

Presiding Commissioner Helen Owens  
Disability Discrimination Act Inquiry  
Productivity Commission  
Locked Bag 2  
Melbourne 8003

February 5, 2004

Dear Commissioner Owens

Please find attached a Submission from Women With Disabilities Australia (WWDA) in response to the Productivity Commission Draft Report 'Review of the Disability Discrimination Act 1992'. Women With Disabilities Australia (WWDA) will also be attending the Public Hearing in Hobart to discuss the Draft Report and its recommendations.

The WWDA Management Committee and WWDA members look forward to studying the outcomes of this process.

Please contact me if you require any additional information.

Yours sincerely

Carolyn Frohmader  
Executive Director

# Women With Disabilities (Australia)

Submission to the Productivity  
Commission Draft Report 'Review of the  
Disability Discrimination Act 1992'

February 2004

## Synopsis

Women With Disabilities Australia (WWDA) Inc. is a not-for-profit organisation constituted and driven by women with disabilities. Its members and managers are all women with disabilities. It also has a very diverse membership base, with associate members from a wide range of sectors - all who support the self-determination of women with disabilities.

This paper is a Submission in response to the Draft Report 'Review of the *Disability Discrimination Act 1992*', authored by the Commonwealth Productivity Commission. Women With Disabilities Australia (WWDA) is making this Submission, because women with disabilities are disproportionately denied equal respect and dignity 'in the provision of certain goods, services, accommodation and premises. Where the Submission recommends reforms, it clearly evidences why they are practicable, cost-effective ones. required 'in the interests of human rights, liberal democracy and the Rule of Law.

### **C WOMEN WITH DISABILITIES AUSTRALIA (WWDA) INC. 2004.**

This Submission was researched and written by Samantha Salvaneschi, and edited by Jennifer Bridge-Wright, for Women With Disabilities Australia (WWDA) Inc.

## Contents

## Page

Acknowledgements and Disclaimer .....	4
Recommendations .....	5
Introduction .....	7
Request for Information and Draft Recommendation 10.2 on the Act's costs and benefits .....	7
Draft Finding 9.2: Model of Disability .....	9
Draft Recommendation 9.1: Definition of disability .....	10
Draft Findings 5.6, 5.7 and 6.2: The people that the Act is failing .....	12
Optimising the Benefits of the Representative Action Provision .....	13
Enabling organisations to bring actions in their own right .....	14
Draft finding 6.1: Industrial Awards .....	15
References .....	18
Appendices .....	20

## **Acknowledgements**

Women With Disabilities Australia (WWDA) gratefully acknowledges the support it received in 2003-2004 from the Global Fund For Women and the Commonwealth Department of Family and Community Services.

As ever, Women With Disabilities Australia (WWDA) is very thankful for the advice it receives daily from women with disabilities. Without their expertise, the policy advocacy of Women With Disabilities Australia (WWDA) - such as this Submission - would not be possible.

## **Disclaimer**

Women With Disabilities Australia (WWDA) Inc. is a member-driven, independent body with no affiliations with any political party (More information about WWDA is provided in Appendix 1).

Its members, Executive Officer and Committee of Management members are all women with disabilities. Concerns about direct and indirect discrimination underpin all of the organisation's policy priorities.

Consequently, Women With Disabilities Australia (WWDA) is very committed to policy advocacy on the protection of the human right of women with disabilities to equality of access to education, premises,

Women With Disabilities Australia (WWDA) Inc. has published this Submission to advance this policy advocacy. The organisation hopes that the Submission will be of value to women with disabilities; advocates; parliamentarians; judicial officers; policy-makers; researchers; philanthropists; and members of other communities of interest.

## Recommendations

### Recommendation 1:

That, in the development of its Final Report, the Productivity Commissioners pays due regard to:

- the biases in the Competition Policy concepts, particularly 'costs', 'anti-competitiveness' and 'inefficiency'.
- the benefits of strong anti-discrimination regulation and the costs of not having such regulation.

### Recommendation 2:

That, the Productivity Commissioners include Draft Recommendation 10.2 in the Final Report.

### Recommendation 3:

That the Productivity Commissioners should revise:

- Draft Finding 9.2 to remove the statement *A definition of disability based on the social model is not practical.*
- the Draft Report, to recommend that the Act's definitions of 'disability' and 'discrimination' are amended to explicitly situate them within the International Classification of Functioning, Disability and Health (ICF) framework.

### Recommendation 4:

That the Productivity Commissioners recommend that Parliament should amend the Disability Discrimination Act 1992 to clarify that substance dependence is a disability for the purposes of the Act and to stipulate that if a disability is a disability under the Act, then behavioural manifestations of it are too.

### Recommendation 5:

That the Productivity Commissioners recommend in the Report that:

- the Parliament request the Australian Law Reform Commission to inquire into how to advance public interest litigation. This inquiry should cover representative actions taken in the public interest under disability discrimination law. This inquiry should also canvas how to abolish the severe financial impediments to accessing the courts for the purposes of such litigation. In particular, it should make recommendations on policy and law for court orders of costs in public interest cases.
- the Parliament amend the Act to allow the Human Rights and Equal Opportunity Commission and other appropriate bodies to bring actions in their own right under the Disability Discrimination Act 1992.
- the Government adequately funds the Human Rights and Equal Opportunity Commission and community legal centres to extensively design and deliver education about representative actions (and actions in one's own right, if they are enacted into being).
- the Government adequately funds the Human Rights and Equal Opportunity to develop and publicise easily understood guidelines on who may lodge a complaint under the procedures for

representative actions (and 'own right' ones, if there is law providing for them) and how and when.

- the Government adequately funds the Human Rights and Equal Opportunity to develop and publicise easily understood advice on who provides funding for representative actions (and 'own right' actions, if the law provides for them) and on the basis of what application procedures, eligibility and priority rules.
- the Government should also adequately fund the Human Rights and Equal Opportunity Commission, community legal centres - including disability specific legal services - as well as other appropriate bodies to bring, or advise others on bringing, representative and 'own right' actions.

The Productivity Commissioners should also comprehensively account for the opportunity costs of not implementing each of these proposals, as well as the sum of them.

### **Recommendation 6:**

That the Productivity Commissioners should recommend in their Report that the Parliament amend the Workplace Relations Act 1996 to confer upon the President of the Human Rights and Equal Opportunity Commission the rights to intervene in proceedings of the Australian Industrial Relations Commission. The Commissioners should also recommend that the Parliament model these rights on section 167(2) of the New South Wales Industrial Relations Act 1996.

## Introduction

In the following, Women With Disabilities Australia (WWDA) comments on the Commonwealth Productivity Commission's Draft Report 'Review of the *Disability Discrimination Act 1992*'. This document may be accessed at [www.pc.gov.au](http://www.pc.gov.au)

Women With Disabilities Australia (WWDA) has elected to address only a selection of the Draft Report's Requests for Information, Findings and Recommendations. They are the Draft Requests, Findings and Recommendations that Women With Disabilities Australia (WWDA) possesses intelligence on that seems not to have already received adequate treatment in the Review.

Naturally, some of the Draft Report's matters are beyond the mandate and expertise of Women With Disabilities Australia (WWDA). There are no statements furnished on these.

The Submission begins with a roll-out of the concepts that it uses throughout. In so doing, it attempts to deepen the reader's understanding of the costs of Australia lacking adequately enforceable and enforced law against disability discrimination. It also suggests the types of savings that grow out of serious disability discrimination regulation.

The Submission then commends some reforms to reclaim those parts of the Act's coverage that certain case law has eroded. It then proposes a renewal of representative actions. It also argues for a restoration of the power of parties, other than individually aggrieved ones, to bring actions in their own right. In addition, it explains why it is necessary for the Parliament to empower the President of the Human Rights and Equal Opportunity Commission to intervene in certain proceedings. Finally, the Submission endorses the codification of standards in the Disability Discrimination Act.

Women With Disabilities has focused the Submission on practicable responses to reverse the sharp losses in the Act's potential to meet its Objects.

## Request for Information and Draft Recommendation 10.2 on the Act's costs and benefits

In the Draft Report, the Productivity Commissioners request information on the nature of the costs and benefits of the disability discrimination law. Apropos this request, Women With Disabilities Australia (WWDA) urges the Productivity Commissioners to hold in mind the following.

First, the Competition Policy is an unsuitable basis for analysis of the savings that flow from robust anti-discrimination regulation. It is also ill-equipped to detect the costs of not having such regulation. This is because the Competition Policy is predicated on neo-classical economics. This paradigm of economics is not given to recognising the savings in seriously protecting human rights and the costs in failing to do so. Instead, it privileges debits and credits that are easily detected and measured in highly positivist, quantitative terms.

Second, as Draft Finding 8.4 acknowledges, the Federal legislation proscribing disability discrimination has the potential to make significant savings by reinforcing people's sociable behaviours. These behaviours forge bonds between people, which increase the likelihood that they will enjoy good health and create material and cultural wealth. The latter is those inventions and rituals that enrich people's lives. They can be ethical, linguistic, aesthetic, mechanical, zoological or botanical in nature. A society's cultural wealth, for example, includes the nurturance of children by inclusive schools.

Such nurturance generates more cultural wealth, namely the children's healthy development. It also



contributes to the society's material wealth by ensuring that the children will not need rehabilitation from a life of abuse.

Conversely put, when a society fails to defend a minority's human rights, members of that minority are more likely to become ill, homeless or otherwise deprived. These deprivations incur significant costs to themselves and people and institutions around them.

Other serious costs are also incurred by weak human rights protections. These include falls in the:

- citizenry's respect for the Rule of Law, particularly among people who flout, and witness others flouting, human rights law with impunity; and
- health and well-being of carers who, often unsupported, care for the people who are suffering from discrimination.

All of the above costs inexorably spill from the communities discriminated against into other communities. Often socio-economically privileged groups can shield themselves from almost all of this spill-over. This costs avoidance reduces the cost efficiency of the anti-discrimination regulation. This is because the privileged are the decision-makers who possess the power to make or not make people's disabilities disabling; and; they are unlikely to duly consider the costs incurred by discrimination and the savings accrued by anti-discrimination regulation, if they never stand to pay a substantial amount of the costs.

Accordingly, the Productivity Commissioners must sufficiently consider the interestedness of the models of costs and savings that the Submissions use for disability discrimination regulation. As the Public Interest Advocacy Centre comments in its Submission to the Review, employers and other respondents often exaggerate the costs of complying with the current disability discrimination law, particularly with its requirement of 'reasonable adjustment'. This exaggeration is likely to be motivated by the respondent wishing to bear out that it the adjustment would constitute 'unjustifiable hardship'.

Women With Disabilities Australia (WWDA) urges the Commissioners to critically reflect on several questions before determining that an actual or potential regulatory tool is too costly for potential respondents. First, who is bearing the costs of the particular discrimination that the tool would regulate; who is bearing the costs of the present regulatory tools; how large are the costs relative to the bearers capacity to pay; and who should be meeting some of the costs but is not?

In this connection, Women With Disabilities Australia (WWDA) highly commends Draft Recommendation 10.2. This recommends that:

*The criteria for determining unjustifiable hardship in the Disability Discrimination Act 1992 (s.11) should be amended to clarify that community-wide benefits and costs should be taken into account.*

**Recommendation 1:**

That in the development of its Final Report, the Productivity Commission pay due regard to:

- The biases in the Competition Policy concepts, particularly 'costs', 'anti-competitiveness' and 'inefficiency'.
- The benefits of strong anti-discrimination regulation and the costs of not having such regulation.

**Recommendation 2:**

That, the Productivity Commissioners includes Draft Recommendation 10.2 in the Final Report

## Draft Finding 9.2: Model of Disability

Women With Disabilities Australia (WWDA) disagrees strongly with Draft Finding 9.2. It states that it is impractical for the Act to define disability in accordance with the 'social model' of disability and should continue to define it in medical terms.

The World Health Organisation's International Classification of Functioning, Disability and Health (ICF) is based on an integration of the medical and social models, to provide a coherent view of functioning and disability from a biological, individual and social perspective (<http://www3.who.int/icf/icftemplate.cfm>). It is an internationally endorsed framework and classification that the World Health Assembly has encouraged national institutions to adopt. Some Australian institutions are in the midst of actively implementing it, in a wide range of contexts (see AIHW 2003a, Section 10; and the ICF Australian User Guide [www.aihw.gov.au/disability/icf](http://www.aihw.gov.au/disability/icf)).

The Productivity Commission Review of the Act is an excellent opportunity to harmonise the Act's terms with those of the ICF (see the Second Australian Institute of Health and Welfare Submission to the Review). This is critical if Australia is ever to possess nationally and internationally comparable data on people with disabilities. Such data are necessary for robust estimates of, say, the proportion of all Australian women with disabilities who have lodged complaints under the Act.

Such data is also fundamental to any sound assessment of the degree to which people with particular disabilities - for instance, women with psychiatric disabilities - are equitably receiving services that evidence shows they direly need. Such services include housing and reproductive health ones. The Human Rights and Equal Opportunity Commission conducts such assessments in the inquiries into human rights that it conducts under the Act. Further, it records and reports data on the characteristics of complainants and the nature of complaints.

Other organisations can optimally use these data, if they are comparable to those of the World Health Organisation the Australian Institute of Health and Welfare and the Australian Bureau of Statistics. The latter two organisations are aligning their data collections with the ICF For example, the 1998 Australian Bureau of Statistics Survey of Disability, Ageing and Carers drew on definitions from the predecessor of the ICF This was the World Health Organisation's International Classification of Impairments, Disabilities and Handicaps (ICIDH). However, the Bureau has made its 2003 Survey consistent with the ICF

The Productivity Commission's Draft Report recommends that Parliament amends the Act's definitions. In discussing this proposal, it refers to the ICIDH. Yet, the Draft Report makes no reference to the ICF Worse, it presents definitions and key terms that are unambiguously inconsistent with the ICF This is erroneous because the ICF is the current tool of international classification. Moreover, it was so before the Productivity Commissioners developed the Draft Report.

The Draft Report compounds this serious error, by referring to the 1988 Australian Bureau of Statistics Survey definitions. As noted above, these are ICIDH definitions and the Bureau is harnessing future surveys to the ICF

Bickenbach et al have made compelling arguments for basing anti-discrimination law on the ICF (forthcoming in 2004, in the journal *Social Science and Medicine*). Women With Disabilities Australia concurs with these arguments.

The ICF, unlike the Act, unequivocally posits that it is a society's choices that interact with the biological state of a person's disability to make it more or less disabling. Bickenbach et al put it this way:

the ICF definition *justifies anti-discrimination law and policy by identifying society as responsible for the disadvantage associated with impairments.*

This 'biopsychosocial' definition of disability is, thus, far more apt than that in the current Act.

Women With Disabilities Australia believes it is highly possible to develop definitions of 'disability' and 'discrimination' that are practicable and fundamentally consistent with the ICF. One option is to retain the Act's current definitions, but amend the Act to explicitly present them in ICF terms. So drafted, the definition of 'disability' in Section 4 of the Act would look much like this:

*"disability" in relation to a person, means problems in body function or structure such as significant deviation or loss, and includes: ... [points (a) to (g) in current definition]*

The Act's current definition of 'discrimination' turns on how the 'discriminator' treats a person with a disability. Such a definition sits easily within the ICF 'environmental factors'. These factors are human-made barriers that adversely affect the capacity of a person with a disability from carrying out activities.

The Act specifies that one of its objects is to eliminate discrimination on the grounds of disability in a range of spheres. These include access to education, employment, and so on. These spheres squarely fit within the ICF definition of activities and participation (see Second Australian Institute of Health and Welfare Submission to the Review).

### **Recommendation 3:**

That the Productivity Commissioners should revise:

- Draft Finding 9.2 to remove the statement *A definition of disability based on the social model is not practical.*
- The Draft Report, to recommend that the Act's definitions of 'disability' and 'discrimination' are amended to explicitly situate them within the International Classification of Functioning, Disability and Health (ICF) framework.

### **Draft Recommendation 9.1: Definition of disability**

Women With Disabilities Australia (WWDA) agrees with Draft Recommendation 9.1. It reads:

*The definition of disability in the Disability Discrimination Act 1992 (s.4) should be amended to ensure that it includes:*

- *medically recognised symptoms where a cause has not been medically identified or diagnosed.*
- *genetic abnormalities and conditions*
- *behaviour that is a symptom or manifestation of a disability.*

Other changes to the definition are, however, also necessary because of recent court decisions.

In a decision dated 15 November 2000, the Federal Court held that opium dependency is a disability for the purposes of the Act (*Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* (2000) FCA 1619 15 November 2000). In the wake of this case, people questioned whether any substance dependence constitutes a disability for the purposes of the Act, and, if so, in what circumstances.

Hence, the Act needs to be amended to provide that any substance dependence that the World Health Organisation defines as substance dependence will be a disability for the purposes of the Act. The WHO definition encompasses dependence on licit and illicit substances, irrespective of the reason for

that dependence (World Health Organisation, [http://www.who.int/substance\\_abuse](http://www.who.int/substance_abuse)

Other court decisions have narrowed the Act's coverage.

The Federal Court in *Alex Purvis v State of New South Wales* (New South Wales Department of Education) ([2002] FCAFC 106) and the Federal Magistrates Court in *State of New South Wales v Human Rights and Equal Opportunity Commission and Alex Purvis* (FCA 29 August 2001) both held that behaviours *per se* are not a disability, under the Act, even if they are a clear manifestation of the disability.

The plaintiff must not only show that the behaviour is caused by the disability. They must also demonstrate that the behaviour is the direct result of the disability.

In justifying the decision, Justice Emmet of the Federal Court commented that:

*It would have been possible for parliament to define disability by reference to symptoms that have a particular cause. For example, it would have been possible to define disability as disturbed behaviour that results from a disorder, illness or disease* (paragraph 38).

In a similar case, Federal Magistrate Raphael reserved judgment on whether the applicant's behaviours, manifesting from their disability, constituted a disability for the purposes of the Act. In so doing, the Court tentatively referred to a disability/manifestation dichotomy (*Minns v State of NSW* [2002] FMCA 60, paragraph 267).

Women With Disabilities Australia (WWDA), thus, recommends that the Act be amended to stipulate that if a disability is regarded as a disability under the Act, then behavioural manifestations of that disability are too. This change is already in Recommendation 9.1.

What is not is that, if the Parliament is concerned about the breadth of this protection, it should add a proviso that is not too narrow. This should be that the applicant must cite a sound body of evidence that, but for the disability, it is unlikely the applicant would have exhibited or exhibited such a high degree of the behaviours.

This ad hoc clause should not prescribe who the authors of this evidence should be. However, it should specify that it is not necessary that sound evidence in not to be interpreted as undisputed evidence. In an age of orthodox and alternative health specialists, and rapidly developing medical knowledge, the Parliament should leave it open who the class of authority will be in the particular circumstances of each case.

## **Draft Findings 5.6, 5.7 and 6.2: The people that the Act is failing**

Women With Disabilities Australia (WWDA) agrees with Draft Finding 5.6. It reads:

*The Disability Discrimination Act 1992 appears to have been more effective for people with mobility and sensory impairments than those with a mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation.*

Women With Disabilities Australia (WWDA) agrees with Draft Findings 5.7 to the extent that it suggests that people with disabilities who are Indigenous, from non-English speaking backgrounds, and those residing in regional and rural areas are subjected to an array of human rights abuses and ones that significantly reduce their capacity to avail themselves of individual complaints processes.

Women With Disabilities Australia (WWDA) agrees with Draft Findings 6.2 to the extent that it recognises that People with disabilities living in institutional settings face particular barriers to achieving equality before the law. Women With Disabilities Australia (WWDA) also agrees with Findings 6.4 and 6.5 to the extent that they suggest that people with cognitive difficulties are subjected to an array of human rights abuses and ones that significantly reduce their capacity to avail themselves of individual complaints processes.

People who are highly subjected to discrimination are usually the very same people who are most unable to avail themselves of conventional, public remedies.

For example, women with disabilities are disproportionately subjected to discrimination in terms of their access to suitable housing, employment, education and a number of other basic human rights. Those of them who have cognitive and/or psychiatric disabilities also tend to experience extremely high rates of violence (Carmody 1990; Cattalini 1993; Hard 1986; McCarthy and Thompson 1996; Mulder 1996).

Often times, the perpetrator is their 'carer' or someone else upon whom they are very reliant. The perpetrator may also be a member of the organisation that is doing the discriminating (Sobsey and Doe 1991; Sobsey and Mansell 1992).

Violence often renders a person quite unable to make a formal complaint to the Human Rights and Equal Opportunity Commission. This is so, notwithstanding that the Commission helps people to form their complaints via a toll-free telephone number, a city office and referrals to advocates and interpreters.

Even if someone is not being assaulted, if they complain about a service provider, they risk triggering unfavourable treatment by those staff members who are employed by the provider. This is particularly likely, if the complainant has so-called 'high and complex support needs' and if they are living in accommodation provided and serviced by the respondent.

This would not be of much consequence, if the person enduring the discrimination had the option of obtaining services from another service provider. Unfortunately, women with disabilities, among other minorities, often cannot choose upon whom they depend for many of life's essentials.

They have limited purchasing power because they are disproportionately disadvantaged in the labour, education and housing markets. They cannot readily change health professionals who understand how their disability/ies impact on their well-being. Also, many specialists have closed their 'books' or are prohibitively expensive. Similarly, they often find it well nigh impossible to find affordable and

Accessible housing that is near jobs and health and other services (Papanicolaou and Fitch Consultants 1997).

Cases such as these could be ideally accommodated by a representative action. This is because an organisation can bring such an action for an aggrieved person or class of aggrieved people, without identifying them. The Human Rights and Equal Opportunity Act already provides for these actions, but organisations have seldom brought such actions.

Women With Disabilities Australia (WWDA) commends this anonymous representative action as one answer - although, hardly the whole answer - to the Draft Report's Request for Information on how to address people's fears of being victimised for making a complaint under the Act.

Even if a person with a disability who is not in fear of such victimisation, indigenous people, people from ethnic-minorities and people with cognitive, psychiatric, neurological and/or speech disabilities often find it difficult to use formal complaints process. Among other reasons, this is because the process fails to accommodate their preferred modes of communication. It is also because the stressful dimensions of the process put people with some disabilities at risk of becoming ill or exacerbating their illness.

In circumstances such as these, the Human Rights and Equal Opportunity Commission or another appropriate body could bring a representative action for the aggrieved individual or class of individuals.

Person(s) who was/were afraid of reprisals, and/or uncomfortable with the formal individual complaints process, could also benefit from an action that an appropriate body, such as the Human Rights and Equal Opportunity Commission, brought in its own right.

## Optimising the Benefits of the Representative Action Provision

In the experience of Women With Disabilities Australia (WWDA), few of the organisations that are interested in advancing human rights know about the provision for representative complaints in the Human Rights and Equal Opportunity Act. This is consistent with Draft Finding 7.8, 7.9 and 7.11 on the need for the Commission to heighten awareness of the terms of the Act.

In its first submission to the Inquiry, the Human Rights and Equal Opportunity Commission states that: *Use by disability community organisations of the representative action procedure has been limited to date.*

The Commission Also comments that:

*A number of important cases have involved representative actions but others with equally broad systemic significance have been brought by individuals.*

*In some areas covered by the DDA cases, a successful complaint will almost inevitably have a systemic impact whether it is brought on an individual or representative basis ... In these instances there is little additional benefit in using the more complicated provisions for representative actions.*

*There may be more advantage in use of the representative procedure in areas where outcomes in individual complaints are not being reflected in broader systemic change. There have been suggestions that this is occurring on some issues in insurance and in education.*

These comments by the Commission suggest that it is failing to take seriously the range of pay-offs of representative actions and the costs flowing from a dearth of them. Alternatively, the Commission may

be unable to take this option seriously because most organisations lack the financial resources to bring representative actions.

In any event, the Government should promptly request the Australian Law Reform Commission to inquire into how to advance the quantity and quality of public interest litigation. This inquiry should cover representative actions taken in the public interest under disability discrimination law. It should inquire into how to eliminate the severe financial impediments to community sector organisations accessing the courts. In particular, it should make findings and recommendations on the policy and law governing court orders of costs in public interest cases.

## Enabling organisations to bring actions in their own right

Women With Disabilities Australia (WWDA) recalls that the Act originally provided for the Commissioner to lodge a complaint or initiate court proceedings, in her own right.

Many citizens and community sector bodies regarded this power as essential to the regulatory scheme's achievement of changes that countered systemic discrimination. This was not least because most concerned individuals and bodies possess scarce resources to legally or otherwise challenge such entrenched discrimination.

However, in 1999, the Parliament removed this provision for an 'action in its own right'. Even before this amendment, the Commissioner was unable to use the provision, due to defects in its drafting.

Amendments to the Human Rights and Equal Opportunity Act have stripped it of its former power to conciliate complaints and make tribunal determinations. This eliminates the risk of perceived or actual conflicts of interest or biases in the Commission initiating an action in its own right.

As is the case with representative actions, an absence of actions brought by suitable bodies in their own right incurs large opportunity costs.

The Government should give the Australian Law Reform Commission a reference to inquire into which organisations, in which circumstances, should have standing to bring actions in their own right under the Disability Discrimination Act. This reference should require the Commission to consult with relevant parties about how the standing rules can protect people who are subjected to disability discrimination and court resources from inappropriate parties and actions.

Once an 'action in its own right' provision is enacted, the Government should adequately fund the Human Rights and Equal Opportunity Commission to:

- develop and publicise easily understood guidelines on who may lodge a complaint under the representative action procedure and how and when;
- develop and publicise easily understood advice on who provides funding for representative actions and on the basis of what application procedures, eligibility rules and order of priority.
- advise bodies that are considering bringing a representative complaint.

The guidelines should include case studies of how Australian and overseas organisations employed representative actions to challenge breaches of human rights law.

The Government should also adequately fund the Human Rights and Equal Opportunity Commission, community legal centres - including the disability discrimination, HIV/AIDS, mental illness and other

disability specific legal services – as well as other appropriate bodies to bring representative and ‘own right’ actions and advise organisations that are considering bringing such actions.

#### **Recommendation 5:**

That the Productivity Commissioners recommend in the Report that:

- The Parliament request the Australian Law Reform Commission to inquire into how to advance public interest litigation. This inquiry should cover representative actions taken in the public interest under disability discrimination law. This inquiry should also canvas how to abolish the severe financial impediments to accessing the courts for the purposes of such litigation. In particular, it should make recommendations on policy and law for court orders of costs in public interest cases.
- The Parliament amend the Act to allow the Human Rights and Equal Opportunity Commission and other appropriate bodies to bring actions in their own right under the Disability Discrimination Act 1992.
- The Government adequately funds the Human Rights and Equal Opportunity Commission and community legal centres to extensively design and deliver education about representative actions (and actions in one’s own right, if they are enacted into being).
- The Government adequately funds the Human Rights and Equal Opportunity to develop and publicise easily understood guidelines on who may lodge a complaint under the procedures for representative actions (and ‘own right’ ones, if there is law providing for them) and how and when.
- The Government adequately funds the Human Rights and Equal Opportunity to develop and publicise easily understood advice on who provides funding for representative actions (and ‘own right’ actions, if the law provides for them) and on the basis of what application procedures, eligibility and priority rules.
- The Government should also adequately fund the Human Rights and Equal Opportunity Commission, community legal centres – including disability specific legal services – as well as other appropriate bodies to bring, or advise others on bringing, representative and ‘own right’ actions.

The Commissioners should also comprehensively canvas in the Report the opportunity costs of not doing each of these actions, as well as the sum of them.

### **Draft finding 6.1: Industrial Awards**

Women With Disabilities Australia (WWDA) disagrees strongly with Draft Finding 6.1. It reads:

*Current arrangements in the Human Rights and Equal Opportunity Act 1986 (s.46) dealing with discriminatory acts under Awards are appropriate.*

It is difficult to understand how the Productivity Commissioners concluded this given Draft Finding 5.1. It states:



*The number of complaints under the Disability Discrimination Act 1992 and participants' views indicate that disability discrimination in employment remains a significant issue. Overall, the Act appears to have been least effective in reducing discrimination in employment*

Section 46 of the Human Rights and Equal Opportunity Act is not nearly enough, given there are no legislative provisions for redress of Awards that are discriminatory in and of themselves under the Disability Discrimination Act (see the New South Wales Anti-Discrimination Board Submission to the Review). Section 46 provides no such counter-measure and nor do the rest of the Human Rights and Equal Opportunity Act, the Disability Discrimination Act or the Workplace Relations Act.

There is ample evidence in the Draft Report of the disadvantaged position of women, with disabilities, in the achievement of fair pay and conditions, as compared to any group including men with disabilities. Hence, the Productivity Commissioners should consider recommending an amendment to the Workplace Relations Act that would confer rights upon the President of the Human Rights and Equal Opportunity Commission to intervene in proceedings of the Federal Industrial Relations Commission.

The Productivity Commissioners should also consider recommending that the Parliament model these rights on the exemplary ones provided by section 167(2) of the New South Wales Industrial Relations Act 1996.

These rights enable the President of the New South Wales Anti-Discrimination Board to intervene in some proceedings of the New South Wales Industrial Commission. These proceedings are ones that entail unlawful discrimination under the New South Wales Anti-Discrimination Act.

Section 169(4)(b) also empowers the President to apply to the Industrial Relations Commission to vary those terms of an industrial instrument that will give rise to discrimination that is unlawful under the Act.

In addition, Section 187(d) empowers the President to appeal against a decision of a single member of the Commission, if the President assesses that that decision is inconsistent with the principles of the Anti-Discrimination Act.

In tandem with ongoing, effective education of industrial parties, the judicious exercise of these rights by the Human Rights and Equal Opportunity Commissioners should reduce the extent to which individuals find themselves in circumstances that arise from the terms of industrial awards and agreements and amount to an action under the Disability Discrimination Act.

Embedding intervention rights for the President of the Human Rights and Equal Opportunity Commission in the *Workplace Relations Act* can only enable the Industrial Relations Commission to better fulfill its anti-discrimination obligations in law. These obligations are specified by the *Workplace Relations Act*. They mandate that the Industrial Relations Commission will ensure that the terms of industrial instruments do not discriminate on certain grounds including disability. These provisions include section 143(1C)(f) in relation to awards and section 170LU(5) in relation to certified agreements.

The intervention rights can also only enable the Human Rights and Equal Opportunity Commission to better meet the requirements of section 93 of the Human Rights and Equal Opportunity Act. These requirements are that in the performance of its functions, the Commission takes account of the principles related to employment in the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*.

**Recommendation 6:**

That the Productivity Commissioners should recommend in their Report that the Parliament amend the Workplace Relations Act to confer upon Human Rights and Equal Opportunity Commissioners the rights to intervene in proceedings of the Federal Industrial Relations Commission. The Productivity Commissioners should also recommend that the Parliament model these rights on the exemplary ones provided for by section 167(2) of the New South Wales *Industrial Relations Act 1996*.

## References

- Anti-Discrimination Board of New South Wales (NSWADB) (2003): Submission to National Competition Policy Review of the Disability Discrimination Act 1992. Sydney: NSWADB.
- Australian Institute of Health and Welfare (AIHW) (2003a): Australian ICF user guide version 1.0. AIHW Cat. No. DIS 33. Canberra: AIHW.
- Australian Institute of Health and Welfare (AIHW) (2003b): Second Submission to National Competition Policy Review of the Disability Discrimination Act 1992. Canberra: AIHW.
- Bickenbach, J., Gray, D., Madden, R., Walsh, J. and Bricknell, S. (forthcoming). 'ICF and disability policy outside the domain of health'. *Social Science and Medicine*.
- Carmody, M. (1990): Sexual Assault of People with an Intellectual Disability. Sydney: New South Wales Women's Coordination Unit.
- Cattalini, H. (1993): Access to Services for Women with Disabilities who are Subjected to Violence. Canberra: Department of Prime Minister and Cabinet, Office of the Status of Women, National Committee on Violence against Women.
- Hard, S. (1986): Sexual Abuse of the Developmentally Disabled: A Case Study. Paper presented at the National Conference of Executives of Associations for Retarded Citizens. Omaha, Nebraska.
- McCarthy, M. and Thompson, D. (1996): 'Sexual abuse by design: An examination of the issues in learning disability services', *Disability and Society*, vol. 11, no. 2, pp. 205-217
- Mulder, L. (1996): Reclaiming our Fights: Access to Existing Police, Legal and Support services for Women with Disabilities or who are Deaf or Hearing Impaired who are Subject to Violence. Sydney: Department for Women.
- Papanicolacou and Fitch Consultants (1997): Housing Needs of People with a Disability Living with Ageing Parents. Melbourne: Victorian Department of Community Services, Office of Housing.
- Productivity Commission (2003): Review of the Disability Discrimination Act 1992, Draft Report, Melbourne: Productivity Commission.
- Public Interest and Advocacy Centre (PIAC) (2003): Submission to National Competition Policy Review of the Disability Discrimination Act 1992. Melbourne: PIAC.
- Sobsey, D. and Doe, T. (1991): 'Patterns of sexual abuse and assault', *Journal of Sexuality and Disability*, vol. 9, no. 3, pp. 243-259.
- Sobsey, D. and Mansell, S. (1992): 'The prevention of sexual abuse of people with developmental disabilities', *Network*, vol. 2, no. 3, pp. 8-17.
- WHO (World Health Organisation) (2001): International Classification of Functioning, Disability and Health. Geneva: WHO.
- WHO, [http://www.who.int/substance\\_abuse](http://www.who.int/substance_abuse). (accessed 1 January 2004).

## **Cases**

Alex Purvis v State of New South Wales (New South Wales Department of Education) ([2002] FCAFC 106)

Minns v State of New South Wales [2002] FMCA 60

State of New South Wales v Human Rights and Equal Opportunity Commission and Alex Purvis (FCA 29 August 2001)

## **Appendix 1: About Women With Disabilities Australia (WWDA)**

Women With Disabilities Australia (WWDA) was incorporated in 1995 and evolved from the National Women's Network within Disabled People's International Australia (DPIA), where it had been operating as an un-funded Network for some eight years. WWDA was initially established by a group of women with disabilities who felt that their needs and concerns were not being acknowledged or addressed within the broader disability sector, or the women's sector in Australia.

Women With Disabilities Australia (WWDA) is the peak organisation for women with all types of disabilities in Australia. It is a federating body of individuals and networks in each State and Territory of Australia and is made up of women with disabilities and associated organisations. The national secretariat is located in Tasmania, an island State of Australia. WWDA is run by women with disabilities, for women with disabilities. It is the only organisation of its kind in Australia and one of only a very small number internationally. WWDA is inclusive and does not discriminate against any disability. WWDA seeks to ensure opportunities in all walks of life for all women with disabilities. In this it aims to increase awareness of, and address issues faced by, women with disabilities in the community. WWDA seeks to ensure the advancement of education of society to the status and needs of women with disabilities in order to promote equity, reduce suffering, poverty, discrimination and exploitation of women with disabilities. WWDA is unique, in that it operates as a national disability organisation; a national women's organisation; and a national human rights organisation.

WWDA addresses disability within a social model, which identifies the barriers and restrictions facing women with disabilities as the focus for reform.

The aim of Women With Disabilities Australia (WWDA) is to be a national voice for the needs and rights of women with disabilities and a national force to improve the lives and life chances of women with disabilities.

The objectives of Women With Disabilities Australia (WWDA) are:

- to actively promote the participation of women with disabilities in all aspects of social, economic, political and cultural life;
- to advocate on issues of concern to women with disabilities in Australia; and
- to seek to be the national representative organisation for women with disabilities in Australia by:
  - undertaking systemic advocacy; providing policy advice;
  - undertaking research; and providing support, information and education.

More information about Women With Disabilities Australia (WWDA) can be found on WWDA's website at:  
[www.wwda.org.au](http://www.wwda.org.au)

## Appendix 2: The Position Of Women With Disabilities In Australia - A Snapshot

Women with disabilities are, from the government record, one of the most marginalised and disadvantaged groups in Australia. Analysis of data available from a variety of sources, gives us the following information about women with disabilities in Australia.

There are 3.6 million people in Australia with a disability, making up 19% of the total population. The proportion of males and females with a disability is similar (around 9.5% each) although it varies across age groups.

There are 1.8 million women with disabilities in Australia. There are more women with disabilities in the older age groups, most notably those 79 years onwards.

Of the 1.1 million people with a profound or severe core activity restriction, 616,000 are women with disabilities (56%). Among older people with disabilities, the rates of severe and profound disability are markedly greater for females.

Over 57% of women with disabilities living in households need assistance to move around or go out, shower or dress, prepare meals, do housework, undertake property maintenance or paperwork, or communicate.

Women with disabilities are less likely to be in paid work than other women, men with disabilities or the population as a whole. Men with disabilities are almost twice as likely to have jobs than women with disabilities. In 1997-98 Commonwealth Government funded open employment services assisted over 31,000 people with disabilities in their efforts to find and maintain jobs on the open labour market. 66.6% of those assisted were men with disabilities. Annual Census of Commonwealth Government funded open employment services show that the percentage of women with disabilities being assisted by these services has continued to decline.

Women with disabilities' participation rates in the labour market are lower than men with disabilities' participation rates across all disability levels and types. Women with disabilities are less likely than men with disabilities to receive vocational rehabilitation or entry to labour market programs. Commonwealth Rehabilitation Services statistics for 1994/5 indicate only 35% of referred clients were female with women more likely to be rehabilitated to independent living (45%) than vocational goals (36%).

Women with disabilities earn less than their male counterparts. 51% of women with a disability earn less than \$200 per week compared to 36% of men with a disability. Only 16% of women with a disability earn over \$400 per week, compared to 33% of men with a disability.

There is a higher incidence of incapacity (10.2%) for unemployed females in Australia compared to unemployed males (7.6%). This applies consistently across all age groups. Unemployed females have a one-third greater incidence of incapacity than unemployed males. The higher incidence of incapacity for unemployed females is more pronounced for those under 50 years age, and especially for 30-39 and under 21 year olds.

Women with disabilities are less likely than their male counterparts to receive a senior secondary and/or tertiary education. Only 16% of all women with disabilities are likely to have any secondary education compared to 28% of men with disabilities.

Women with disabilities are substantially over-represented in public housing, comprising over 40% of all persons in Australia aged 15-64 in this form of tenure. Women with disabilities are less likely to own their own houses than their male counterparts.

Women with disabilities pay the highest level of their gross income on housing, yet are in the lowest income earning bracket. Some women with disabilities pay almost 50 per cent of their gross income on housing and housing related costs. Over 20% of women with disabilities living in public housing are dissatisfied with the service they receive from their State or Territory housing authority.

Women with disabilities spend more of their income on medical care and health related expenses than men with disabilities.

Women with disabilities have a consistently higher level of unmet need than their male counterparts across all disability levels and types. Women with disabilities are less likely to receive appropriate services than men with equivalent needs or other women. 60% of recipients of disability support services funded under the Commonwealth/ State Disability Agreement are men with disabilities.

Women with disabilities are less likely than women without disabilities to receive appropriate health services, particularly breast and cervical cancer screening programs, bone density testing, menopause and incontinence management. In Australia, 41% of women with disabilities with core activity restriction aged 70-75 have never had a mammogram. Almost 30% of women with disabilities aged 70-75 with core activity restriction have never had a pap smear. Of those women with disabilities aged 70-75 core activity restriction who have had a pap smear, 39% have not had regular pap smears (every 2 years). These figures are likely to be much higher for women with disabilities with different disability types (eg: intellectual, cognitive, psychiatric, deaf/hearing impaired, blind/visually impaired) across all age groups.

Girls and women with disabilities are more likely to be unlawfully sterilised than their male counterparts. Between 1992-1997 at least 1045 girls with disabilities in Australia have been unlawfully sterilised. Comparisons with other data sources suggest that the true number is much greater, perhaps by a factor of several times.

Regardless of age, race, ethnicity, sexual orientation or class, women with disabilities are assaulted, raped and abused at a rate of at least two times greater than non-disabled women. Statistics indicate that 90% of women with intellectual disabilities have been sexually abused. 68% of women with an intellectual disability will be subjected to sexual abuse before they reach 18.

Women with disabilities are more likely to be institutionalised than their male counterparts.

Women with disabilities are often forced to live in situations in which they are vulnerable to violence. They are more likely to experience violence at work than other women, men with disabilities or the population as a whole.

Access to telecommunications is a major area of inequity for women with disabilities in Australia. A national survey in 1999 found that 84% of women with disabilities are restricted in their access to telecommunications. 49% of women with disabilities are restricted by issues of affordability; 76% by poor design of telecommunications equipment; 20% by lack of training; 20% by lack of information; and 18% by discrimination.

*(Sources: Anderson 1996; Frohmader 1998; WWDA 1998; WWDA 1999, ABS 1999, ABS 1993, AIHW 1998, AIHW 1999, AIHW 2000, Currie 1996, Brady & Grover 1997, Temby 1997, Cooper & Temby 1997, Horsley 1991, Binstead 1997, Rutnam, Martin-Murray & Smith 1999, Warburton et al 1999).*