Submission to
Senate Legal and Constitutional Affairs Committee

Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

12 January 2009

People with Disability Australia Incorporated

Introduction to People with Disability Australia Incorporated

People with Disability Australia Incorporated is a national disability rights and advocacy organisation. We exist within the international human rights framework and provide a number of activities, which include individual, group and systemic advocacy, consumer protection, information, education and training.

Individuals with disability and organisations of people with disability are our primary voting membership. We also have a large associate membership of people and organisations committed to the disability rights movement.

We were founded in 1980, in the lead up to the International Year of Disabled Persons (1981), to provide people with disability with a voice of our own. We have a fundamental commitment to self-help and self-representation for people with disability, by people with disability.

We have a cross-disability focus – membership is open to people with all types of disability. Our services are also available to people with all types of disability and their associates.

We are governed by a Board of directors, drawn from across Australia, all of whom are people with disability. We employ a professional staff to manage the organisation and operate our various projects. A majority of our staff members are also people with disability.

We are part of an international network of disabled people's organisations through Disabled Peoples International.

We are a non-political, non-profit, non-governmental organisation incorporated under the Associations Incorporation Act 1984 (NSW).

Our activities are supported by substantial grants of financial assistance from the Commonwealth and New South Wales Governments, as well as a growing number of corporate and individual donors. This financial assistance is acknowledged with great appreciation.

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1. Executive Summary

PWD welcomes the Government's action on the Disability Discrimination Act 1992 (DDA). PWD supports anti-discrimination legislation as one of the tools for protecting the rights of people with disability.

PWD participated in the Productivity Commission's (PC) Inquiry which reviewed the DDA. The report from the PC's inquiry is the primary source of the amendments currently before the parliament.

PWD has focused its comments on the parts of the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (the Bill) that deal with disability discrimination. As a human rights organisation PWD is interested in the effect of other anti-discrimination legislation on its members. The timeframe for this Inquiry, however, does not allow us the time to comment on the other sections of the Bill.

PWD welcomes the overdue attention to the DDA. PWD supports the strengthening of the DDA and clarifying those sections which have been contested. However, PWD is disappointed that the opportunity to make other changes, those called for by the disability sector over a number of years, has not been taken. PWD also notes that a number of important recommendations and findings of the Productivity Commission have not been addressed.

PWD believes that the DDA needs strengthening. When the DDA is compared to other federal anti-discrimination legislation such as the Sex Discrimination Act or the Racial Discrimination Act its weakness it clear. These Acts do not contain the number of exemptions nor contain tests such as unjustifiable hardship. When discrimination is too costly for the perpetrator to incur then the cost will be borne by the individual and society more broadly. These other Acts largely have exemptions that relate to achieving substantive equality for the people these Acts are intended to protect the rights of. The DDA arguably contains the widest range of exemptions, leading to the largest number of government endorsed discriminatory actions.

If you would like to discuss any of the matters raised in this submission, please contact Dean Price, Advocacy Project Manager, in our Systemic Advocacy Unit on 02 9370 3100 or email deanp@pwd.org.au

2. Definitions

2.1 Definition of Disability

PWD supports the clarification and extension of the definition of disability. PWD agrees with the PC's assessment that a "broad definition helps avoid genuine complaints of discrimination failing at the first hurdle – determining whether or not the person concerned is covered by the DDA. This helps focus attention on the discriminatory action rather than the person concerned".

PWD is concerned that the PC recommendation relating to medically recognised symptoms where the underlying cause is unknown has not been included in the expanded definition of disability contained in the Bill.

Recommendation: That the definition of disability in the DDA be expanded to include medically recognised symptoms where the cause is unknown, as per PC recommendation 11.1

2.2 Definition of Discrimination

PWD has advocated for the definition of discrimination to be clarified. PWD believes that some weakness of the DDA comes from the confusing number of references to the intended outcome of the DDA, equality, and its many forms. PWD believes that the objects of the DDA should explicitly say that the goal of the DDA is to achieve substantive equality and not just equality of opportunity.

Recommendation: That the goals of the DDA are amended to include the goal of substantive equality for people with disability.

3. Other Legislation

3.1 Migration Act 1958

PWD welcomes the implementation of the PC recommendation 12.3 clarifying that the administrative processes of the Migration Act 1958 are subject to the DDA. However PWD is concerned that other aspects of the Migration Act 1958 are still exempt. The current migration regime views people with disability as burdens on society, lacking inherent value. The recent experience of Dr Bernhard Moeller is a case in point. Ensuring the Migration Act 1958 is subject to the DDA would be in line with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Recommendation: That the Migration Act 1958 is made to be subject to the DDA and the Migration Act 1958 is reviewed and amended to ensure compliance with the DDA.

3.2 Electoral Act 1918

PWD is concerned that over 15 years has lapsed since the Federal government passed the DDA yet the Federal electoral system has not caught up with the intent of the legislation and the electoral system does not provide for a fully accessible electoral process.

PWD agrees with the PC finding 9.7 that access to polling places and electoral information varies and is inadequate. PWD supports the PC recommendation 9.2 with regards to the need for amendments to the Electoral Act 1918. However PWD thinks that this finding and recommendation do not go far enough. The PC recommendations go some way to addressing the needs of people with physical and sensory impairments. These recommendations do not adequately deal with the needs of people with other impairments, such as mental illness and intellectual disability.

PWD finds it unacceptable that:

- a number of people with disability, such as those with a vision impairment, cannot cast a secret ballot,
- a number of people with physical impairment cannot access their local polling place to cast their vote,
- hearing augmentation or AUSLAN interpreters are not widely available to people with hearing impairment,
- easy English and other accessible forms of information are not widely distributed to people, including people with intellectual impairment.

PWD has concerns about section 93 part (8) of the Commonwealth Electoral Act 1918. PWD believes the concepts in this section are not well defined. The Act states that a citizen may be disqualified from voting if the person "is, because of being of unsound mind, incapable of understanding the nature and significance of enrolment and voting".

The Federal Government has now ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Article 29 of the UNCRPD, 'Participation in Political and Public Life' and outlines signatories' responsibilities. PWD believes that this framework must be adhered to and would urge the parliament to make further legislative change before the next federal election.

Recommendation: That an Inquiry be undertaken by HREOC and the AEC into discrimination in the area of elections.

3.3 Occupational Health and Safety Act 1991

PWD is aware of many examples of the prioritisation of Occupational Health and Safety (OH&S) laws over the DDA. PWD is supportive of workers rights to safe and healthy work places. PWD is concerned with the regular number of reports from members and clients where OH&S legislation and policy is used as an excuse to undertake discriminatory actions. The PC finding 12.7 suggests that this conflict should be addressed. PWD is concerned that the Bill does not address this conflict.

Recommendation: That the finding 12.7 of the PC review of the DDA be addressed by the Commonwealth Government.

4. Unaddressed Productivity Commission Recommendations & Findings

4.1 De-institutionalisation

PWD supports the PC finding 9.4 which says that the de-institutionalisation of people with disability needs to be assisted by access to disability services. It goes on to say that "there are major limitations on the use of the Disability Discrimination Act 1992 to challenge government decisions about the provision of disability services." PWD is concerned that this has not been addressed in the Bill.

Recommendation: That the DDA be amended to allow government decisions to be challenged addressing finding 9.4 of the PC review of the DDA.

4.2 Complaints

PWD supports the PC recommendation 13.5 that would allow disability organisations to initiate complaints. This would extend to proceeding to the court system when necessary. PWD is concerned that this recommendation is not part of the Bill.

Recommendation: That the DDA incorporate recommendation 13.5 of the PC review of the DDA, allowing disability organisations to initiate complaints.

4.3 People with disability not benefiting from the Disability Discrimination Act

The PC's findings reinforced what many of us know – the DDA is benefiting some groups of people with disability while having limited positive impact for others.

The PC's findings 5.7 and 5.8 outline a number of people who are not experiencing as many positive outcomes. The PC report said that people with "mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome" are not experiencing the same benefits as people with mobility and sensory impairments. The PC also found that people living in institutional accommodation or from rural areas are not seeing the same benefits from the DDA as those living in the community or in cities. It also found that people experiencing multiple sources of discrimination, such as people with disability from a culturally and linguistically diverse background having less success than others.

PWD is concerned that these findings have not been addressed. Some of these issues could be addressed through the implementation of the PC recommendation 13.5 (allowing disability organisations to initiate complaints). The PC also found that Disability Discrimination Legal Services and Disability Advocacy Organisations play a key role in assisting people with disability to enforce their rights. While it is outside of a legislative response, PWD would recommend that the government take action on this and increase the access of people with disability to these services by increasing funding of these services. Similarly the PC finding 15.3 suggests that underfunding of the Australian Human Rights Commission undermines the effectiveness of the DDA.

This is likely to have a disproportionate effect on those who currently do not benefit from the DDA.

PWD also believes that many of the findings of the PC must be considered within the National Disability Strategy, which is currently being developed by the federal government. Some of the findings do not require a legislative response within the DDA but can be addressed through high level policy direction and inter-governmental responses.

4.4 Vilification

PWD believes that the situation regarding PC finding 11.8 has now changed. PWD suggests that through the ratification of the UNCRPD and the Commonwealth's External Affairs powers that the Government is now in a position to legislate against the vilification of people with disability.

4.5 Disability Services

The PC identified that access to disability services was another issue that limited people's ability to gain the full benefits of the disability discrimination act. PWD believes that the differing levels of unmet need for disability services across the country needs urgent attention. PWD hopes that these recommendations will be addressed through other government measures, such as the National Disability Reform Agenda, the National Disability Agreement and at a higher level through the National Disability Strategy.

5. Strengthening the DDA

5.1 Reasonable Adjustments

PWD supports the amendments that make it clear that refusing to make a reasonable adjustment can amount to discrimination.

PWD also believes that there should be no cost to the person with disability when it comes to making reasonable adjustments. It has been shown that people with disability already incur an additional non-discretionary cost of disability. PWD believes that when people have to pay for their own adjustments then it is no longer equitable and is discriminatory against those who cannot pay.

In the past PWD has also raised the issue that using the term 'reasonable adjustment' while having the test of 'unjustifiable hardship'. This imposes two tests on the implementation of measures that allow access and prevent discrimination. Neither the Sex Discrimination Act 1984 nor the Racial Discrimination Act 1975 requires such tests to be met.

Recommendation: That the test of 'reasonable' be removed as the test of 'unjustifiable hardship' should cover those accommodations that are 'unreasonable'.

5.2 Disability Standards

PWD welcomes the expansion of areas in which disability standards can be made.

PWD notes that the PC found that there should not be time limit set on the development of disability standards (finding 14.5). PWD understands the basis for this and the argument that a rushed disability standard would not be in the best interest of people with disability. However PWD believes that business is more likely to benefit by delaying the implementation of a disability standard than people with disability.

5.3 Proposed Indirect Discrimination

PWD thinks it is sensible to cover proposed acts of Indirect Discrimination under the DDA. This preventative stance will hopefully allow discrimination to be stopped before people experience it. This expansion of the definition of Indirect Discrimination will further strengthen the DDA.

6. PWD Recommendations

Recommendation: The definition of disability in the DDA be expanded to include medically recognised symptoms where the cause is unknown, as per PC recommendation 11.1

Recommendation: That the goals of the DDA are amended to include the goal of substantive equality for people with disability.

Recommendation: That the Migration Act 1958 is made to be subject to the DDA and the Migration Act 1958 is reviewed and amended to ensure compliance with the DDA.

Recommendation: That an Inquiry be undertaken by HREOC and the AEC into discrimination in the area of elections.

Recommendation: That the finding 12.7 of the PC review of the DDA be addressed by the Commonwealth Government.

Recommendation: That the DDA be amended to allow government decisions to be challenged addressing finding 9.4 of the PC review of the DDA.

Recommendation: That the DDA be incorporate recommendation 13.5 of the PC review of the DDA, allowing disability organisations to initiate complaints.

Recommendation: That the test of ‘reasonable’ be removed as the test of ‘unjustifiable hardship’ should cover those accommodations that are ‘unreasonable’.