Submission to the Review of the Disability Discrimination Act 1993 by the Productivity Commission

The Public Interest Advocacy Centre

1. The Public Interest Advocacy Centre ("PIAC") is an independent and non-profit legal and policy centre located in Sydney. Its charter is:

> To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

2. Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the matters PIAC undertakes are often of national interest or importance or have consequences beyond state boundaries.

3. PIAC's work extends beyond the interests and rights of individuals as it specialises in undertaking matters which have systemic impact. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities.

4. Over the years, PIAC 's focus on disability issues has ranged from providing advice and acting for individual people with disabilities in numerous complaints pursuant to the *Disability Discrimination Act 1992* (Cth) ("DDA"). Much of this work has concentrated on the rights of people with disabilities more generally, such as administrative reviews of funding decisions relating to the provision of disability services and tort actions based on breaches of standards of care in institutions.

5. In this submission, we confine our comments to areas of the Productivity Commission's ("the Commission") Issues Paper where we have direct experience of the impact of the DDA. In particular, our submission will concentrate on the interpretation and application of the phrase 'Unjustifiable hardship' and the complaint process.

Unjustifiable Hardship

6. The Commission poses the question:

> 'Does the DDA provide sufficient guidance on the meaning of 'unjustifiable hardship'?'

Our response to this question is to first consider the place of 'unjustifiable hardship' in the statutory scheme.

7. Where a complainant claims that they have been unlawfully discriminated against on the basis of a disability they must first establish that they have been discriminated against by reference to the definitions of discrimination in sections 5 and 6 and the specific provisions in Part 2 of the DDA. A respondent then has an opportunity to claim that the discrimination is not unlawful as 'unjustifiable hardship' would arise if they were required to cease discriminating.

8. 'Unjustifiable hardship' is defined in the DDA at section 11. The section states:

> *For the purposes of this Act, in determining what constitutes 'unjustifiable hardship', all relevant circumstances of the particular case are to be taken into account including:*
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> *(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and*
> *(b) the effect of the disability of a person concerned; and*

(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming 'unjustifiable hardship'; and

(d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

9. In *Scott v Telstra Corporation Ltd* Sir Ronald Wilson stated that:

> Section 11 provides a list of some of the factors that may be considered in determining 'unjustifiable hardship' but the DDA does not specifically define the term itself.[1]

It does not offer a definition[2] but rather a framework for a weighing of a range of factors, to be assessed on a case by case basis.[3]

10. Significantly section 11 has been considered in numerous cases brought before the Human Rights and Equal Opportunity Commission ("HREOC") when it was still empowered to hear complaints made under the DDA. HREOC has itself defined some guiding factors[4]. The Federal Court of Australia has specifically considered Section 11 in a number of matters.[5]

11. As a consequence, a significant body of jurisprudence has developed in relation to the principle of 'unjustifiable hardship' and the methodology whereby courts and HREOC evaluate the evidence required to apply section 11. In particular, the case law gives guidance to complainants and respondents on the type of evidence required, the format of the evidence and the weighting process involved in determining if 'unjustifiable hardship' arises. Courts are experienced at interpreting the weighing provisions and evaluating the type of expert evidence raised in these

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1 (1995) H95/34, H95/51 at para 59.
2 (1995) H95/34, H95/51 at para 59.
3 (1995) H95/34, H95/51 at para 63.
4 See the principles set out in *Scott v Telstra Corporations ltd* (1995)
5 *Gluyas v Human Rights & Equal Opportunity Commission* [2001] FCA 1322, *Cosma v Qantas Airways Ltd* [2002] FCAFC 425, *Kevin Williams v President, Human Rights & Equal Opportunity Commission & Anor* [1998] 1325 FCA, *Sluggett v Human Rights & Equal Opportunity Commission* [2002] FCA 987.

cases. Neither HREOC nor the Federal Court have had undue difficulty in applying section 11, proving it to be far from unworkable.

12. Two significant cases in which PIAC has acted for complainants illustrate the weighing approach to evaluate a defence of 'unjustifiable hardship'. These cases are *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658 and *Maguire v Sydney Organising Committee of the Olympic Games (SOCOG)*, H99/115, August 2000.

13. *Hills Grammar School* was a matter in which Scarlett Finney, a young girl with spina bifida, was refused enrolment at the Hills Grammar School on the basis of her disability. Her parents lodged a complaint with HREOC on the grounds of discrimination in education. The complaint was heard by HREOC and became one of the first to test the defence of 'unjustifiable hardship' in relation to disability discrimination in the area of education. The school argued that Scarlett would have required additional services and facilities which would have imposed 'unjustifiable hardship' on its resources and operations. Our client provided evidence that the school had greatly exaggerated the costs of admitting Scarlet and that the real costs were outweighed by the benefits of admission.

14. In his decision, Commissioner Innes found that the modifications to the school required to accommodate Scarlett would have been minimal and that the school's decision was based on general or stereotypical assumptions rather than on Scarlett's particular needs. The Commissioner considered the benefits to the other children of attending school with a child with a disability, the individual benefits to Scarlett, the best interests of the child generally, Scarlett's mobility issues, the financial burden on the school curriculum, the modifications required and the school's duty of care. On the balance of the evidence, Commissioner Innes concluded that there would have been no 'unjustifiable hardship' to the school in accepting Scarlett's application for enrolment.

15. Hills Grammar School sought judicial review of the Commissioner's decision in the Federal Court. Justice Tamberlin upheld the Commissioner's decision. Specifically Tamberlin J, in approving of Commissioner Innes' approach to the interpretation of 'unjustifiable hardship', stated:

> The question is correctly posed by the Commissioner as being whether any hardship is of such a nature or degree in the circumstances of Scarlett's case as to be unjustifiable. This requires a weighing of relevant factors which he was bound to take into account and this is precisely what the Commissioner did when he refers to "weighing" all his findings of fact and law. He was bound to take account of the hardship claims and he did so. Moreover in making these remarks the Commissioner is, as his reasons indicate, applying the approach taken by Sir Ronald Wilson in *Scott v Telstra*….[6]

16. In *Maguire v SOCOG* Mr Bruce Maguire, who is blind, complained that the official Sydney Olympic Games website was not accessible to him. Both the complainant and the respondent provided a substantial amount of evidence of the cost for production of an accessible website, the time-frame for achieving this goal and the respondent's capacity to meet these costs. The complainant led evidence on the benefit to him personally of an accessible website, the benefit to other blind people and to people with disabilities. The experts supporting both parties were comprehensively cross-examined and their evidence tested. Commissioner Carter summarised his findings at pages 15 to 17 of the decision. The Commissioner accepted the expert evidence of the complainant, describing it as 'impressive and convincing' (p.17). Accordingly, on the balance of the evidence the Commissioner found that SOCOG had unlawfully discriminated against Mr Maguire and that it had failed to substantiate its claim of 'unjustifiable hardship'.

17. This decision was one of the first decisions internationally which addressed the rights of people with disabilities to access the internet.

18. In summary, it is our view that section 11 of the DDA provides sufficient guidance on the meaning of 'unjustifiable hardship' and does not require amendment. The current definition of 'unjustifiable hardship' is precise without being unduly prescriptive. It allows the consideration and weighing of a range of factors, based on current social and economic conditions. This is a task at which we believe courts are skilled and experienced.

19. While we are not advocating amendments to the 'unjustifiable hardship' provisions of the DDA, we acknowledge that the DDA would be far more effective in achieving its goals of inclusion if the defence of 'unjustifiable hardship' was not available as a defence for respondents. Complainants initially experience difficulty meeting the narrow legal requirements of discrimination. This is compounded by complainants having to defend claims of 'unjustifiable hardship'. While this approach may allow for consideration of a range of social and economic goals, in our view it reduces the capacity of the DDA to achieve its specific goal of inclusion.

Promoting recognition and acceptance

20. The media coverage of high profile cases such as *Hills Grammar School* and *Maguire v SOCOG* have been extensive. Anecdotal evidence suggests these cases substantially increased awareness of the DDA and generated debate amongst the public, disability groups and amongst industry groups in the areas which are the subject of complaints.

21. Particularly notable was the discussion in industry journals of the internet accessibility aspect of *Maguire v SOCOG*. Internet industry journalists covered the hearing, reported on the decision and wrote opinion pieces on its ramifications. These articles appeared in journals in Australia, Europe and the United States. Mr Maguire's experts were subsequently requested to present papers on the

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[6] See Hills Grammar School v Human Rights & Equal Opportunity Commission [2000] FCA 658 at 48.

implications of the case and the technology discussed. Almost 3 years later, the case was referred to at length in a keynote article in an industry journal.[7]

22. The coverage of cases has also given people with disabilities an important opportunity to tell their story to the wider public and thereby counter negative stereotypes. In particular, Mr Bruce Maguire was a considered and articulate complainant who clearly expressed the frustrations of people with a disability at the marginalisation of their rights.

Economic effects of the DDA

23. PIAC's experience of the consideration of the economic effect of the DDA has been at the micro level of assisting complainants. The economic effects have varied enormously from case to case. In many cases where we have assisted clients, the economic effect has been marginal and the main change required by the respondent has been attitudinal.

24. In cases where economic effects have been central issues, usually involving consideration of 'unjustifiable hardship', the micro economic effects of the DDA have been measured relatively easily and accurately through expert evidence. The expert evidence in these cases focused upon:

    - the technical changes required to ensure that the service provided was accessible and compliant with the DDA;
    - the costs of these change; and
    - the capacity of the organisation to meet these costs, including budgetary considerations.

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[7] Icon, Sydney Morning Herald, March 8-9 2003

1. Concerns have on occasions been raised that respondents have failed to present credible evidence of economic implications. As the President of HREOC, Sir Ronald Wilson stated in *Scott v Telstra Corporation Ltd*;

> The evidence leads me to conclude that the respondent has failed to take seriously the impact that the enactment of the DDA could have upon its operations. If it had done so, I would have expected to receive evidence of relevant research, taking in overseas experience, the revenue to be expected from increased billings, the feasibility of a small levy on all subscribers, and any reasonable adjustment to its present voluntary concessional programme. Even the making of the complaint in this matter failed to stir the respondent from its lethargy or intransigence.[8]

2. PIAC's experience bears out this comment. The respondent's evidence in *Maguire* v *SOCOG* is an example of the tendency of some respondents to exaggerate the costs of compliance. Commissioner Carter in summarising the evidence said

> In short, the evidence of Mr Worthington and Ms Treviranus *(witnesses for the complainant)* strongly disputes the thrust of the respondent's evidence which in certain respects is said to contain "a very, very over-inflated estimate.(p.17)

In relation to one specific example the Commissioner said

> What the respondent suggested would take 25 business days could be effectively completed within a few hours. (p.18)

3. The economic impact of the DDA in individual complaints requires careful consideration and detailed evidence as there are numerous variables. The task of assessing economic impact becomes infinitely more complicated when considering the overall impact across the economy. The cost of the DDA to industry will vary

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[8] (1995) H95/34, H95/51 at para 66.

from case to case and industry to industry. It will confront different needs from people with disabilities. Their disabilities will in themselves require different responses.

4. An additional consideration on the potential economic impacts is the fact that the DDA has and will continue to have substantial positive economic effects. We cite one major example, which flowed from the *Maguire* decision, of significant benefit to the economy. The internet has the potential to revolutionise people with disabilities' access to goods and services and their participation in the marketplace as consumers. The Woolworths website is accessible and enables a person with a disability to purchase any product in the store and have it delivered to them. The effect of the provision of such an accessible service is to benefit the person with a disability by offering them independent access to services. There is a corresponding benefit to the business and its ability to expand its consumer base at a negligible once-off cost, that of designing and implementing an accessible website.

5. In summary, we recommend caution when considering the overall effect of the DDA upon the economy. It is only via vigorous examination of comprehensive evidence that these impacts, both positive and negative, can be properly quantified.

Regulations, Standards and other instruments

6. We believe that standards could be of substantial benefit to the regulatory framework as they could create objective measures against which questions of unlawful discrimination could be determined. Section 32 of the DDA makes it unlawful to contravene a disability standard. Standards would provide certainty and would thus assist those seeking to comply with the DDA as well as those regulating compliance.

7. The development of the current disability standards has however proven to be time-consuming and costly to formulate. This has to some extent been a result of a political process which has been driven by competing needs of the various parties.

As a consequence few standards have been developed. In reality, the complaint process has proved a more effective method of generating standards for application in particular scenarios. Unfortunately these standards are not often of general application.

Complaints

8. As few standards have been developed regulation, ensuring compliance with the DDA, has focused upon the complaints process and the willingness of people with disabilities to bring complaints. Many people with disabilities have been empowered through their use of the complaints process and by resolving their complaint during the conciliation process. HREOC provides, in our experience, an efficient and effective conciliation process. However the ability of people with disabilities to pursue complaints beyond the conciliation stage is limited by the costs of litigation and the fear of an adverse costs order.

9. PIAC is often approached by complainants when their complaints have been terminated by HREOC.[9] Once the complaint is terminated the complainant then has 28 days within which to lodge an application in the Federal Court or Federal Magistrate's Service (FMS)[10].

10. Many complainants are in our experience ill-prepared when dealing with the failure of conciliation of the complaint and it is during this period that complainants can become overwhelmed by the prospect of litigation. PIAC routinely advises people with disabilities that they must obtain evidence of their disability, evidence of the discriminatory conduct and expert evidence on the benefit to themselves and costs to the respondent before the merit of the application can be adequately assessed. This evidence needs to be accumulated before the decision is made to continue with the complaint to court or quickly after the lodgement of the application to court. This

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[9] s.46PH *Human Rights and Equal Opportunity Commission Act* ("HREOCA") *1986* Cth

[10] s.46 PO HREOCA

raises two issues; the timeframe in which evidence and advice is needed, and secondly, the cost of collecting evidence and providing advice.

11. In relation to the timeframe, the DDA could be more effective if it was amended either by increasing the 28 day time limit or enabling complainants to file a holding summons of similar effect to that allowed in the NSW Court of Appeal.[11] This would simply require the complainant to lodge a holding summons within 28 days and then allow a longer period, 3 months in the case of the Court of Appeal, in which to lodge the application relating to unlawful discrimination.

12. Unless, in the rare case, legal aid is available, complainants must pay for any expert reports themselves. The cost of expert reports can be prohibitive, making it impossible for complainants to pursue their action. Accordingly the DDA would be more effective if legal aid was widely available for people with disabilities. In addition, the DDA's effectiveness would also be increased if the Attorney General's power to assist complainants pursuant to s.46PV of the *Human Rights and Equal Opportunity Commission Act* ("HREOCA*") 1986* Cth was widely publicised, the application process for assistance understood and assistance were more readily available.

13. A further significant impediment to complainants is the prospect of a costs award against a complainant should they lose. Whilst PIAC and its counsel are able to act on a pro bono basis we must advise our clients of the risk of an adverse costs award pursuant to the *Federal Court of Australia Act* 1976 s.43.[12]. The court's use of its discretion is guided by Order 62 of the Federal Court Rules. The general rule that the Court follows is that 'costs follow the event'. This means that where a party is unsuccessful they are required to pay the costs of the successful party. Whilst there may be evidence that some complainants who have been unsuccessful have not had

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[11] Supreme Court Rules1970 NSW, Part 51 Rule 4.

[12] This position is the same in the FMS see s.79 of the Federal Magistrates Act 1999 (Cth)

adverse costs awards made against them[13], this is far from being the usual case. The assertion that complainants "usually expect to have to pay only their own costs even if they lose the case"[14] is plainly wrong. A complainant cannot be advised with certainty that they will not be required to pay the respondent's costs if they are unsuccessful.

14. PIAC has advised a significant number of peak bodies and advocates in relation to pursuing complaints which relate to disability issues of a systemic nature. Occasionally these organisations and individuals have pursued these complaints. However our impression is that many of those organisations and individuals do not pursue these cases as they perceive the risk of an adverse costs order is too high.

15. In our view the effectiveness of the DDA would be increased if the provisions of either the DDA, HREOCA or the Federal Court and Federal Magistrates Service Rules were amended to ensure that costs should either be limited or not awarded against complainants where their complaints have been assessed to be meritorious and of a systemic nature but are ultimately unsuccessful. A discussion of the principles that relate to costs awards in public interest cases is set out in the decision of the High Court in *Oshlack* v *Richmond River Council.*[15]

16. An alternative amendment would be to make the Federal Magistrate's Court a 'no costs' jurisdiction whilst retaining the cost discretion in the Federal Court. PIAC developed this proposal during its consultations for *Discrimination … Have you got all day? Indigenous women discrimination and complaints process in NSW*.[16]

Representative proceedings

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[13] See '*Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction'*, HREOC, 2003, p.170

[14] See p.26 of the Issues Paper.

[15] [1998] HCA 11

[16] PIAC and Warringa Baiya Aboriginal Women's Legal Centre, December 2001 p.73.

17. Part IVA of the *Federal Court Act* contains provisions in relation to representative proceedings. There are a number of technical requirements set out in the Part IVA that need to be met before a representative action can be successfully mounted. In recent litigation involving Part IVA, these technical questions have lead to extensive litigation where respondents have sought to challenge the very basis of the representative proceedings.[17] In such circumstances the legal costs of both the complainant and respondent have been significant. The difficulties set out above in relation to adverse costs and the obtaining of evidence would also apply. Accordingly, while PIAC has advised a number of organisations and groups of individuals on potential class actions, none have proceeded to court applications.

HREOC's power to initiate complaints

18. As a consequence of the cost of expert reports, the risks of adverse costs and the technical complications of representative proceedings, we are aware of many potential complaints against structural discrimination that have simply not eventuated or been discontinued. PIAC has advised organisations on a number of such complaints. The complaints had merit and would have significantly promoted the objectives of the DDA. It would therefore significantly enhance the effectiveness of the DDA if HREOC were given power to take such proceedings in its own name. For example HREOC could be given an analogous function to that exercised by the Australian Competition and Consumer Commission under s.80 of the *Trade Practices Act*. HREOC could be given power to seek injunctive relief in its own name where there has been a contravention of the Act.[18]

19. We strongly support HREOC being given such a power. As we have set out above, complainants face a number of significant difficulties in the complaints process. HREOC does not face the same difficulties and is well placed to ensure that matters of systemic discrimination are fully considered by the courts.

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[17] See for example the *Bright v Ferncare Ltd* litigation where the Federal and Full Federal Court have so far made 11 reported decisions.

[18] This proposal is based upon an amendment to HREOCA suggested by Mr John Basten QC in his Submission on the Human Rights Legislation Amendment Bill 1996 to the Senate Legal and Constitutional Affairs Committee in March 1997.

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