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Submission to the Productivity Commission

Inquiry into the Disability Discrimination Act 1992

1. Introduction

Victoria Legal Aid (VLA) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into the *Disability Discrimination Act (Cth) 1992* (DDA).

VLA is an independent statutory authority established by the *Legal Aid Act (Vic) 1978*. It provides extensive legal assistance, advice, education and information services throughout Victoria and aims to be "a leading and responsible force for community access to the legal system and for social justice."¹ VLA's network of 12 offices across Victoria makes it the largest and most accessible criminal law and family law practice in the state. It also has a large, specialised practice in the area of human rights and civil law. By funding the private profession and using in-house legal staff, it undertakes over twenty thousand criminal law, over ten thousand family law and over four thousand civil law cases a year. (VLA *Eighth Statutory Annual Report 2002-03*).

VLA's priorities, in order of importance to this organisation, include firstly the provision of assistance in criminal matters where the liberty of the subject is at risk, secondly providing assistance where the welfare, custody or rights of children are at issue and thirdly providing assistance in order to protect the rights of the marginalised and economically disadvantaged in civil and matters. Over the last decade and because of budgetary pressure and narrow guidelines imposed by the Commonwealth government, the third priority is regrettably less resources than the other two.

The objects of the DDA as stated in the Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the grounds of disability discrimination in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport;
 - and

¹ Victoria Legal Aid, *Strategic Plan 2003-2006*

- (ii) the provision of goods, facilities, services and land; and
- (iii) existing laws; and
- (iv) the administration of Commonwealth laws and programs; and
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.²

On the eve of the tenth anniversary of the DDA (28 February 2003), the Commonwealth Attorney-General's Department issued a media release that strongly supported the current system and indicated that the Commonwealth was committed to ensuring the effectiveness of the regime. In the same month the Parliamentary Secretary to the Treasurer issued the terms of reference for the inquiry within the framework of the Government's continued National Competition Policy Review. An inquiry into fundamentally rights-based legislation in terms of competition principles and broader economic considerations is a novel and challenging approach and VLA looks forward to the greater levels of understanding that such an approach will hopefully deliver.

The comments in this paper are confined to those areas where VLA's experience and expertise enables us to make an informed contribution to the discussion.

The focuses of this submission are:

- disability discrimination in Australia and the role of the DDA in addressing it;
- the factors influencing the effectiveness of the DDA in terms of its objects and the role of VLA in facilitating these ends; and
- the review of the DDA with reference to competition and economic considerations.

2. Disability Discrimination in Australia

VLA supports the vital work of organisations that provide accurate information on the incidence and nature of disability discrimination in Australia. In particular, we refer you to comments provided by the Equal Opportunity Commission Victoria in their submission to this inquiry:

*"the statistical data confirms the picture provided anecdotally to the Commission by people with disabilities, who state that disability discrimination remains rife, that it operates daily in many physical, attitudinal and procedural guises and that it has a major impact on their lives. The quantitative and qualitative evidence available indicates that the need for effective anti-discrimination legislation is as critical as ever."*³

There is also extensive academic investigation and analysis that is concerned with disability discrimination.

² *Disability Discrimination Act* (Cth.) 1992, section 3

³ Equal Opportunity Commission Victoria, "*Submission in response to the Productivity Commission Inquiry into the Disability Discrimination Act 1992*"

The formal and substantive protection of human rights should be one of the overarching principles guiding the Australian political process. No overt constitutional protections or Bill of Rights exists in Australia to protect these rights. Through the exercise of its 'external affairs' power⁴ in the Australian Constitution, the Federal Government has the authority to enter into treaties and international conventions. These treaties and conventions become part of Australian law only when they are enacted by the Commonwealth Parliament. By 1992 the Federal Government had made Australia a signatory to each of the major international human rights instruments and illustrated its commitment to the rights of people with disabilities by enacting the DDA.

The enactment of the DDA explicitly endorsed the creation of:

*"a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringement of their rights...where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such differences."*⁵

The DDA aims to prohibit certain types of discrimination and harassment while it advances information collection in a number of specified areas. However, it does not specifically articulate positive rights of people with disabilities. Importantly, it does provide a framework that attempts to incorporate a broader mandate than simply redressing individual complaints of disability discrimination. The DDA's mandate extends to the development and maintenance of a system that has the capacity to address systemic discrimination, including problematic societal values and attitudes towards people with disabilities.

Any investigation of the effectiveness of the DDA should consider the historical development of, attitudes towards, and regulation of, disability discrimination in Australia. VLA suggests that a review of the regulatory regime provided by the DDA should also include consideration of regimes in other jurisdictions, especially jurisdictions where similar attitudes are held towards disability discrimination. Without these considerations, any inquiry into the effectiveness of the DDA is limited by its self-referential nature.

RECOMMENDATION 1: VLA recommends that an investigation of the effectiveness of the DDA should consider the historical development of attitudes to and regulation of disability discrimination in Australia.

RECOMMENDATION 2: VLA recommends that a review of the regulatory regime provided by the DDA should incorporate a cross-jurisdictional analysis.

⁴ *The Australian Constitution (Cth.) 1901*, section 51(xxix)

⁵ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2755 (Brian Howe, Minister for Health, Housing and Community Services)

3. The Effectiveness of the DDA

The enactment of the DDA is both a consequence and a cause of changing attitudes towards disability discrimination in Australian society. These attitudinal changes reflect an underlying expectation that people with disabilities should be entitled to participate equally in society. The effectiveness of the DDA should be determined with reference to the adequacy of the outcomes it produces for disabled people, and any residual barriers that may limit the effectiveness of the legislation. For example, a goal of the DDA is to change public perceptions of the capacity of people with disabilities to be good employees but the goal may be limited by the lack of resources available to relevant agencies to undertake perception changing activities.

The ability of the DDA to redress individual grievances and facilitate broader social change should be analysed with continual reference to an overarching standard of equal participation. Guaranteeing equality before the law and equal rights for people with disabilities goes a long way to ensuring their capacity to be equal participants in our society.

As the Commission notes in its *Issues Paper*:

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; e.g. 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.

The achievement of both formal and substantive equality for people with disabilities requires consideration. The DDA may sufficiently articulate a framework for assessing complaints of disability discrimination but if this framework is not adequately resourced then its effectiveness in ensuring access to justice is compromised. The formal conferral of a right is of no value unless adequate means are available to protect the right and to enforce corollary obligations.

Access to justice is an important element of the rule of law, a foundational tenet of our legal system, as stated by King CJ of the South Australian Supreme Court,

*We cannot be said to live under the rule of law, in the full meaning of that expression, unless 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 modern 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.*⁶

RECOMMENDATION 3: VLA recommends that an investigation of the effectiveness of the DDA should be conducted with continual reference to the overarching standard of equal participation of people with disabilities in society.

⁶ 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.

RECOMMENDATION 4: VLA recommends that an investigation of the effectiveness of the DDA should consider the importance of both formal and substantive equality for people with disabilities.

3.1 Measuring the Achievements of the DDA

Distinguishing between changes that may have resulted from broader social movements, rather than the enactment of the DDA is difficult. Even where discernible changes can be attributed to the DDA - for example, the number of disability discrimination complaints successfully addressed, it is difficult to quantify their positive social effect. It is also particularly difficult to quantify the qualitative changes which have come about as a result of increased community recognition of disability discrimination.

An inquiry into the economic effectiveness of the DDA is not within our area of expertise. However, VLA submits that an expert economic analysis according to the principle that people with disabilities should enjoy equal participation in society is vital for an adequate review of the effectiveness of the DDA. Therefore, a more effective review of the DDA should encompass the experience of people with disabilities. It also needs to ensure that substantive as well as formal equality is investigated as part of the review. It is difficult to maintain that no discrimination exists where:

“people with disabilities in general have a lower labour participation rate, a higher long term unemployment rate and lower school and vocational education and training participation rates than people without disabilities. People with disabilities are poorer on average than those without disabilities, and can be subject to unacceptably high levels of social and community exclusion.”⁷

VLA is concerned at how assistance, specifically professional legal assistance and/or representation, influences client outcomes and proceedings under the DDA, as well as the overall effectiveness of the Act. VLA submits that it would be useful to obtain information from the Human Rights and Equal Opportunity Commission (HREOC), the Federal Magistrate Service and Federal Court regarding:

- the percentage of complainants who are legally represented and the outcomes of their complaints compared with complainants who were unrepresented,
- the percentage of respondents who are legally represented and the outcomes of their complaints compared with respondents who were unrepresented; and
- qualitative evaluation of that data.

RECOMMENDATION 5: VLA recommends that, in the context of this Inquiry, an investigation should be conducted that evaluates the effects of legal assistance and representation in proceedings under the DDA

⁷ Equal Opportunity Commission Victoria, “Submission in response to the Productivity Commission Inquiry into the Disability Discrimination Act 1992”

3.2 The Role of VLA and constraints on its operations

VLA recognises that people with disabilities have the same rights and legitimate expectations as the rest of the community in relation to formal and substantive equality. The DDA provides, at a federal level, the framework within which to facilitate and encourage this goal. VLA supports this framework, however contends that the framework fails to establish sufficiently clear and enforceable rights and duties.

Disability discrimination occurs within our society at both individual and systemic levels. VLA strongly argues that education of industry, professions and the broader community, as well as extensive public debate, are essential elements of an agenda to adequately address this issue.

VLA submits that appropriate legal support and resources should be available to individuals who wish to bring disability discrimination complaints. This is important to ensure equality of access to our legal system whilst also being vital to fulfilling the objectives of the DDA. Appropriate legal services should include:

- legal information – via seminars and publications,
- legal education,
- legal advice – via telephone and duty lawyer services,
- referrals,
- case work, and
- legal representation where appropriate.

VLA submits that people with disabilities who believe they have been discriminated against in Victoria do not have adequate access to sufficient specialist legal services. VLA's capacity to provide legal aid is restricted by narrow Commonwealth 'guidelines' or rules as to which matters can be assisted with a grant of legal aid. The private legal profession is generally reluctant to accept disability discrimination matters on a "no win, no fee" basis. VLA submits that legal aid services to people with disabilities should be provided by the Commonwealth Government providing additional funding for that purpose to organisations like VLA, community legal centres and specialist legal services such as the Disability Discrimination Legal Service.

The objectives of VLA as stated in the *Legal Aid Act (Vic) 1978* are to:

- a) provide legal aid in the most effective, economic and efficient manner;
- b) manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state;
- c) provide to the community improved access to justice and legal remedies; and
- d) pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.⁸

These objectives are affirmed in the VLA Strategic Plan 2003-06. As mentioned, VLA provides specialist legal services across a broad range of areas. The provision of improved access to justice services to people with disabilities fits squarely within the statutory and strategic objectives of VLA.

⁸ *Legal Aid Act (Vic) 1978*, section 4.

The Productivity Commission's Draft Report outlines how the effectiveness of the DDA hinges on the contributions made by legal services including legal aid commissions and the Disability Discrimination Services. In particular, p. XLI outlines how inadequate resources for Disability Discrimination Legal Services can in fact undermine the effectiveness of the DDA. VLA supports this finding.

As noted, the specialist assistance provided by VLA under the DDA is extremely limited. The Commonwealth's priorities and guidelines, which are defined in the Commonwealth/VLA Funding Agreement, regulate tightly the provision of legal assistance in discrimination matters. The Commonwealth requires all legal aid commissions to comply with its priorities and guidelines as a condition of Commonwealth funding. A grant of legal aid is available in a case of disability discrimination under the DDA only if both of the following two essential elements are met:

- the case has strong prospects of providing substantial benefit to the applicant; and
- it also has strong prospects of providing substantial benefit to the public or a section of the public.

It is the latter hurdle, the 'public interest' requirement, which is primarily responsible for only three grants of aid being made by VLA in the last two years.

In June 1998 the Senate Legal and Constitutional References Committee handed down its third and final report of its inquiry into the Australian Legal Aid System. The committee noted that "the requirement in discrimination cases that there be a substantial benefit to the public or a section of it before legal aid will be provided is inappropriate. It fails to recognise that the community has a definite interest in ensuring that discrimination does not occur in individual cases".⁹ Accordingly, the Senate Committee recommended that the guideline in relation to the provision of legal aid in discrimination matters be amended to remove the second condition. This recommendation (Rec. 13, p.122) has not been adopted by the Commonwealth.

Draft Recommendation 6.1 of the Productivity Commission's draft report states that "the Attorney-General should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system". VLA thinks that this recommendation does not go far enough and that immediate steps can be taken to achieve greater access to legal representation/assistance. Broadening the legal aid guidelines would improve access and ensure that a class of socio-economically disadvantaged disabled complainants who meet the means and merit test would be assured of legal representation

VLA submits that either the 'public interest' requirement should be removed from the Commonwealth guidelines or these two requirements need to be in the alternative. A grant of aid should be available to an individual complainant to redress a specific grievance if the case has merit. It is also important in circumstances where there are either significant legal principles under review or where minimum standards under the DDA are threatened that these issues are pursued in the public interest and that can only occur if the complainant is legally represented.

⁹ Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System (Final Report), Canberra, 1998, p.xxi.

VLA also submits that additional Commonwealth funding should be provided for essential services that do not involve a grant of legal aid. Such services to assist complainants include the provision of seminars and publications, telephone and duty lawyer services and minor casework.

RECOMMENDATION 6: VLA recommends that appropriate legal information and assistance should be available to individuals who wish to bring disability discrimination complaints.

RECOMMENDATION 7: VLA recommends that the provision of appropriate legal education, information and assistance, functions which fit squarely within the statutory and strategic objectives of all legal aid commissions, be better resourced by government.

RECOMMENDATION 8: VLA recommends amending the Commonwealth guidelines to allow VLA to broaden its operations to better facilitate the objects of the DDA.

3.3 Technical Aspects of the DDA that Influence the Effectiveness of the Act

While VLA has not provided a response to all aspects of the Productivity Commission's inquiry, it supports other submissions that address particular features, namely:

- the approaches of the Equal Opportunity Commission Victoria (EOCV) and HREOC to the definition of disability under the DDA,
- the approach of HREOC to the term "Unjustifiable Hardship" as it is treated in the DDA, and
- the approaches of the EOCV and HREOC to the term "Reasonable Adjustment," as it is treated under the DDA.

3.3.1 Definition of Discrimination and Disability under the DDA

The Commission's Draft findings 6.4 – 6.5 with respect to people with cognitive disabilities recognise "practical limitations" in achieving equality before the law. VLA submits that the recent decision of *Purvis v NSW (Department of Education and Training)*¹⁰ significantly restricts the capacity of the DDA to address discrimination against people with intellectual disability or acquired brain injury. In light of the judicial determinations in this area⁹¹¹ the Productivity Commission's findings do not go far enough in crystallising equality before the law for people with cognitive disabilities.

Legislative reform will be required to address the issue that discrimination "on the grounds of a disability" is not included in the definition of "discrimination" where the behaviour is a manifestation of an individual's disability, as this case highlighted.

¹⁰ High Court of Australia, [2003] HCA 62 (11 November 2003)

¹¹ Ibid.

Access to redress of grievances for people who experience disability discrimination should not be determined by the nature and manifestation of their disability. Consequently, VLA submits that the definition of “disability” in the DDA should remain broad so that it does not constitute a technical legal barrier to addressing disability discrimination.

RECOMMENDATION 9: VLA recommends that the DDA be amended to reflect a recognition that discrimination “on the grounds of a disability” should include discrimination on the basis of behaviour that is a manifestation of an individual’s disability.

3.3.2 Areas of Application of the DDA and Exemption under the DDA

The DDA specifies or lists particular areas where disability discrimination is unlawful. However, because Australia lacks comprehensive constitutional protection of human rights, and because the DDA is one of Australia’s few pieces of legislation that does have human rights protection as its focus, an alternative approach should be adopted. VLA submits that the current ‘listing’ of areas where the law would apply is insufficient. An alternative approach introducing an assumption that the DDA applies in all contexts unless stated otherwise in the legislation ought to be instituted. VLA proposes that the system be comprehensive and that relevant areas, industries or bodies apply to opt-out of the coverage.

RECOMMENDATION 10: VLA recommends that the DDA should be amended so that it is assumed to apply to all contexts unless otherwise stated in the Act.

3.3.3 Complaints-Based Focus of the DDA

VLA recognises that a complaints-based system of addressing disability discrimination is essential but must be coupled with broader initiatives that address systemic discrimination. A complaints-based system must provide a potential complainant with the following:

- ready access to knowledge of their rights under the DDA,
- adequate aid and assistance to ensure they can successfully engage with the complaints system, and
- a remedy should be available that is able to address the substance of a complaint.

The Productivity Commission’s draft report partially addresses the issue of accessibility by promoting the establishment of a HREOC “shopfront presence” in each State. VLA supports the expansion of HREOC’s presence in each state but also considers that there is a real imperative for increased funding to empower HREOC in a role that will engage complainants from initiation through to a determination.

3.3.4 Knowledge of Rights under the DDA

A great hurdle for people suffering disability discrimination is a lack of knowledge of their rights under the DDA, for especially for people with disabilities who are already socially marginalised.

VLA submits that this knowledge must be provided in a format accessible to people with a wide range of disabilities and backgrounds, and in a diverse range of contexts. As noted above, this will only be possible where appropriate resourcing of advocacy and legal organisations occurs.

The Productivity Commission's draft report focuses mainly on the capacity of HREOC to implement education and promotion of community awareness. It is submitted that such education should also extend to professional and business education and legal education. Greater funding should also be considered and allocated to allow a specific educational mandate with respect to disability discrimination beyond the role of HREOC.

RECOMMENDATION 11: VLA recommends that initiatives be undertaken to improve the level of awareness of rights and responsibilities under the DDA more accessible.

RECOMMENDATION 12: VLA recommends that since education of industry, professionals and the broader community, as well as extensive public debate, are essential elements of an agenda which wishes to adequately address disability discrimination, these activities should be more vigorously promoted and better resourced.

RECOMMENDATION 13: VLA recommends that appropriate legal information and assistance should be available to individuals who wish to bring disability discrimination complaints.

3.3.5 Adequate Assistance to Negotiate the Complaints System

Peoples' access to the complaints system is effected by a range of factors which include:

- the nature of the complainant - including the nature of the disability, language skills, social & cultural background, ability to prepare, knowledge of rights and of the complaints system, &
- the nature of the system - including its complexity, costs and formal requirements.

VLA submits that support and assistance is vital to ensure the accessibility of the complaints system for most complainants.

VLA believes that an increase in the need for legal assistance of complainants is a direct consequence of the changes to the complaint procedure under the DDA which has pushed more matter into the slower and more costly litigation pathway. A complaint that is not successfully conciliated at HREOC (the first tier) must be pursued by the complainant in the Federal Court or Federal Magistrates Service (the second tier)¹². Court proceedings are both formal and adversarial and are more complex than the previous regulatory regime managed by HREOC.

¹² The first tier 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

VLA has observed that, unlike the previous HREOC procedure that was less formal and more inquisitorial, the Federal Magistrates Service conducts complaints within the confines of the traditional adversarial system. VLA submits that the Federal Magistrates Service should provide specialist training for magistrates and mediators including, for example, equal opportunity training and cross-cultural training, to ensure a more accessible process.

Alternatively, VLA submits that a more appropriate forum for addressing disability discrimination complaints is a tribunal, mirroring the approach at the Victorian Civil & Administrative Tribunal under the *Equal Opportunity Act* (Vic) 1995.

Regrettably, the Federal Magistrates Service system has also increased the procedural costs and complexity for the complainant. Most importantly, cost orders are now being awarded against a complainant who loses their case because magistrates apply the common law “costs follow the event” rule. These costs discourage complainants from taking their complaint to court and seriously limit the accessibility of the complaints system, and consequently the effectiveness of the DDA. 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”.¹³

VLA submits that a specific provision be inserted in the DDA to address such barriers to the complaints system. VLA also submits that court cost exemptions should apply to bona fide complainants. Respondents who are, however, subjected to frivolous or vexatious complaints should be protected by the overarching discretion of the Magistrate to make appropriate costs orders in such circumstances.

RECOMMENDATION 14: VLA recommends a review of the approaches taken to disability discrimination matters in the Federal Court and the Federal Magistrates Service.

RECOMMENDATION 15: VLA recommends that a more appropriate forum for dealing with disability discrimination matters is one akin to a tribunal.

RECOMMENDATION 16: VLA recommends that the DDA be amended to remove the common law rule that “costs follow the event”, to protect complainants against potential costs orders.

3.3.6 Remedies Available under the DDA

Like other anti-discrimination legislation, the DDA provides a raft of statutory remedies, including permanent interim injunctive relief and orders for compensation. The Court is also given broader power to order “such relief as it thinks fit” (s. 46PO (4) of the *HREOC Act* 1986).

place. If the complaint is not settled at conciliation the complainant has the choice to have the matter referred to the Federal Magistrates Service for determination by the Magistrate (Section 46PO(1) of the *HREOC Act*).

¹³ Ryan v Presbytery of White Bay Sunshine Coast [2001] FMCA 12 at para 20.

Given that the DDA (and other anti-discrimination legislation) is publicly beneficial legislation, VLA is of the view that the courts ought to provide creative remedies to address the wrongs caused by discriminatory conduct and, in particular, to address the wrongs caused to disadvantaged groups (rather than individual complainants/victims) who are intended to be protected by the DDA.

It is VLA's experience that the courts have, however, tended to read down the discretion and have applied the common law principles used in respect of other purportedly analogous causes of action. Also, courts have generally applied an individualised focus on the complaint that ignores the class-wide ramifications of discrimination. When addressing disability discrimination, the court has generally confined itself to making interim orders, or providing permanent injunctive relief, within the narrow parameters of the common law. For example, the granting of compensatory relief is limited by the constraints of the common law's "compensatory principle". In other words the choice of remedies is not expanded to focus beyond the parameters of the common law.

This approach seriously limits the court's ability:

- to satisfactorily redress an individual's grievance;
- to ensure further discrimination of a similar nature does not occur; and
- to address systemic causes of discrimination, for example - review of relevant broader policy concerns which could prevent discrimination against others.

This limitation restricts the effectiveness of the DDA in fulfilling its objectives, provides insufficient deterrence to future offenders and is also an inefficient approach towards addressing disability discrimination. VLA submits that in addition to awarding compensation, the court should have the legislative authority to award injunctive relief that has benefits beyond the individual complainant. Such benefits should also extend to members of the complainant group, for example - Kooris, the deaf, gays and lesbians. This could also include the implementation of broader and more creative anti-discrimination policies.

Amendments are required to the *HREOC Act* to empower courts to order injunctive relief that will deliver benefits to and improve the general position of the relevant claim or group effected. For example, the racial vilification amendment made to the *Anti-Discrimination Act* (NSW) in 1989 includes a remedial power to order the development of a "program or policy aimed at eliminating unlawful discrimination". (ADA s.113(b)(iib)).

The courts could also be empowered to order remedies such as the building of a Cultural Centre for Kooris. This remedy was sought by indigenous complainants in a NSW race discrimination case but was refused by the relevant tribunal on the basis that it could only remedy the individual complainant's losses (Wagga Wagga Aboriginal Action Group v Eldridge - (1995) EOC 92-701 - EOTrib(NSW - 19/05/1995)). Another example may be the funding of an organisation for the blind on behalf of a complainant who is blind and the victim of discrimination.

As draft finding 12.6 of the Commission's draft report acknowledges, the development of disability standards has been very slow, therefore there is a real need to expand the social relevance of individual remedies as alluded to in draft finding 11.11.

Expanded court remedies which include disability standard development programs would constructively complement the individual-based focus of current remedies and would be a powerful input toward addressing systemically entrenched sources of disability discrimination.

RECOMMENDATION 17: VLA recommends that the remedies available under the DDA be extended beyond compensatory measures.

3.3.7 Representative Actions under the DDA

VLA strongly supports the reintroduction of the power of the DDA Commissioner to initiate complaints. VLA also supports the introduction of the power of representative disability organisations to initiate complaints under the DDA. In this respect we support the submission made by the Victorian Equal Opportunity Commission (VEOC)¹⁴. In particular we refer to chapter 4 of their submission titled “The need for a new approach”.

RECOMMENDATION 18: VLA recommends that the power of the DDA Commissioner to initiate complaints under the DDA be reintroduced.

RECOMMENDATION 19: VLA recommends that the power of representative disability organisations to initiate complaints be introduced to the Act.

3.3.8 The Role of HREOC

VLA believes that the HREOC has done an excellent job in carrying out its mandate under the DDA in the 10 years of the legislation. Many of the submissions made to this inquiry highlight the positive outcomes reached for complainants through the complaint process.

Some impediments to accessing a remedy under the DDA, thus limiting the effectiveness of the DDA, are caused by the limitations placed on the role of HREOC. These limitations are primarily caused by inadequate resourcing of the Commission. Funding cuts to HREOC have resulted in long delays in the processing of complaints. Many complainants give up pursuing their matter because of sheer frustration caused by this procedural delay and denial of justice. HREOC does not have an office in Victoria. This means that complaints have to be forwarded to Sydney, but more importantly, the Commission does not have a physical presence in the State. This presence is important for the Commission to provide:

- access to substantive and procedural information for parties to proceedings;
- the provision of educative material and programs for industry and the broader community; and
- consultation with appropriate entities in order to improve the regulatory system, for example the provision of appropriate referrals to parties to proceedings.

¹⁴ Equal Opportunity Commission Victoria, “*Submission in response to the Productivity Commission Inquiry into the Disability Discrimination Act 1992*”

VLA submits that an appropriate level of funding be available to reduce delays in the processing of complaints. VLA submits that an office of HREOC be established in Victoria in order to facilitate access to the regulatory regime.

The overall operation of the DDA could be improved by allowing HREOC the capacity to pro-actively promote and protect the human rights of people with disabilities. This is essential when addressing systemic and structural discrimination. VLA submits that HREOC should be given a broader mandate to enable it to address systemic discrimination via the following measures:

- that HREOC, as the primary national human rights institution in Australia, ought to be guaranteed its independence in accordance with the Paris Principles.¹⁵ 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 government,
- that HREOC's inquiry power be used as a critical tool in enabling systemic issues to be addressed and should not be fettered by a lack of resources,
- that the power to initiate complaints should be reinstated to HREOC given firstly, that the disabled are often those that are most unable to initiate complaints due to lack of resources and community marginalisation, and secondly given that HREOC no longer has the power to make binding determinations,
- that HREOC play a role in investigating the use of action plans under the DDA and reform of the DDA be made to allow for the enforcement of action plans by HREOC, and
- that the intervention power of HREOC should not be made subject to the veto of the Attorney General as is proposed under the *Australian Human Rights Commission Legislation Bill* 2003 (the subject of a Senate Legal and Constitutional Legislation Committee report tabled in Parliament on 28 May 2003).

RECOMMENDATION 20: VLA recommends that HREOC obtain additional funding assistance to reduce delays in the processing of complaints.

RECOMMENDATION 21: VLA recommends that a HREOC office be established in Victoria in order to facilitate access to the regulatory regime under the DDA

RECOMMENDATION 22: VLA recommends that HREOC be given a broader mandate.

3.3.9 Two Regulatory Regimes

There are obvious advantages and disadvantages for complainants where complaints systems exist at both a Commonwealth and State level. Complainants will have to negotiate an additional level of complexity when deciding to lodge a claim. However, it is possible that they may be able to address their concerns in one system better than in the other.

¹⁵ The United Nations Principles relating to the Status of National Institutions Competence and Responsibilities ('the Paris principles') derived from the UN Human Rights Commission Resolution 1992/54 (3 March) 1992) annexed to and adopted by General Assembly Resolution 48/134 (20 December 1993).

VLA submits that the current inquiry consider and review the extent to which complainants are able to access redress of grievances. The capacity of any system to provide sufficient recognition of the fundamental human rights that the regimes were instituted to protect should also be considered.

RECOMMENDATION 23: VLA recommends that review of the overlapping State and Federal regimes consider the extent to which complainants are able to access redress of grievances and also the extent to which each regime sufficiently recognises the fundamental human rights that it was instituted to protect.

4. Competition and the Economic Effects of the DDA

The objectives of the DDA are to facilitate the equal participation of everyone in society. Discrimination and misconceptions about the capacity of people with disabilities limits the ability of individuals and society to achieve their potential. For example, discrimination by employers acts to distort the market of employment services because it prevents otherwise capable (but disabled) workers from achieving their economic potential.

The principle of equal participation in society is important in its own right. There is a need to dispel an assumption often made that this principle automatically exists as a cost when conducting an economic analysis. It is pleasing that draft finding 8.4 of the report acknowledges the real “social capital” of positively reinforcing and/or expanding the application of the DDA.

In this context VLA submits that regulation of disability discrimination by the DDA should not be assumed to inevitably constitute both an economic cost and a negative influence on competition. It is important that this assumption is not at the basis of this inquiry. This does not mean that an investigation of the effectiveness of the DDA should not address issues of economics and competition. VLA submits that these considerations are vital aspects of a successful inquiry.

An extensive and sufficient consideration of the effects of the DDA on matters of economics and competition is beyond the expertise of VLA. As a consequence, VLA submits that a comprehensive, complete and balanced analysis of this area of regulation, with careful consideration of the methodological approach, should be conducted by an appropriate and suitably qualified agency. The outcome of this analysis should be integrated into an overall assessment of the DDA that considers the following:

- Misconceptions and dominant mindsets exist in our society regarding the capacity of people with disabilities to contribute socially, politically, culturally and economically. These misconceptions and mindsets have had the effect of isolating and marginalising people with disabilities.
- The view that people with disabilities should participate equally in society should not be advocated because of ‘charitable’ intentions alone, but rather be considered as necessary for the smooth functioning of a modern industrial society. The isolation and marginalisation of people with disabilities imposes a heavy social and economic burden on the community.

- Our society can afford to provide an acceptable standard of life for all, including access to services, education, social and leisure activities, markets, and importantly, a legal system that addresses limitations placed upon this access.
- Historically, Australia has been a leader in advancing some areas of human rights. The Australian government also represents itself as a worthy global and regional leader in the area of civil, political and human rights. Australian society is also represented as successfully accommodating diversity. A 'cost' of being able to maintain this position is the implementation of effective disability discrimination law.
- Whilst there may be good will and changing attitudes towards disability discrimination in industry and the broader community this is not sufficient to effectively address the incidence of disability discrimination. It is quite clear that without the application of appropriate and effective regulation and education, disability discrimination can only be addressed on an ad hoc basis. The 'cost' of an effective anti-discrimination system lies not only in its creation, but also in its continuing accessibility.

RECOMMENDATION 24: VLA recommends that regulation of disability discrimination by the DDA should not be assumed to constitute both an economic cost and a negative influence on competition.

5. Conclusion

The DDA both protects the rights of the individual and seeks to set acceptable minimum human rights standards. Legislation of this nature should not only be proclaimed in law but in addition receive policy and funding priority.

In this context, VLA is concerned by two recent government initiatives:

- the *Australian Human Rights and Commission Legislation Bill 2003*; and
- support of a reciprocal obligation model to define the provision of assistance to many people with disabilities.

VLA submits that the Government should show greater leadership in the area of disability discrimination and introduce policy initiatives that assist the broader focus of the DDA.

Government policy initiatives should include:

- working more closely with HREOC to develop standards of equality under the DDA in all the areas where disability discrimination is prohibited;
- the investigation and implementation of an effective education campaign for industry and the community regarding rights and responsibilities under the DDA;
- the investigation of the availability of legal assistance to those experiencing disability discrimination with a view to instituting a scheme or funding program that addresses its findings; and
- the investigation and assessment of other Commonwealth legislation, instruments or regulations in terms of their consistency with the DDA. A process of reform should then be instituted to address any inconsistencies.

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RECOMMENDATION 25: VLA recommends that the Government demonstrate greater leadership in the area of disability discrimination and introduce policy initiatives that assist the broader focus of the DDA.

RECOMMENDATION 26: VLA recommends that the Government assist HREOC in the development of standards under the DDA in all areas where disability discrimination is prohibited.

RECOMMENDATION 27: VLA recommends that the Government investigate and assess other Commonwealth legislation, regulations, or instruments in terms of their consistency with the DDA. A process of reform should then be instituted to address any inconsistencies.

VLA would welcome the opportunity to elaborate upon the comments made in this submission and engage in future aspects of this inquiry.

Yours faithfully

A handwritten signature in cursive script that reads "A. Parsons".

TONY PARSONS
Managing Director