Inquiry into the Disability Discrimination Act
Submission to the Productivity Commission from the Public Advocate in Victoria
May 2003

Introduction

This submission from the Public Advocate to the Productivity Commission's Inquiry into the *Disability Discrimination Act (1992)* (Cth) (DDA) will address the following areas:

- The effectiveness of the DDA in promoting recognition and acceptance of the rights of people with disabilities.
- The effectiveness of the DDA in ensuring, as far as is practicable, that people with disabilities have the same rights to equality before the law as the rest of the community.
- The cost effectiveness of the DDA in light of the above.

About the Public Advocate

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act* 1986 (Vic). The office represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

The Public Advocate delegates his authority to his staff, who may be advocates, investigators or guardians. The office also coordinates the Private Guardian Support Program, the Community Visitors Program and the Independent Third Person Program in Victoria. Further material on the role of the office can be provided if required by consulting the Office of the Public Advocate's (OPA's) website: www.publicadvocate.vic.gov.au.

The Promotion of the Recognition and Acceptance of the Rights of People with Disabilities

The 10th anniversary of the DDA has recognised and celebrated the DDA as having been a positive force for change in the lives of people with disabilities. In the decade since the passing of the Act, community awareness of the right of people with disabilities to be treated equally with other members of the community has increased. People with disabilities are far more 'visible' and their needs and rights are more likely to be understood and supported than they were a decade ago. One example of this is the fact that many public and private sector organisations (including the Office of the Public Advocate in Victoria) have developed Disability Action Plans and actively encourage the employment of people with disabilities.

As a result of the legislative requirements of the DDA, many sectors of the community now recognise that people with disabilities have the same rights as others to access public places,

public transport, education, employment, accommodation, goods and services etc. It is generally accepted that public buildings, shops, cinemas, office buildings, restaurants etc. should include ramps and other facilities for people with disabilities. The community is now more aware of the fact that accessible design for people with disabilities is good design for all. Some of the recent public disquiet about the new Federation Square concerned its poor accessibility for people with disabilities as well as other members of the community such as older people and parents with prams. In the same vein, the community expects that facilities and participation in the upcoming Commonwealth Games in Melbourne will be inclusive of all people, including people with disabilities, as happened when Sydney hosted the Olympic Games in 2000.

One of the consequences of the DDA's promotion of the recognition and acceptance of the rights of people with disabilities has been that many in the private sector who may have feared the 'costs' of complying with the DDA have now recognised the benefits of compliance. Such benefits can include: increased patronage of their business or service by the whole community, including people with disabilities, the creation of demands for new services and/or products. Many business also recognise that employing someone with a disability is not necessarily more 'costly' than employing someone without a disability (Disability Employment Action Centre, undated).

Whilst the DDA has helped raise the community's level of awareness and acceptance of the rights of people with disabilities, the level of discrimination experienced by people with disabilities is high. However, it is also worth noting that the high level of usage of the DDA by people with disabilities indicates that the Act is being well utilised by its key stakeholders. This is an important measure of the cost effectiveness of the DDA since high rates of usage indicate a high level of awareness by people with disabilities of their rights. In 2001/2002, for example, 36% of complaints received by the Human Rights and Equal Opportunity Commission (HREOC) were made under the DDA, compared to 31% related to sex discrimination and 15% to race discrimination. In 2001/2002, of the 452 complaints received under the DDA, 52% related to employment and 27% concerned access to goods & services (HREOC annual report 2001/2002). Both of these areas are key indicators of the level of community access, acceptance and participation of people with disabilities. It will take time to reach the level of community acceptance and understanding of the DDA that the Sex Discrimination Act (1984) and the Racial Discrimination Act (1975) currently have. Both of those Acts were seen initially by many in the community as imposing costs of compliance particularly in employment. But now people's rights under those Acts are more generally recognised and accepted in the community and the benefit of such legislation is more widely acknowledged.

However more still could be done to promote positive recognition and acceptance of the rights of people with disabilities. One positive step would be to certify that organisations who have disability action plans have voluntarily complied with the Act. This would serve to acknowledge the important work of organisations that have sought to meet their obligations under the DDA.

The Public Advocate also believes that the promotion and acceptance of the rights of people with disabilities not to suffer discrimination would be better served if the current Commonwealth Government's practice of enacting stand alone acts covering particular types of discrimination was retained. The DDA is better known and understood precisely because it is **not** part of omnibus legislation.

Equality Before the Law

The second object of the DDA relating to equality before the law is crucial because the Act has the capacity to empower people with disabilities who experience discrimination. But the level of benefit to the complainant(s) depends on whether the person(s) discriminated against has a knowledge of the DDA, has the ability and resources to make a complaint, go through the conciliation process and then, if the claim is not conciliated, have the financial and legal resources to file a claim in the Federal Court. The level of resourcing of legal, advocacy and other support services required by people with disabilities to ensure both equal access to the complaints resolution mechanisms of the DDA and equity of outcomes is manifestly inadequate. This limits the effectiveness of the DDA as a means of ensuring equality before the law because of the lack of access people with disabilities have to adequate legal representation and other supports. The existing community based services that could provide assistance are inadequately funded, under resourced, and sometimes lack workers experienced in dealing with DDA claims. People with cognitive disabilities are particularly disadvantaged because of the complexity of the legal process itself.

Further, the lack of formal sanction provisions in the DDA is a major impediment to people with disabilities experiencing full equality before the law. This is because a lack of sanctions for non-compliance makes it more difficult for people with disabilities to enforce their rights under the law and easier for those failing to comply with the DDA to do so with little fear of the possible consequences.

Many people with disabilities live in accommodation specifically provided for them by government or community-based agencies. Any disability specific support services are sometimes also often provided by the same agencies. This means that these people with disabilities are wholly reliant on the service provider to provide for them and lack real choices about how, when or even if such services are provided. In such situations many are vulnerable to being exploited, abused or neglected. The DDA is ineffective in protecting the rights of people with disabilities in such situations because these services are specifically exempt from claims of discrimination under Section 45 of the Act. For example, in Victoria residents of Community Residential Units (CRUs) and Supported Residential Services (SRSs) have few tenancy rights as they are not covered by the *Residential Tenancies Act* (Section 23*)*.

This is exacerbated by the fact that State and Federal Governments give low priority to accommodation and support services for people with disabilities. For example, people with psychiatric and intellectual disabilities do not often receive an adequate level of support so that they can live in the community and the resultant exacerbation of their health and circumstances can result in constraints on their freedom of movement because of their disability under the provisions of the *Mental Health Act* or the *Intellectually Disabled Persons' Services Act*. Resorting to restrictive practices under these Acts and the *Guardianship and Administration Act* (1986) (Vic.) would diminish if proper services and supports were available. The DDA has limited application to Governments' allocation of resources and disability issues receive low priority. This low priority is discriminatory.

The principle of equality before the law also includes the right of people with disabilities to a fair trial and to equal treatment in the justice system. In this area, regrettably, the DDA has had little effect. The evidence strongly suggests that people with disabilities either as victims,

witnesses or perpetrators of crime receive less favourable treatment because of their disability. For example, people with intellectual disabilities are over represented as victims of various forms of abuse, particularly sexual abuse (Davis 2000; 73-76; Victorian Law Reform Commission 2001:114; Victorian Law Reform Commission, 2002: 1). Victims of crime and/or witnesses with cognitive incapacities are generally viewed as unlikely to be reliable witnesses and so the alleged perpetrators are not even charged because of the perceived likelihood on the part of those involved (police and/or prosecutors) that there is little chance of conviction (Davis 2000: 75). Conversely, people with cognitive disabilities are more likely to be over represented in the criminal justice system as offenders (Hayes 2000: 63-71). In such situations they are less likely to have adequate legal representation and to have their disability-specific needs addressed in prison.

Once in the prison system, people with disabilities' needs are often not met because of a lack of understanding of their disability and a lack of appropriate services. This can lead to people being subject to inappropriate sanctions for breaching prison rules. For example, people with dementia, Huntington's disease, or autism spectrum disorders are sometimes placed in seclusion as punishment for inappropriate behaviours that they were unable to control because of their disability.

Parents with cognitive disabilities are more likely to be subject to scrutiny of their parenting skills by child protection services than those without disabilities. According to *Pride and Prejudice: A Snapshot of Parents with Disabilities Experience of the Child Protection System in Victoria* Melbourne: Disability Discrimination Legal Service, 2002:

- Parents with disabilities appear to be over represented in child protection proceedings before the Children's Court.
- Be more likely to have the possibility of sexual, emotional abuse or neglect raised than parents without disabilities (i.e. intellectual disability = problem)
- Have their parenting capacity scrutinised as a matter of course.
- Have inadequate access to childcare and other supports
- Receive limited information about their rights or options

The Office of the Public Advocate has investigated the possibility of making a claim under the DDA against child protection services in relation to their treatment of parents with intellectual disabilities. However, because the client of child protection services is the child and not the parent, there is no scope currently to mount a claim of discrimination under the Act.

Cost Effectiveness of the DDA

People with disabilities are amongst the most disadvantaged in Australian society. One in five people in the community have some type of disability and the rate and incidence of disability increases as the population ages. People with disabilities are less likely than people without disabilities to be employed, have lower levels of education, and are more likely to be dependent on social security benefits (Australian Bureau of Statistics 1999 cited in Productivity Commission 2003: 17). The DDA plays a significant role in helping to redress some of this disadvantage through the social, legal and economic benefits described above. In most instances both direct and indirect costs are small and existing provisions are more than adequate to minimise any indirect and direct costs of compliance with the DDA. The DDA currently allows for organisations and/or individuals to claim 'unjustifiable hardship' when it

is felt that the costs of compliance for that particular organisation or individual would be too onerous regardless of the negative impact on the quality of life for people with disabilities. (The extension from 20 to 30 years for public transport to be accessible fully is one glaring example of the detrimental effect on the lives of many people with disabilities of unjustifiable hardship provisions under the DDA can cause.) The provision allowing for Disability Action Plans to be lodged also gives organisations time to comply, which reduces costs and still further minimises effects on competition. Further the Public Advocate believes that the Commonwealth Government should not be able to claim 'unjustifiable hardship' under the DDA because it should act as a role model for the whole Australian community with regards to its compliance with the DDA and its support of the Act's principles and practices.

Recommendations

The Public Advocate is of the view that:

- The benefit and effectiveness of the DDA could be improved by greater legal and financial resourcing of people with disabilities and those who support them to use the legislation.

- The DDA should remain a stand-alone Act rather than become part of omnibus human rights legislation.

- The treatment of people with disabilities in both the criminal justice system and the area of disability-specific accommodation and support services require marked improvement before it could be said that the DDA has fully achieved its object of promoting the recognition and acceptance of the rights of people with disabilities as well as that of achieving equality before the law.

- There are benefits to acknowledging compliance through having a Disability Action Plan in place while at the same time providing stronger mechanisms for the enforcement of sanctions.

Conclusions

In sum, not withstanding the suggestions for improvement presented in this submission, the Public Advocate believes that the DDA is a vital piece of cost effective legislation that has been a positive force for change, one which has benefited both people with disabilities and the broader community.

Acknowledgement

The Public Advocate would like to acknowledge the input of various community advocacy groups on the effectiveness of the DDA at a forum convened by the Office of the Public Advocate on March 21st 2003.

References

Davis, C. 'Systemic abuse: intellectual disability and the criminal justice system', in A. Schaddock et. al. *Intellectual disability & the law: Contemporary Australian Issues*. Sydney: Australian Society for the Study of Intellectual Disability, 2000, 73-76.

Hayes, S. 'Needle in a haystack: Identifying the offender with intellectual disability', in A. Schaddock et. al. *Intellectual disability & the law: Contemporary Australian Issues*. Sydney: Australian Society for the Study of Intellectual Disability, 2000, 63-71.

Productivity Commission (2003). *Disability Discrimination Act Issues Paper.* Melbourne: The Commission.

Disability Employment Action Centre (undated) Promotional material. Melbourne.

Human Rights and Equal Opportunity Commission. *Annual Report 2001-2002*. www.hreoc.vic.gov.au accessed 15/05/2003.

Pride and Prejudice: A Snapshot of Parents with Disabilities Experience of the Child Protection System in Victoria (2002). Melbourne: Disability Discrimination Legal Service.

Victorian Law Reform Commission (2001). *Sexual Offences: Law and Procedure.* Melbourne: Victorian Law Reform Commission.

Victorian Law Reform Commission (2002). 'Draft discussion paper on the criminal justice system and mentally-impaired victim/survivors of sexual assault'. Melbourne.

For further enquiries regarding this submission, please contact:

Natalie Tomas
The Office of the Public Advocate
Level 5, 436 Lonsdale St
Melbourne, Vic. 3000.

Tel: (03) 9603-9558
Fax: (03) 9603-9501
Email: natalie.tomas@justice.vic.gov.au