployment rate for the population as a whole.

- Research in Australia and overseas strongly indicates that people with disability have additional, non-discretionary costs of living that are directly attributable to their impairment type and/or to the effects of disability.

- Work by the Physical Disability Council of Australia shows strong evidence that people with disability have greater costs – on specialist items and general expenditure – than people with no disability.

- A survey by the Australian Quadriplegic Association (AQA) found that among 200 adults with quadriplegia between one-quarter and three-fifths of people's income was spent on non-discretionary items related to disability.

- The AQA survey found that for people whose only income was the DSP, 59% was spent on disability related items (with median figure of $5,054 per year).

- The same survey found that people in employment spent a median figure of $8,783 on disability related expenses, representing 23% of their income.

In NSW alone;

- Most dwellings are not accessible. They are not built to barrier-free standards that would allow people with physical disability to rent or buy them.

- Marginally less than 10% of Department of Housing properties are accessible, although 22% of applicants on the priority waiting list for housing are believed to require adaptable or accessible housing.

- With the exception of some SEPP 5 developments, most newly built dwellings are not accessible. It is often impossible for people with physical disability (not just wheelchair users) to visit new dwellings, let alone live in one.

- An internal survey of Housing Department waiting lists in 1997 found that people with physical disability requiring adaptable housing wait more than a year longer to be re-housed than people with no physical disability.

- People with physical disability are disproportionately represented in the top twenty applicants of waiting lists throughout the Department of Housing. People with disability rise to the top of waiting lists as they are managed in chronological order. When people with disability reach the top of the lists, however, the lack of accessible housing means that applicants with no disability are allocated available properties, 'leap-frogging' over people with disability.

- The "Special Assistance Subsidy (Disability)" scheme is a helpful initiative to assist people with physical disability with unmet housing need. As welcome as the scheme must be to people with disability who are assisted by it, PDCN cannot escape the observation that the very existence of the scheme is an admission by the Department of Housing that it's current housing stock cannot meet demand from people with physical disability.

- No reliable data exists about the accessibility and/or adaptability of the housing stock in NSW.

- Larger families with a member who has a physical disability face particularly acute housing problems when they need 3 or 4 bedroom properties.

- People with disability find themselves (like others on low incomes) moving from popular and/or metropolitan locations as they search for affordable, accessible accommodation. The need to re-locate to less densely populated,

lower cost areas tends to move people further away from other services that they may depend on, exacerbating problems of unmet need.

- New homes being built are not accessible or easily modified because few local Councils have development control plans incorporating the Adaptable Housing Standard for multiple-unit developments AS4299 and AS3661 (the Slip-Resistant Surface Standard for pedestrian areas).

- 95% of taxis in NSW are not wheelchair accessible.

- 90% of City Rail stations are not accessible to wheelchair users and a very large proportion cause difficulty to others with mobility problems.

- 63% of Sydney ferry stations are not wheelchair accessible.

- 80% of private sector buses are not wheelchair accessible.

- Less than 30% of State Transit Authority buses are wheelchair accessible.

- All but one Country Link station is wheelchair accessible, which we applaud, although we note that many Country Link destinations are actually served by buses, which are not low-floor design or wheelchair accessible.

It is clear that the DDA has not yet achieved its objective of eradicating discrimination. It is no less clear that very substantial levels of disadvantage and less favourable treatment remain widespread despite 10 years of the DDA.

Even where progress towards reducing discriminatory barriers can be identified, it is not clear that the Disability Discrimination Act has been the determining factor in effecting change. For example:

- The policy decision by the NSW State Transit Authority to purchase only wheelchair accessible buses may be attributable more to overseas

manufacturers' decisions (in response to USA and UK legislation) and the Government's commitments to social justice than to the much delayed and highly contested DDA Standard on Accessible Transport.

- Pro-active sensitivity to the communication needs of visually impaired people seeking access to the Internet is more attributable to international standards developed and recommended by the W3C Web Accessibility Initiative than the Australian DDA. Where the DDA can be seen to have had some effect is with regard to 'after the event', corrective action or punishment of discriminatory behaviour (e.g. SOCOG)

11. Competition and economic effects

Received wisdom would have us believe that regulation has a deleterious economic effect and works against competition. There is very little evidence to support either contention unless one restricts one's view to what some people term economic rationalism and short-term approaches to markets and competition.

We believe that the DDA has the potential to boost economic activity through re-shaping social relations. Similarly the DDA can become a force to stimulate greater competition as new and existing suppliers strive to meet the requirements of re-shaped markets that become less distorted and excluding because of new market rules that depend upon equality of opportunity to gain access to those markets.

We repeat an earlier observation. The status quo of discrimination and disadvantage costs everyone, including people with disability, vast amounts of inappropriately directed tax dollars. The status quo is not cost-free or neutral with regard to competition, markets and economic well being.

The indirect costs of discrimination and inequality are massive:

- Unnecessarily large amounts of tax dollars are targeted at disability specific and support services, which (in many instances) do no more than inadequately compensate people with disability for social exclusion.

- So-called special services (transport, housing, day time activities, segregated education, etc) distort our collective appreciation of what the term mainstream ought to mean in relation to all services. As a consequence, markets, services and competition to meet the needs of those markets through inclusive services have become distorted.

- People with disability have become identified as economic burdens to be borne by a so-called mainstream comprised of people with no disability. As a consequence of such ideologies, for example, people with disability of working age have been denied entry to the workforce and, therefore, the opportunity to be economically active, contributing neither as taxpayers nor entrepreneurs.

- Economic exclusion of people with disability distorts markets and competition by narrowing the focus of product and service development. Inclusiveness of design or service delivery, capable of meeting a broad range of market and competitive requirements, has been sacrificed to narrow, short term and unsustainable gains. The shifting paradigm between commitment to more accessible public transport for all and traditional emphases on private transport is but one example.

Can costs and benefits be quantified? Yes. For example:

- People with disability of working age are four times more likely to be unemployed than people with no disability. Most of the people with disability who are excluded from work will be in receipt of fixed income support funded directly by taxation. Acting to eradicate prejudice and discrimination against people with disability with regard to employment simultaneously increases potential tax income (people with disability are

more likely to work and pay taxes) and reduces potential tax-based spending (people with disability in work make less of day services, health services, etc).

- A fully accessible, fully integrated public transport system has identifiable costs (both to create and sustain). There are measurable economic, social and environmental benefits, however, resulting from increased passenger numbers, reduction in the use of private vehicles, associated reduction in the use of non-renewable energy sources and in greenhouse gas emissions. And these benefits are not limited to people with disability. Evidence from Europe clearly indicates that where transport services are made more accessible to people with disability usage increases by people with no disability.

- The debatable additional costs of designing new houses that are barrier-free from inception are outweighed by increases in property value across and throughout the life of such houses. Houses designed to meet the potential needs of any user contribute to reduced levels of public expenditure funded by taxes by permitting people to remain in their own home for as long as possible with no more than the required amount of home-based support. Conversely, poor housing design requires people to move, if and when impairment becomes a factor in their lives, often moving to less cost-effective supported accommodation, nursing home or hospital settings. These costs, attributable to unequal access to the market, will be substantial in a population that is ageing and living longer.

We believe these three examples can be and are reflected in every aspect of modern living. We reject the assumption inherent to the third question on competition (page 20 of the Issues paper) that the DDA has a negative effect on competition. There is not a shred of evidence to support such an assumption.

12. Omnibus legislation

PDCN 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.

13. Disability Standards

If Disability Standards are to play a meaningful role in eradicating discrimination they must become enforceable minimum requirements that mandate the behaviour of social actors within and no less than a set of prescribed, measurable performance indicators. In short, Standards have to mean what they say.

Standards have greater chances of delivering the intention of Parliament, within the spirit of the law, if a duty is placed upon providers to make reasonable adjustment. If all social actors understand and believe that passivity is not an option then Standards can become a tool for informing, guiding and leading processes of change to which all stakeholders must show commitment through demonstrable action.

The process for developing disability standards can be improved in the following ways:

- The majority of the group devising standards should be people with disability.

- More resources need to be allocated to developing and consulting on draft standards.
- The time taken to develop a draft disability standard should never again be as long as that taken with the transport standard.
- The commonwealth Government must act with a more powerful and transparently committed political will.
- Service providers must have placed upon them a duty to make reasonable adjustment.

Independent, mandatory monitoring must be incorporated into all future standards. We propose a changed role for HREOC elsewhere in this response. If our suggestions were adopted we would be happy for HREOC to become the enforcement agent of mandatory monitoring and attainment of standards objective. If the roles of HREOC remain conflicted and unclear we would prefer that discussion commenced on identifying another agency to enforce the disability standards of the DDA.

PDCN believes strongly that the inclusion of the concept of "unjustifiable hardship" within the text of a DDA Standard undermines the intention of developing Standards. If, as we are led to believe, DDA Standards constitute minimum requirements (rather than guidance) the Standard must be constructed on the basis what is required is reasonable and affordable.

It is fair that guidance should be subject to a test of affordability. A requirement, however, must surely assume that that which is required is affordable. To allow a defence on "unjustifiable hardship" with regard to a minimum requirement makes no logical sense. We strongly urge the Productivity Commission to recommend that "unjustifiable hardship" be removed from DDA Standards, safe with the knowledge that the Act already permits consideration of this defence where no minimum requirement has been set.

In our view there is more merit in a guidance regime, not bound by the misnomer of "DDA Standard", than a supposedly minimum requirement Standards regime

incorporating what we see as an unreasonable ‘get out clause’ such as “unjustifiable hardship”.

14. HREOC guidelines and advice

We welcome HREOC giving guidance and wish its role strengthened, subject to satisfactory removal of the potential for conflict of interest that clearly, currently exists. If HREOC continues to have a role to play in mediation in complaints it remains possible for HREOC to be guiding, advising and mediating on its own guidance and advice if a complaint is lodged in an area that HREOC has issued guidance.

In such circumstances the role of HREOC becomes impossibly confused. Mediation requires an interested but uninvolved third party capable of working with two (or more) people or organizations contesting facts and interpretation of facts around a single event or set of circumstances. No agency, including HREOC can play all roles: guide, advisor and mediator. No agency should be asked to.

15. Disability Action Plans

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 business submitted voluntary action plans? Because they are voluntary. 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 PDCN to be wholly 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. PDCN 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.

16. 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. There must be no amendment to the DDA to facilitate self-regulation

17. 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.

18. 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 we have 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.

Physical Disability Council of NSW
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