SUBMISSION IN RESPONSE
TO THE
PRODUCTIVITY COMMISSION INQUIRY
INTO THE
DISABILITY DISCRIMINATION ACT 1992

Robert A Daly
Human Rights Lawyer
Vie

Submission to the Productivity Commission Inquiry into the DDA 1992

1. Introduction

I welcome the opportunity to respond to this important inquiry. By way of background my qualification to write a submission is based on some 10 years practice as a human rights lawyer with respect to application of the anti-discrimination legislation. This includes acting as the Regional Director of an Anti-Discrimination Commission in North Queensland, being employed by numerous community legal centres, such as the Disability Discrimination Legal Service Inc and volunteering with numerous relevant community organisations.

I am currently employed by Victoria Legal Aid within its Human Rights Division and specialise in anti-discrimination law. I note that this submission is my personal submission and reflects my personal opinions and not the opinions of Victoria Legal Aid.

I support the provisions of the international human rights instruments, especially the so-called International Bill of Rights" [1] and within that the anti-discrimination principle, namely respect for human rights, without any element of discrimination or distinction. VLA also notes the absence of a specific Convention for the rights of people with disability and supports the current processes within the United Nations to draft same.

2. Comments on the terms of reference of the inquiry

The focus of the inquiry is an assessment of the costs and benefits of the DDA and its effectiveness in achieving its objectives. Evaluating the effectiveness of legislation aiming to achieve social change is very difficult, especially if the primary measurement tool is a costs and benefits analysis.

Whilst formal and express discrimination have been affected by the implementation of laws, there has been little impact on covert forms of discrimination or the positions of inequality and social disadvantage people with disability experience. For example, a cursory glance at the position of people with disability suggests that Australian anti-discrimination legislation has not disturbed existing social power relations. That is Anglo-Australian, educated, able-bodied, heterosexual men continue to retain most positions of power.

There are many reasons that could be asserted why the DDA has failed to achieve substantive equality. This includes:-

> The legislation contains limited power for the Human Rights and Equal Opportunity Commission (HREOC) or the adjudicators (Federal Court and Federal Magistrates Court) to achieve substantive equality (e.g. affirmative action programs and the capacity to initiate the complaints). Rather the bulk of the powers given to HREOC and the Courts relates to redressing individual complaints made by individual complainants (most of which are settled confidentially at conciliation). The mostly narrow and conservative approach taken by the judiciary to the interpretation of the DDA. The inadequate funding provided to HREOC to promote and manage the DDA.

1 The Universal Declaration of Human Rights (UDHR) and the two Covenants - the *International Covenant on Civil and Political Rights* (ICCPR) and *the International Covenant on Economic and Social and Cultural Rights* (ICESR).

- The lack of accessibility to the law for people with disability. For example, the HREOC has its sole office in Sydney; the time and emotional commitment involved in making a complaint to HREOC; and even more difficult litigating an action in the adversarial, complex and costly setting of the Federal Magistrates Court creates a disincentive to accessibility for people with disability who are often extremely vulnerable.

3. The focus of my submission

In this submission, whilst I could respond to each and every one of the terms of reference I have decided to confine my comments to the following three aspects of the inquiry:-

2.3. Effectiveness in achieving objectives - ensuring equality before the law; and
2.7. Complaints.
2.9 Looking to the future - Do you have any suggestions about how to improve the overall operation of the DDA? Are you aware of approaches in other jurisdictions (in Australia or overseas) that work better than the DDA ?

I have adopted this focus because I have observed from direct experience that it has had a significant impact on the effectiveness of the DDA and other anti-discrimination legislation. With respect to other aspects of the inquiry I support the submissions made by the HREOC and the Equal Opportunity Commission of Victoria.

2.1 Effectiveness in achieving objectives - ensuring equality before the law The Productivity Commission notes:

> *the second object of the DDA is to ensure that the legal rights of people with disabilities are protected. In practice, there might be many restrictions in the freedom and privacy of people with disabilities; for example, through constraints imposed on people living in institutional accommodation, and the rules governing decision making by and for people with some forms of intellectual and psychological disability. Equality before the law also includes the right of people with disabilities to a fair trial and equal treatment in the justice system.*

People with disability are often the most disadvantaged and vulnerable members of the community. I agree with the Commission that ensuring equality before the law includes the right of people with disabilities to a fair trial and to equal treatment in the justice system. The right to equality before the law is enshrined in international human rights instruments to which Australia is a signatory, including the *International Covenant on Civil and Political Rights* (Article 14).

Victoria Legal Aid's (VLA) Melbourne office provides a specialist Human Rights and Civil Division (HRCD) that provides legal services in a variety of legal matters, including specialist services for people with intellectual and psychiatric disability and acquired brain injury. For example, the HRCD provides advice and representation to:-

- patients who are held in involuntary detention in mental health hospitals throughout metropolitan Victoria.
- clients who are contesting applications for the appointment of a guardian and or administrator in the Victorian Civil and Administrative Tribunal.
- Clients who are seeking to contest or waive State fines under the "Perin system"; and

- Clients who have been charged with criminal offences
- Clients with disputes with Centrelink in relation to claims for Disability Support Pensions.

Equality before the law is not limited to the right to a fair trial, equality before the law ought to include more broadly the right to access to justice. Access to justice is a fundamental right and makes rights more effective. The formal conferral of a right is of no value unless adequate means exist to protect that right and to enforce corollary obligations. Access to justice is also an important aspect of the rule of law. As King CJ of the South Australian Supreme Court has said [2]

> *We cannot be said to live under the rule of law, in the full meaning of that expression, unless all citizens are able to assert and defend their legal rights effectively and have access to the courts for that purpose. Under our legal system, and indeed under the legal systems obtaining in all complex modem societies, that requires professional assistance. If that professional assistance is denied to any citizen who reasonably needs it to assert or defend his legal rights. the rule of law in the society is to that extent deficient.*

It is my submission that the level of professional assistance available to people with disabilities in respect of discrimination complaints under the DDA is not adequate.

The Disability Discrimination Legal Service of Victoria is the only service providing assistance specifically in the area of equal opportunity and discrimination for people with disability but is constrained by its limited resources as to the amount of assistance it can provide. The private legal profession is generally reluctant to accept discrimination cases on a "no win, no fee" basis because of the generally low levels of compensation awarded and the difficulty in proving a case. The Public Interest Legal Clearing House has very restrictive guidelines which by and large preclude discrimination matters. Community Legal Centres are generally limited by their resources to providing information and referral assistance.

One of the most significant obstacles to professional assistance is the legal aid guidelines in respect of Equal Opportunity/Discrimination Cases. For example, in Victoria, in addition to the requirement that an applicant meet the merits and means tests of Victoria Legal Aid, it provides:

> *VLA may grant assistance for equal opportunity/discrimination cases where there are strong prospects of benefit being gained not only by the applicant but also by the public or a section of the public.*

This guideline has effectively removed the availability of legal aid for complainants in discrimination matters because it is virtually impossible to satisfy. This means that any complainants who do not have the financial capacity to pay for legal representation to take their case to the Court or Tribunal are unrepresented. It is my experience that this has resulted in many complainants deciding not to pursue their claim further than the Human Rights and Equal Opportunity Commission if their complaint fails to settle. This significantly undermines the effectiveness of the DDA and any other anti-discrimination legislation. Those who have the courage to pursue their claim unrepresented are regularly met with an application by the respondent to strike out their claim. Such applications often succeed because the applicant did not have the capacity to oppose the

2 Opening address, Commonwealth Legal Aid Council Conference (1984) quoted in Disney, J, Redmond, P, Basten, J and Ross, S, *Lawyers* (2nd ed, Law Book Co, Sydney, 1986), p 461.
3 Victoria Legal Aid Grants Guidelines, Appendix 2B, paragraph 5, page 25

application or to properly litigate their claim. If an unrepresented complainant is fortunate enough to take their case to a hearing, they are usually unsuccessful because of the inequality with respect to the capacities of each party to litigate their case. Professor Margaret Thornton makes the point as follows:-

> *Adversarialism allows the inequality in wealth and power between the parties to be used by the discriminator to continue to discriminate against the complainant and his or her class so that victory is eventually attained .... It is particularly pertinent in the case of anti-discrimination legislation because of the inherent inequality between the parties – employer/employee, landlord/tenant and educational authority/student.*[4]

I recognise that legal aid funding cannot be provided for all legal matters, and that governments have to prioritise spending of their revenue sources. Nevertheless I submit that the prioritisation in the granting of legal aid for defendants in criminal trials - in particular, in cases where a prison sentence may be imposed - ought to be balanced by a fairer allocation of funding to discrimination matters.

RECOMMENDATION: I recommend that the national legal aid guidelines be changed whereby a merit and means test is applied rather than the current public benefit test.

2.2 How should the effectiveness of the DDA in ensuring equality before the law be measured?

It would be useful to obtain statistics from the Human Rights and Equal Opportunity Commission and other State Commissions and from the Federal Magistrates' Court and Federal Court regarding the levels of professional representation and the respective outcomes. I have no doubt that the statistics will reveal that many meritorious claims are not being pursued because of a lack of access to legal aid.

2.3 What evidence can you provide of performance in ensuring equality before the law?

There are many examples of clients with a disability who have been ensured equality before the law as a result of receiving adequate (competent) professional assistance. Clients with individual complaints have been able to receive remedies such as compensation, apologies and more far reaching remedies such as an agreement by the respondent to implement policies and training in the workplace. These remedies would in many cases not have been achieved if the client had not had access to advice and assistance in negotiating outcomes.

2.4 What other influences on ensuring equality before the law should be taken into account? How should they be measured?

The key measure of equality before the law is not whether it provides formal equality but whether it provides substantive equality or what is often referred to as substantive justice. As a cynical English judge of the Victorian era once remarked 'the law, like the Ritz Hotel, is open to rich and poor alike'. A notional equality of this kind is of limited use to a person with a disability who is the victim of discrimination and wishes to pursue his or her rights, but lacks the means and capacity to litigate and has to exercise their rights against their rich opponent.

4 Thornton, M, The Liberal Promise – Anti-Discrimination Legislation in Australia, Oxford University Press Australia, Oxford, 1990 page 175

In my experience, it is more usual than not that my clients in discrimination matters are opposed by respondents who have substantial resources (such as government departments or large corporations) to hire the best legal teams. Accordingly, measuring the level and equality of legal assistance is of paramount importance.

Other ways of measuring equality before the law or access to justice includes the cost and complexities of the law and the legal processes involved. This leads me to the next aspect of the focus of our submission.

2.5 Complaints

The original ideal of the two-tiered complaints process was to enable complainants to have two distinct and separate processes in which to try to resolve their complaint. The first stage involves the complainant submitting their complaint to the HREOC where their complaint is investigated and if accepted as having legal substance usually a confidential, informal cost free and non adversarial conciliation process takes place. If the complaint is not settled at conciliation the complainant has the choice to have the matter referred to the Federal Magistrates Court for determination by the Magistrate.

2.5.1 What affects the willingness or ability of people with disabilities to make complaints to HREOC, and to proceed to the Federal Court?

Some of the impediments to making complaints to HREOC includes:-

> Accessibility, in that it does not have an office in Victoria and therefore complaints have to be forwarded to Sydney. Inadequate resources. HREOC's funding was reduced by almost 50% in 1996 resulting in long delays in the processing of complaints. I know of many complainants who gave up on their complaints out of frustration with the delays having been denied swift justice.

With respect to the Federal Magistrates Court the most significant impediment is the costs consequences for unsuccessful litigants, namely costs follow the event.[5] Many complainants upon being advised of the costs risks in litigation choose the State system where the legislation provides that each party bear their own costs. Before the implementation of the Federal Magistrates Court system, the legislation provided that each party bear their own costs and I submit that the legislation should be amended to revert to that position. Respondents who are the subject of unmeritorious complaints are protected by the discretion provided to seek costs orders if the claim is vexatious. One Magistrate recently noted:

> *Whilst I have a power to award costs the nature and intent of anti discrimination could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even ultimately unsuccessful claims.*[6]

In my experience unlike the previous HREOC and the State VCAT, the Federal Magistrates Court lacks the specialist training in anti-discrimination matters, and is more formal, technical and adversarial in nature. Mediators have tended to approach a mediation similarly to a commercial litigation mediation, rather than the more gentle, fairer, conciliatory style of the HREOC or VCAT. Filing fees are also charged rather than complaints being cost free.

2.5.2 Has the introduction of the Federal Magistrates' Service led to improvements in the hearing of complaints?

5 Ball and Morgan Ball v Morgan & anor [2001] FMCA 127 (21 December 2001)
6 Ryan v Presbytery of White Bay Sunshine Coast [2001] FMCA 12 at para 20.

The most obvious improvement is that determinations are enforceable thereby removing the problems caused by the decision in Brandy's case. In other respects the Court operates like a "Court" rather than a Tribunal or the previously constituted HREOC and is therefore less accessible to unrepresented litigants.

2.5.3 What scope is there to use representative actions to achieve systemic change?

I strongly support the reintroduction of the power of the DDA Commissioner to initiative complaints as well as introduction of the power of representative disability organisations to initiate complaints. In this respect I support the submission made by the Victorian Equal Opportunity Commission[7] (VEOC). In particular I refer to chapter 4 of their submission titled "the need for a new approach", pages 13-16. The current provisions under Part IVA of the *Federal Court Act* are technical, lead to extensive litigation and for most complainants will be inaccessible.

More importantly, I agree with the VEOC that the reliance on an individual complaints model to protect the rights of people with disabilities and other groups within the community who experience discrimination is an inadequate means of addressing systemic discrimination. Whilst individual complaints can have broader ramifications for the group it effects, generally the benefit of the remedy or outcome does not extend beyond the individual complainant. This applies particularly in relation to orders made by the Court or Tribunal and is due to their adherence to the compensatory principle.

Due to the privacy/confidentiality requirements of the conciliation process, it is not known to what extent there are outcomes within that process that have wider benefits. Certainly, in my experience of acting on behalf of complainants in conciliation hearings, whilst some conciliated agreements have benefits for others, such as implementation of policies and training, in most cases, the outcome is limited to the individual complainant.

2.6 Looking to the future - Do you have any suggestions about how to improve the overall operation of the DDA? Are you aware of approaches in other jurisdictions (in Australia or overseas) that work better than the DDA ?

One of the most important ways in which the overall operation of the DDA could be improved relates to the capacity of the HREOC to pro-actively promote and protect human rights of people with disability; especially in respect of the covert forms of systemic and structural discrimination.

I acknowledge and fully support the essential need for all individuals to have the right to have their individual complaint addressed. Moreover, I believe that the HREOC has done an excellent job in carrying out its mandate under the DDA in only 10 years of operation. Many of the submissions made to this inquiry highlight the positive outcomes reached for complainants through the complaint process.

However, the statistics provided by the Productivity Commission, the HREOC and EOCV indicate that the majority of people with a disability are generally excluded from most of the areas of life covered by the DDA, including employment, education and training. Further, it is clear that despite the gains made through the operation of the DDA and through policy and legal change directed at ensuring an inclusive rather than exclusive society, disability discrimination has not been eliminated from Australian society.

I therefore support the views of the EOCV that a new approach is needed that does not rely primarily on a complaints-based approach.

7 Submission No 129

Broadening HREOCs mandate

HREOC should be given a broader mandate to enable it to address systemic discrimination.

The following is a summary of some of the measures that could be implemented to improve HREOC's role.

1. The HREOC as the primary national human rights institution in Australia ought to be guaranteed its independence in accordance with the Paris Principles. In this regard, it must be guaranteed independence of structure, composition and mandate so that it is not subjected to the changing agendas of each newly elected government.
2. HREOC's inquiry power is a critical tool in enabling systemic issues to be addressed and should not be fettered by a lack of resources.
3. The power to initiate complaints should be reinstated given that it no longer has the power to make binding determinations as should the power of representative bodies.
4. HREOC should be able to implement mandatory standards.
5. Legislation is needed to enable action plans to become a duty.
6. Specific affirmative action legislation is required.
7. The intervention power should not be undermined by making it subject to the veto of the Attorney General as is proposed under the HREOCA Bill.

Broader remedial powers for the Federal Magistrates Court

At the second stage of the complaints process, the individualised focus on the complainant which accords with the common law compensatory principle in Tort, ignores the class or group dimension of discrimination. The Court will only provide a remedy for a complainant that places the complainant in the same position that he or she would have been, if the wrong (discrimination) had not occurred. This usually amounts to monetary compensation for special damages or general damages for psychological injury.

Whilst remedies are vital to address the harm suffered by an individual complainant, I submit that the Court should be given remedial powers that have classwide effect for people with disability.

For example, a client (public tenant) who had an acquired brain injury that prevented him from being able to read written material succeeded in settling a complaint against the Department of Housing because the Department had failed to provide accessible means of communication for him, including e-mail via specific software programs. The Department agreed to pay compensation and to communicate properly in the future. Whilst this may constitute a good result for the individual complainant, it does not address the future conduct of the Department towards other tenants with a disability who may have grievances.

The Court could be given a broad remedial power to make non-monetary orders of an injunctive nature. For example under the racial vilification provisions of the New South Wales *Anti-Discrimination Act* the Tribunal has power to order the development and implementation of a 'program or policy aimed at eliminating unlawful discrimination'. In reality, agreements in this regard are sometimes reached between parties at conciliation but due to the confidentiality requirements of conciliation agreements there is scant information about the outcomes.

Conclusion

It should be borne in mind that the DDA is one of many tools available to effectively address discrimination and inequality. For example, government policies and funding initiatives to facilitate an inclusive society for people with disability are also of paramount importance, especially for people with intellectual disability, psychiatric disability and brain injury. Community attitudes also have to change. Removing prejudice cannot be achieved overnight and for some individuals may never be removed, hence the need for enforceable laws to protect vulnerable groups. Given that the DDA was only introduced in 1992, it is may be premature to make any more than limited assessment of the DDA. However, some issues mentioned will need legislative change, changes to the composition and training of the judiciary and changes to funding (eg legal aid funding, HREOC funding) and government policy in respect of the application of the DDA. To finish, economic rationalism must never be used as means to reduce human rights. Some things in life should not be negotiated on monetary grounds, and that includes the human right of all people with disability to fully participate in all aspects of life (housing, social security, employment, education, and so on) in the same way as other members of the community. One of the most positive recent examples I can provide of what can be achieved if the will and support of the community exists involves an academic who enrolled students in a university course in Canada. Each of the students had varying degrees of severe intellectual disability. They each gained qualifications and most of them gained jobs. If the structural and systemic impediments to enrolment were removed in Australia, there is no reason, the same results could not be achieved.

I would be happy to provide further submissions if required and would welcome the opportunity to address the Commission at a public inquiry. .

Rob Daly Dated 16 October 2003