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Disability Discrimination Amendment Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 140 2001-02

Disability Discrimination Amendment Bill 2002

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14 May 2002

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Disability Discrimination Amendment Bill 2002

Date Introduced: 14 February 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal sections start on Assent, and the effective provisions start either by Proclamation or, failing the making of a Proclamation, on the first day after 6 months has passed.

Purpose

To allow for exemptions to be granted from disability standards governing public transportation services and facilities.

Background

Section 31 of the *Disability Discrimination Act 1992* ('the DDA') provides for the making of standards. A breach of a standard is automatically regarded as a breach of the DDA (s. 32). Compliance with a standard is a defence to a claim of discrimination. The DDA gives the power to formulate these standards to the Attorney General, while reserving the power to review the standards to Parliament, according to typical arrangements made for delegated legislation. The following areas can be made the subject of standards:

- Transport
- Education
- Employment
- Accommodation
- Administration of Commonwealth Government Laws & Programs, and
- Access to Public Buildings (added following an amendment to the DDA on September 23, 1999).

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Standards made under s. 31 are essentially delegated or subordinate legislation, made on the basis that Parliament cannot be expected to legislate for the minutiae of government and there will be many aspects of the standards which must be changed regularly or which need detailed consideration not amenable to parliamentary enactment.

Standards are designed to deal with systemic discrimination without the need to resort to proving discrimination through a complaints based process under the Human Rights and Equal Opportunity Commission ('HREOC'). The use of standards in the DDA represents an innovative approach to anti-discrimination measures in Australia.

The Attorney-General has worked with a body called the Disability Discrimination Act Standards Project (more specifically with the Working Group on transport) to settle the transport standards. This body has been made up by members of the National Federation of Disability Consumer Organisations. As of April 2001 it had the following constituent members:

- Australian Association of the Deaf
- Blind Citizens Australia
- Deafness Forum of Australia
- Head Injury Council of Australia
- National Council on Intellectual Disability
- National Ethnic Disability Alliance
- Physical Disability Council of Australia
- Women with Disabilities Australia

In an earlier incarnation the Transport Standards Working Group took a strong stand against provisions being made for exemptions to standards, resolving that:

There are to be no exemptions for historical conveyances and structures, rental cars, or any conveyance or infrastructure.¹

However subsequent positions have been more accommodating to the proposal for exemptions, commenting with respect to 'up front exemptions and delegation of decision-making authority for unjustifiable hardship and 'equivalent access' proposals':

We understand that there are some legal questions concerning the draft Standard and the need to have a mechanism in place that can provide up front approval for equivalent access options and requests for exemption on the grounds of unjustifiable hardship. If this is necessary WE consider HREOC to be the most appropriate body to undertake this assessment so long as HREOC has the appropriate resources to do the work. In addition a process involving consultation with interested groups, similar to

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the current HREOC procedure for exemptions, must be applied. [emphasis in the original]²

The Attorney-General has made it clear that the Transport Standards will not be tabled until this Bill, providing for exemptions to the standards, is passed. The disability community has been waiting for a long time for these Standards to come into effect, and, in the event, there does not seem to be on-going objections to the proposed legislation.

While the DDA and the concept of standards have received bi-partisan support, the road to achieving transport standards has been a long one. The Attorney-General himself has observed that '[t]he Transport Standards have been a very long time in the making.'³ The DDA Standards Project website makes it clear they have been working towards the establishment of regulatory Standards since 1995.⁴ The draft Standards were first approved by the Australian Transport Council in June 1996 and after that approval was given there was a lengthy process which developed the Regulatory Impact Statement. The meeting of the Australian Transport Council which endorsed the Draft Standards in 1999 also agreed that the implementation of the Standards should be subject to an audit after one year and that 'the Standards themselves, which were developed in 1996, be reviewed after two years.'⁵ The Attorney-General has said that as soon as this Bill is passed he proposes to formulate and table the draft Transport Standards.⁶

The Attorney-General has nominated this Bill among his priorities for the Government's third term.⁷ The Shadow Attorney-General, while not quarrelling with the intent of the legislation, has complained that the Bill has been delayed by a shortage of sitting days in which to deal with legislative business.⁸ With this bi-partisan support of the Bill it seems likely its passage will be swift.

The DDA already makes provisions for exemptions from the Act to be granted by HREOC (s. 55, and see generally Division 5, which deals with a range of exemptions). Until now Standards have not been the subject of exemptions under the DDA, however this Bill seeks to change that situation.

Main Provisions

Item 2 of Schedule 1 makes provisions for standards to be the subject of an exemption. It does this by modifying s. 33 — the section which prevents Division 5 from applying to standards (Division 5 being the Division which deals with exemptions).

Item 3 of Schedule 1 inserts provisions into s. 55 which will allow HREOC to grant exemptions in relation to specific disability standards. The power to grant such an exemption will be confined to standards dealing with the provision of public transportation services and facilities.

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The new provisions under s. 55 provide that the HREOC must consult with the body or bodies which have been prescribed under regulations before making a decision on the granting of an exemption. The HREOC is also given the power to use its discretion to consult with other bodies which may not have been prescribed.

Item 6 provides for the making of regulations which prescribe a particular body (or bodies) that HREOC must consult before making a decision about the granting of an exemption. The Attorney-General has announced that the body which will be prescribed for that purpose will be the National Transport Secretariat.⁹

Concluding Comments

It is arguable that by providing for exemptions to be granted to Standards this Bill simply represents a logical extension of the pre-existing power to grant exemptions from the Act itself. The Attorney-General has commented that:

The ability to grant exemptions from these particular disability standards is an essential part of the standards implementation process and is an extension of the Commission's current power to grant exemptions from provisions of the Disability Discrimination Act.¹⁰

Despite the compromises that have been made along the way, the representatives of the disabled community who have worked on the standards believe that on balance it will be a good thing when they come into operation. In defending the standards they have commented:

...it is important to understand that Standards become regulatory laws which must be complied with. As such, State and Territory Transport Ministers have far less resistance from their respective 'Cabinets' and Treasury in getting approval for upgrading to accessible transport. We are informed that if they are just guidelines, there will be far less compliance in a systemic way to making transport accessible. Their priority status would immediately drop.

The Transport representatives and the Project agrees entirely with much of the concern expressed that we cannot afford for the Standards to be watered down any further as it becomes legal discrimination. We were very disappointed about the extension of the compliance timetable to 30 years for trains and trams but in reality, especially for trains, this does not mean people with disabilities won't be able to use them during this time-span.¹¹

It is also important to remember that, as the DDA Standards Project often points out, and as the Attorney-General also says, these Standards will not only benefit members of the disabled community but a very wide range of people in the general community:

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These standards will make it easier for older Australians, [...and] parents with infants in pushers or prams to use public transport. They will help to break down the social and economic barriers faced by people with a disability or mobility problem, and their carers and friends, and promote public awareness of this issue.¹²

Endnotes

1. The Consolidated Consumer Response to the Draft Accessible Public Transport Standards, January 1996 (available at <http://members.ozemail.com.au/~ddasp/DDAStandards1doc6.htm>).
2. DDA Standards Project 'Letter to ATC action March 1999', <http://members.ozemail.com.au/~ddasp/DDAStandards1doc3.htm>.
3. The Hon Daryl Williams, MP, Attorney-General 'The Disability Discrimination Act as a tool for change', Summit for peak disability organisations in Australia, Human Rights and Equal Opportunity Commission, Castlereagh Street, Sydney, Tuesday 4 December 2001.
4. <http://members.ozemail.com.au/~ddasp/DDAStandards1.htm>.
5. Australian Transport Council, Communique, 30 April 1999: <http://www.dotrs.gov.au/atc/atc8.htm>.
6. The Hon Daryl Williams AM QC MP, Attorney-General, 'Portfolio Priorities in the Howard Government's Third Term', *Press Release*, Tuesday, 5 February 2002.
7. *ibid.*
8. Robert McLelland, MP, 'Disability Bill held up by government legislative laziness', *Press Release*, 22 March 2002.
9. The Hon Daryl Williams AM QC MP, Attorney-General, 'Accessible Public Transport', *Press Release*, 14 February 2002.
10. *ibid.*
11. <http://members.ozemail.com.au/~ddasp/Transport%20Standard%20Update%200601.htm>.
12. The Hon Daryl Williams AM QC MP, Attorney-General, 'Accessible Public Transport', *Press Release*, 14 February 2002.

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