SUBMISSION IN RESPONSE TO THE

INQUIRY INTO

DISABILITY DISCRIMINATION ACT

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QLD

DDA ENQUIRY RESPONSE

This document is a joint submission by Mrs. Sheila King and Mr. Robin King.
Our response will be structured around Issues Paper –

2. GENERAL ISSUES

What have been the effects of the DDA's broad definition of disability?
Are any elements of the DDA's definition of disability too narrow or, conversely too broad/

We believe that the broad definition of disabilities contained in the DDA is appropriate. In all our dealings with the complaint process of the DDA we have not been challenged as to the validity of our claim relative to disability as defined in the Act.

We also believe that to create narrow definitions of various disabilities would only create problems, in that, "grey areas" will occur between the various definitions. This will provide loopholes in the Act which will be exploited.

What areas of activity are covered?

We believe that the stated activities covered in the DDA are adequate but with regard to the application of exemptions, strict guidelines as to the application of these exemptions should be put in place.

Our comments with regard to reasonable grounds for discrimination in the provision superannuation and insurance is as follows:

- . Superannuation – Should not have any exemptions applied if there are no death benefits attached to the policy. If the contributions are paid, then payment at maturity should follow as for any other member of the public.
  With regard to any death benefit attached to the policy, we are not qualified to provide any constructive comment other than to say the cost of such cover should represent a fair risk factor to the insurance company.

- Insurance - There should not be any exemptions for property insurance, but life insurance should be fairly assessed according to the individual's situation. With medical insurance the pre-existing injury clauses would of course apply.

What actions are unlawful?

We have no problem with those actions which are defined as unlawful in the Act

Discrimination

We believe that the definitions contained in the DDA with regard to Direct and Indirect discrimination are broad enough as not to create "grey areas"

- **How has the concept of 'unjustified hardship" enhanced or reduced the effectiveness of the DDA?**

  In our experience, the use of unjustifiable hardship provides the biggest loophole for non-compliance. Any figures presented at a conciliation conference can be totally untrue, and to verify these figures can be a very expensive process for the complainant. We have had personal experience in this area, where a complaint was conciliated with a less than satisfactory solution due to financial hardship. We could not afford to verify the figures presented, and after the conciliation agreement was signed, this company announced the purchase of another enterprise nearby for $40 million plus.
  We believe that all figures submitted to support a claim of unjustified hardship should be sworn as correct and that these figures should follow through to any court action.

- **Should 'reasonable adjustment' be defined in the DDA? If so how?**

  We believe that reasonable adjustment is a level of acceptable access with regard to specific claims. This should be subject to negotiation between the parties and cannot be reasonably defined. If a level of reasonable adjustment cannot be agreed to, the assessment of unjustifiable hardship should be carried out.

- **What are the costs of reasonable adjustments? Who currently bears these costs. What is there impact, if any, on competition.**

  The costs of reasonable adjustments are born by the establishment/ owner/ organisation concerned. If for instance it is an access issue, statistics have shown that when a person with a disability dines out in a restaurant or goes shopping etc they are accompanied by carers or family members. Thus by making their premises or services accessible they increase their customer base.
  We have found that for instance when an existing MacDonald's restaurant installed a ramp access, car parking for people with disabilities, and a compliant unisex toilet, their customer base increased. Retirement home courtesy buses began stopping there during outings for residents which would not have occurred had they not changed their premises.

- If a sporting body can obtain public liability insurance and there is no danger over and above that experienced by the general public participating in the activities, then unjustifiable hardship should apply.

Harrassment

How has the prohibition of harassment worked in practice? **How could it be improved?**

By providing specific instances of what is deemed to be harassment. we believe this would be helpful.

Requests for information

We believe that any information requested over and above that required from any other member of the public, is unacceptable. Having said that, this should not preclude a request for information by a service provider or employer, with a view to making adjustments to the work place or service to try and meet any special needs.

2.2 PROBLEMS THAT THE DDA SEEKS TO ADDRESS

We believe that the DDA does adequately describe the social, environmental and economic problems that should be addressed. With regard to access issues to the built environment, public authorities and private certifiers have no legislation they can call upon to impose what they deem to be a requirement under the DDA. All they have that they can call upon, is the Building Code of Australia and that in some cases is not complied with resulting in a complaint to the Building Services Authority.
We desperately need the DDA Standards put in place as soon as possible.

2.3 EFFECTIVENESS IN ACHIEVING OBJECTIVES

The box 3 statistics are pertinent, but in our opinion do not fully represent the true situation as to whether the DDA is achieving its objectives. Disabled members of the community in the workforce have some measure of confidence and self esteem, whereas those who are not in the workforce in the main tend to accept what is offered. The thought of making a complaint through a tribunal or judicial system is more than enough to be a deterrent for the latter group.

How should the effectiveness of the DDA in eliminating discrimination be measured?
What other influences on eliminating discrimination should be taken into account. How should they be measured?
The true effectiveness of the DDA could be measured by auditing a community for the following:

- How many complaints have been received of discrimination and how have these complaints been resolved. How many of the complaints were forced upon them, and lost by the defendants in the judicial system.
- How many companies, local government bodies have taken the trouble to register an Action Plan with HREOC. What is their performance rating with regard to the outcomes of the action plan.

- Canvas the disability groups in the area as to their opinions on what they consider discriminatory. Did they make a complaint to HREOC, what was the outcome. If they did not make a complaint – why not.

Ensuring equality before the law

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

One of the first areas of equality before the law would be equitable and dignified access to the law court itself. How may courts have compliant unisex toilet facilities, wheelchair access to the witness box, doors that can be independently opened, low sections of reception counters that give dignity of access for people with mobility aids to the court system. With regard to the latter, security could still be maintained with bars or plate glass similar to that in a bank.
If the members of the public cannot access the court system any statistics derived from attendance in the court will be flawed.

Promoting recognition and acceptance -

How should the effectiveness of the DDA in promoting recognition and acceptance of the rights of people with disabilities be measured?
What evidence can you provide of the progress in promoting recognition and acceptance of the rights of people with disabilities?

Until there are DDA Standards in place giving definitive minimum requirements to comply with the DDA, we do not believe there will be full appreciation of this legislation. There is still a belief out in the general community that it is just too difficult and with creative accounting the unjustified hardship clause can be invoked and 'I do not have to do it' is the response received. Even when the HREOC Access to Premises Guidelines are given as an illustration of the requirements on access issues, the reply is that they have no force in law. Which of course they have not.

2.4 COMPETITION AND ECONOMIC EFFECTS

What are the potential economic and competition effects of the DDA? How should they be measured?
What are the direct and indirect costs and benefits of the DDA? Can they be quantified? If so how?

The potential economic benefits could be quite substantial, in that if premises are made accessible say for wheelchairs they would benefit other members of the community such as mothers with prams, the elderly, the vision impaired etc. As with the disabled members of the community an outing does not usually include one member but a social or family group. The same would apply to the delivery of goods and services, as when a provider modifies the method of delivery to provide dignified

and equitable service and access, good news travels fast in the community of people with disabilities, to the benefit of their customer base. The costs incurred we believe should be recovered over time.

2.5 THE DDA AND OTHER REGULATIONS

Can the relationship between the DDA and other Commonwealth legislation be improved?
What effect is the overlap between Commonwealth and State and Territory anti-discrimination legislation?
Are there impediments to the development of co-operative arrangements with States and Territories on disability discrimination?

Yes we think it can be improved. Other failures to comply with Commonwealth Legislation such as the Building Code of Australia or decisions of the Building Services Authority to name a few, should be allowed to be referenced in a claim of discrimination under the DDA. In terms of access issues there is no definitive benchmark for compliance under the DDA, therefore it should be permissible to quote applicable minimum requirements that are not complied with under other Commonwealth legislation.

Both the State and Commonwealth have the same goals, but in our experience the operation and execution of the State and Commonwealth legislation differs considerably. This difference becomes more apparent in the conciliation phase of the complaint. We have had three complaints conciliated under the Queensland Anti-discrimination Act and have left the conference with the feeling that we had a very good hearing. The conciliators were impartial and very fair in their conduct of the meeting. In our conciliation meeting with our complaint under the DDA, we came away with the feeling that we had been “shafted” . The conciliator refused to allow any discussion as to compliance with the BCA and yet dismissed part of our complaint as being adequately dealt with by the Building Services Authority. The Building Services Authority deals with the conduct of licensed inspectors with respect to their certifications and compliance with the BCA and not specific access issues.

There should be strict guidelines to be followed for conciliators in that they should conduct the meeting but should not control the subject matter of the meeting, and should not in any way give advice to either party.

We do not see any impediments to the development of co-operative arrangements with States and Territories on disability discrimination.

2.6 REGULATIONS, STANDARDS & OTHER INSTRUMENTS.

What is the rationale for prescribing these particular Acts? What would be the impact of extending or removing the prescription?
Are there other matters that should be subject to regulation? Would some parts of the DDA be better addressed by regulation?

We believe that there must be prescribed laws effective within the DDA. These laws would not only protect the disabled individual but other members of the public. A good example would be the use of firearms. When these prescribed laws are included, a very tight and definitive requirement must be satisfied prior to invocation, not just a blanket 'you are disabled ' and therefor you are unacceptable attitude.
Yes there are some areas of the DDA that would be better addressed by regulation but only in the form of referenced DDA Standards. Any independent regulations could end up with conflicting requirements.

Disability Standards

What are the advantages and disadvantages of mandatory disability standards?
How can the process for developing disability standards be improved?
Should the DDA be amended to allow disability standards to include independent monitoring arrangements and enforcement arrangements?

The advantages of having mandatory disability standards are that they would give a high degree of certainty of compliance with the DDA. These standards are long overdue, as we have at present, regulations that do not in many areas represent the requirements of the DDA.

We believe development of disability standards are taking far too long. The Access to Premises Standard for instance was due out for public comment in 2002. If this had been a design project taken on in private industry, target dates would have to be met or the company would have lost money or even become insolvent. In the area of disability access there is a no regulatory requirements for parks, beach accesses, walkways and the like. We are continually being told that in respect to these areas that "it is not covered by the Building Code of Australia and we do not have to comply". They of course do not have to comply, but a ramp access or walkway in a park should not be any different to that attached to a building. We are then left with the "requirement" under the DDA and a legal interpretation of that requirement if a complaint was place into the court system.

Yes we believe that there is a place for independent monitoring and enforcement. This independent enforcement should only be in areas where a DDA Standard is in place. All decisions by the independent body should be ratified by HREOC.

What are the advantages and disadvantages of being able to formulate disability standards in some areas of discrimination listed in the DDA and not others?

Any DDA standard formulated, gives a degree of certainty to the area covered and can only be of enormous advantage to the interpretation of the DDA requirements in these areas. For any areas not covered by DDA standards, assessment should be made as to whether standards in these areas are applicable, at the very least guidelines should be formulated.

HREOC guidelines and advice

What are the advantages and disadvantages of guidelines or advisory notes compared to disability standards?
What are the advantages and disadvantages of HREOC's Frequently Asked Questions compared to guidelines or advisory notes.

In our experience the issue of guidelines or advisory notes have the advantage of indicating the level of access or provision of goods and services that can be expected under the DDA. The disadvantage is that when referred to with reference to a complaint to an owner service provider etc, the immediate response is that they have no force in law. It is essential that a definitive minimum requirement such as a DDA Standard is put into place as soon as possible, it would also be an advantage if these Standards are able to be legitimately referenced in any State Anti-discrimination legislation.

In our opinion there are no advantages or disadvantages of HREOC's Frequently Asked Questions compared to Guidelines or advisory notes, the two documents compliment each other. The only disadvantage on both would be that they have no force in law unless like in the Disability Standards for Accessible Public Transport 2002 Part 1.5 the Guidelines are referenced within the Standard.

Voluntary Action Plans

Are there sufficient incentives under the DDA to submit voluntary action plans?
How have voluntary action plans influenced decisions on what is or is not unjustifiable hardship?
Why have relatively few businesses submitted voluntary action plans?

We are not aware of any action plans being adhered to. It would appear that once an action plan has been submitted and accepted by HREOC it is then put on the shelf to gather dust. The only test of its performance is when it is used as part of a defence against a claim. When an action plan is lodged with, and accepted by HREOC, there should be periodic progress statements required by HREOC as to the compliance with the timetables for the goals contained in the action plan. Any deviation from the stated timetables should be highlighted with a report as to how the action plan timetable can be put back on track and an explanation as to why it went 'off track'.

If an action plan has been adhered to, any outstanding issues as a result of a claim would still have to be assessed with regard to the present financial situation of the defendant.

With regard to only a few businesses submitting action plans. We believe a risk assessment is carried out by the business relative to the cost of creating an action plan against the chance of a claim being successful, or even a claim being made.

Should there be a formal link between action plans and exemptions?

Most definitely not. There is insufficient monitoring of the adherence to action plans to grant an exemption. Should this facility be available it could be used to delay compliance through creative accounting. Exemptions should only be granted under the present scheme where, for instance, a Standard is about to be changed and it is not yet gazetted, a temporary exemption should be granted. We believe that an exemption should not be tied to an action plan as the financial situation of the party submitting the plan can change, and a blanket exemption at time of submission would not be appropriate.

2.7 COMPLAINTS

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

We have been mainly involved in mobility complaints and have found that there are very few people with disabilities in this area that have the knowledge and capability of pursuing a claim all the way to the Federal Court.

For many people with disabilities the thought of having to appear before a mediator and the people/organisation they are complaining about is too traumatic and therefore very few complaints are made. Further even if conciliation is achieved during mediation there is nothing binding on either party to comply with the agreed outcome. This again is a major deterrent to bringing a claim in the first place.

Finally, to proceed beyond conciliation to the Federal Court requires the complainant to have a strong will and dedication as to the credibility of the claim in question, notwithstanding the incumbent costs of a court action.

What are the advantages or disadvantages of overlapping State and Territory and Commonwealth complaints systems?

In respect of the Commonwealth legislation (DDA) any agreement achieved during mediation is not binding on either party. Under Queensland State Legislation should any party involved in the mediation renege on the terms of the agreement made in conciliation an enforcement can be applied for to enforce the said agreement. However the enforcement order bears a substantial cost to register. All enforcement orders made by the present court system are built around enforcing the orders of the court in respect to monies owed. The enforcement of the requirements of a conciliated agreement do not have their own procedures or protocols. We believe that a possible answer to this problem would be that the legislation is changed to allow immediate registration into the Court system for mandatory compliance of any agreement achieved in conciliation as a part of the conciliation process.

What factors affect the choice of jurisdiction? What can be learnt from processes in other jurisdictions?

We have recently heard of a complaint registered against a federal utility via the Queensland Anti-discrimination Commission which was refused because the complaint was against the said federal utility. The lines of jurisdiction should be clearly defined as to what cases should go to the Federal jurisdiction and what to the State jurisdiction. At the present time these lines are very indistinct.

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

We have not yet had to utilise this service and cannot therefore make any comment.

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

There is very little scope to achieve systemic change via representative action as this usually entails conflicts of small advocacy groups with limited finance against large corporations or utilities with unrestricted finance. The incumbent cost of such an action to the complainants may be prohibitive.

Should the DDA be amended to allow HREOC and/or other appropriate bodies to initiate complaints?

Yes. We do not believe that there is a conflict of interest in HREOC conciliating complaints or initiating complaints. Any complaints resulting from failure to conciliate is totally driven by the parties involved in the complaint. The HREOC mediator is there purely to conduct the mediation and does not give any advice. Therefore we believe there cannot be a conflict of interest and therefore the position of HREOC conciliating/initiating complaints should be re-visited. If the conciliation is conducted by HREOC under very strict and transparent guidelines, no conflict of interest can occur.

We believe that there should be an avenue for a complainant to refer a situation of perceived discrimination to HREOC, and if it is deemed to be valid, HREOC should be able to proceed with that complaint.

CONFIDENTIALITY

We believe confidentially provides more advantages to the transgressor than to the complainant. By keeping the name of the transgressor from public scrutiny and the nature of the complaint hidden, this only enables others who could have complaints made against them to continue to disregard the requirements of the DDA. For example one of our complaints was conciliated positively and the transgressor has since publicly taken credit for having initiated the conciliated changes without divulging that they were complying with a conciliation order.

2.9 LOOKING TO THE FUTURE

We believe that one of the major changes likely to affect people with disabilities and the future role of the DDA is the formulation of DDA Standards to give the DDA definitive teeth under section 32. This will then allow any person, other than an aggrieved person, to make a complaint as it will then be only a statement of fact that the transgressor has contravened a DDA Standard.

It should be a requirement for Architects, surveyors and planners to include a module within their qualification curriculum encompassing State and Federal disability anti-discrimination legislation.

3.3 ACCESS TO PUBLIC TRANSPORT

Has the accessibility of public transport improved since the DDA was introduced. What more remains to be done?

We believe that access to public transport has only improved in some city areas. The rural areas have not improved whatsoever. The latter might now change with the introduction of the Access to Public Transport DDA Standard.

How has the term Unjustifiable Hardship been interpreted in the provision of public transport?

What impact do you expect the disability standards for accessible public transport to have on discrimination in this area?

We believe that this can only be assessed over the next five years where, in the majority of cases, 25% of all forms of transport and infrastructure will have to comply with the only defence being that of 'unjustifiable hardship'.

Since the Disability Discrimination Standard has been introduced a more definitive requirement for accessibility is now in the public forum. There are adequate guidelines attached to this standard but the education of all transport operators and in some cases local government authorities, needs to be made aware of their obligations under this standard.

One further advantage of this DDA standard is that ALL new equipment entering service after October 2002 must fully comply and unjustifiable hardship cannot be a consideration.

What are the costs of 'reasonable adjustments' in public transport?
Who currently bears the cost?
Who should bear them and why?

We are not in a position to assess what the costs are of 'reasonable adjustments' but would surmise that many of these adjustments would probably be in the procedural area and would be of minimal cost to the owner/operator.

As to who bears the cost of 'reasonable adjustments' any changes to industrial or service providing procedures are usually passed on to the user.

We believe that any costs should be borne initially by the owner/operator and recouped over a period of time by tax advantage through depreciation and amortisation of the reasonable adjustments costs over this period.

What impact do you expect the Disability Standards for Accessible Public Transport to have on discrimination in this area?

We expect a major impact and change in this area to occur as with the inclusion of this standard, definitive requirements for compliance and time-scales will be set in law.

3.4 ACCESS TO PUBLIC PREMISES

How has the DDA improved access to public premises so far?

The DDA has improved access to public premises to some extent, but not as much as we would have expected in the 10 years of its life-span. We are finding that there is an awareness now that any conciliated agreement is not binding on either party. Very few complainants have the staying power to proceed a complaint pass the mediation stage.

How has the term 'unjustifiable hardship' been interpreted in access to premises?

In our experience the claim of unjustifiable hardship protection is being abused through creative accounting and inflation of the stated rectification costs of a complaint. Any submission for unjustifiable hardship at the conciliation stage should be able to be presented as evidence, if the claim proceeds to Court. We believe that at present figures can be submitted during the conciliation conference which are totally inaccurate but to verify these figures would commit the complainant to unnecessary costs.

What are the costs of 'reasonable adjustments' in access to premises? Who currently bears these costs? Who should bear them?

Reasonable adjustments should only be applicable to buildings erected prior to the commencement of the DDA. As to the question of who currently bears the cost, this, of course, is usually the owner/occupier which inevitably will be passed on to the community.

What impact do you expect disability standards for public premises to have on discrimination in this area?

The establishment of a DDA Standard on Access to Premises will have a profound impact on how the DDA functions in this area. It will not only give the DDA teeth, but it will also provide a measure of certainty for the members of the disabled community and owner/occupiers of premises. At the present time failure to comply with the Building Code of Australia is not a basis for a complaint under the DDA, whereas once this standard is established a charge of failing to comply with this Standard under section 32 is applicable. The only defence would therefore be 'unjustifiable hardship' as outlined above. The disability standards for public access is urgently required and it would appear that having an open-ended time-table for completion of this standard disadvantages both the owner of the premises and the complainant. The provisional draft of this standard was due for public comment in 2002. It has now been delayed to late 2003, this constant delay is not acceptable as if it had been a Government project subject to public tender then target dates would have been set and met or penalties accrued.

2.5 GOODS, SERVICES, AND FACILITIES

How effective has the DDA been in eliminating discrimination in the provision of goods, services and facilities?

The fear of a complaint under the DDA in this area has not had, in our opinion, the impact that would have been expected ten years ago when the DDA was legislated.
We have post boxes, public telephones, Centrelink facilities etc, that are still unusable by people with disabilities.

How has the term 'unjustifiable hardship' been interpreted in provision of goods, services and facilities?

We refer to our previous comments regarding 'unjustifiable hardship' with the additional comment relative to the provision of goods and services, that any re-training and adjustment costs should be born totally by the owner/operator.

What are the costs of 'reasonable adjustments' in the provision of goods, services and facilities? Who currently bears the costs? Who should bear them and why?

Where the costs arise because of re-training or changing the system of providing services, these costs should be totally borne by the provider as these costs will not only remove discrimination but increase the customer base.

Should the DDA be amended to allow for development of disability standards for the provision of goods, services and facilities?

Yes, most definitely as this is an area where a lot of indignities and inequities are experienced by people with disabilities.

What has been the impact of industry- based codes of practice on discrimination in this area?

In our experience, if there are industry codes of practice many of these are being ignored. This ignorance might be due to inadequate training of employees, total disregard of the known obligations in this area or lack of knowledge of the requirements of section 24 of the DDA.

3.5 ACCOMMODATION, LAND, CLUBS, AND SPORT

How effective has the DDA been in eliminating discrimination against people with disabilities in relation to accommodation, land, clubs, and sport?

We feel that the DDA has not been effective in eliminating discrimination again people with disabilities in relation to hotel/motel accommodation or many social clubs. We specifically say this in relation to hotel/motel accommodation in respect to the advertising of accessible accommodation. Many hotels/motels advertise themselves as being 'wheelchair friendly', but in reality they mean 'not wheelchair accessible'. For instance we were asked to look at a motel that had the international symbol for access displayed and the unit advertised had a ramp up to two steps at the entrance of the unit, and a step into the shower. This therefore, was neither wheelchair friendly or wheelchair accessible.

The use of the international symbol should have strict guidelines governing its use and display.