

**Department of Transport Energy and
Infrastructure
Response to the Senate Legal and
Constitutional Affairs Committee Inquiry into**

**The
Disability Discrimination and
Other Human Rights Legislation
Amendment Bill 2008**

January 2009

Executive Summary

South Australia is committed to the provision of services to people with disabilities and welcomes many of the changes being introduced under the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008.

The recommendations made by the Productivity Commission following its review of the *Disability Discrimination Act 1992* (the Act) in 2004 addressed many of the concerns related to the Act at the time. However, many issues in relation to the formulation, development and implementation of Standards under the DDA remain unresolved.

The Department for Transport, Energy and Infrastructure is highly supportive of the Productivity Commission review recommendations in relation to recommendations 14.4 and 14.5 as they promote monitoring and enforcement of disability standards by existing regulatory processes and the development of co-regulatory arrangements.

The Department for Transport, Energy and Infrastructure (DTEI) seeks to highlight the importance of these recommendations to the transport sector and the need for them to be addressed through amendments to the DDA.

The closing date of 12 January 2009 for comments to be made to the Legal and Constitutional Affairs Committee on the proposed amendments to the Act, limits this response.

DTEI requests leave to make a personal presentation to the Committee in order to expand on and clarify points raised in this submission and the reason for changes to be made to the proposed Bill.

Jim Hallion

Chief Executive
Department for Transport, Energy and Infrastructure

Date January 2009

Introduction

The Department for Transport, Energy and Infrastructure (DTEI) has clear priorities and directions arising out of both the South Australian Strategic Plan and the Strategic Infrastructure Plan for South Australia.

DTEI aims to provide services and infrastructure to meet South Australia's future transport and energy needs in a safe, efficient and ecologically sustainable way. Further, DTEI has a leadership role in the management of public sector assets, information and communication technology services and infrastructure to provide cost-effective access to government services for all South Australians.

In relation to meeting the objectives contained within the DDA, DTEI has lodged an Action Plan with HREOC. The work of the department has provided considerable experience in applying the legislative requirements of the Act across all aspects of providing transport services.

South Australia has been actively involved in the development and implementation of the Disability Transport Standards for Accessible Public Transport 2002 since their inception in 1995. Over this period the Department has repeatedly expressed concerns in relation to:

- agreement about what constitutes compliance with the Transport Standards;
- monitoring and reporting against compliance;
- lack of process for making required changes to the Standards;
- ambiguity and general confusion within the Standards;
- problems of interpretation of Federal legislation;
- the exemption process and associated issues;
- the 5 Year Review process;

- the absence of an agreed process for co-regulation, Industry Standards and or formal Action plans; and
- the relationship between the DDA and the Transport Standards.

These concerns have been raised by DTEI as part of the 5 Year Review of the Disability Standards for Accessible Public Transport 2002 which commenced early May 2007 and is yet to provide a final report.

DTEI seeks changes to the DDA to facilitate the development and implementation of compliance processes associated with the Transport Standards under the DDA to provide for the development of a co-regulatory model which would facilitate the objectives of the DDA.

Discussion

The Disability Standards for Accessible Public Transport tried to create certainty for both providers and people who use public transport. Six years on, there are many lessons that have been learnt and improvements that need to be made to the DDA in order for the Transport Standards to be effectively applied and administered.

While the Transport Standards were intended to clarify people's rights and responsibilities without having to resort to complaints and litigation, neither the Federal Attorney General's Office nor Human Rights and Equal Opportunity Commission (HREOC) is able to advise what constitutes compliance with the Standards. There is no final arbiter of what constitutes compliance as there is for building developers under the Building Code.

Throughout Australia, local arrangements have been adopted in order to progress implementation of the Transport Standards. However, they have no legal standing and could be challenged. Local interpretation or modification has been required in order to address the many difficulties and complexities associated with trying to comply with incomplete Standards. To suggest that the exemption process provides for such variation is to over-simplify the exemption process and consequent national implications.

Requiring recourse to the legal system to define what constitutes compliance is clearly inefficient and potentially ineffective and needs to be addressed in any proposed changes to the DDA.

Concerns related to implementation of the Standards are many and have been repeatedly raised in conjunction with the Federal Attorney General's Office and the Human Rights and the Equal Opportunities Commission (HREOC). The Productivity Commission's final report was received by the Australian Government on 5 May 2004 and was tabled in Parliament on 14 July 2004.

The Federal Government's response to the Productivity Commission review of the Disability Discrimination Act 1992 in January 2005 was that it was satisfied with many of the recommendations. Yet the current Bill does not adopt many recommendations raised by the Productivity Commission which could have addressed many of the concerns being expressed by the transport sector.

The Productivity Commission review contained 32 recommendations of which the Government stated it was prepared to accept 26 either in full, in part or in principle. The actions required to give effect to those recommendations would enhance the benefits of the DDA and ensure that it continued to provide net benefits to the Australian community as a whole.

For example the Productivity Commission Review stated in recommendation 14.4

- Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes.

The Federal Government indicated that it would accept this recommendation and suggested that consideration should be given to incorporating existing regulatory processes in the development of any future disability standards. The Federal Government cited the approvals process with the Building Code of Australia but recognised that there were currently no comparable processes for dealing with the Standards developed for public transport.

It is suggested that this recommendation needs to be given greater consideration in the Bill to ensure that Standards under the DDA are effectively addressed.

DTEI believes that compliance with the requirements of the Transport Standards can be achieved based on the same approvals process as other infrastructure in the Building Code.

In order to achieve this outcome it is suggested that the DDA be amended to provide for independent State certification of all Public Transport buildings and related infrastructure.

Similarly the Productivity Commission Review stated in recommendation 14.5

- Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.

The Federal Government accepted the recommendation at the time and stated that it was supportive of flexible approaches which encourage industry and service providers to take proactive steps to eliminate disability discrimination and noted that HREOC already actively engages with industry through processes such as issuing guidelines, and considering action plans and temporary exemption applications.

While the Attorney-General indicated that he would ask HREOC to put forward proposals for implementing this recommendation, the results of this are unclear.

The lack of attention in the current Bill on the range of issues that need to be addressed under a co-regulatory model is of concern.

DTEI questions the appropriateness of drafting changes to the DDA which do not address many of the fundamental issues which require clarification in relation to the implementation and administration of DDA Standards under the DDA and powers of the Commission to facilitate administration of DDA Standards.

The current Bill makes no provisions for Standards to be updated, modified or redefined to meet implementation criteria necessary for practical application or correct ambiguities or provide greater clarity.

The Bill's focus on the Commission's capacity to grant exemptions fails to recognise that exemptions are not the end product - they are only an interim process that may be locally driven and yet may have significant national implications and application. The Bill needs to address the larger picture associated with exemptions.

While it is recognised that the Attorney General may have a range of questions in relation to any co-regulatory models, it is an issue that changes proposed by the Bill are being made before work has been undertaken with industry to improve administration and implementation of Standards under the DDA.

Information available to DTEI is that there is considerable support from industry stakeholders for development of a co-regulatory/code of practice approach to ensure that the aims and objectives of the DDA are achieved efficiently and effectively across the transport sector.

The development of the co-regulatory model under the DDA would need to ensure that formal processes are in place that would give legislative force to formally developed codes of practice developed in conjunction with industry, the disability sector and the Commission. A major concern with the Transport Standards is that the guidelines underpinning the Standards are at times ambiguous when interpreting compliance requirements.

It could be argued that a co-regulatory/code of practice approach for transport is not an area in which self-enforcement would be expected to be work. However, co-regulatory schemes and or codes of practice do not need to rely exclusively on self-enforcement.

Provided the appropriate legislative changes are in place the co-regulatory/code of practice approach could significantly improve current and future compliance with the Transport Standards, while significantly improving the complaints process at both State and Federal level.

DTEI proposes that enforcement could occur through judicial and executive means via codes or standards developed in conjunction with industry and other bodies such as HREOC. This would mean that compliance with a formally adopted code could constitute a defence, partial or complete, to obligations envisaged by the DDA.

The concept of industry-based mechanisms in monitoring implementation, and addressing complaints has much to offer all parties. However, the Bill, by not adopting the co-regulatory recommendations from the Productivity Commission report, does not address these issues.

A co-regulatory approach could provide valuable support to the administration of Disability Standards for Public Transport, without displacing existing rights to make complaints.

DTEI acknowledge that a self-regulatory system would not totally replace the capacity for aggrieved parties to make complaints to HREOC or if necessary for parties to seek enforcement of the Standard in the Federal Court or Federal Magistrates Court.

However, it is suggested that industry codes should include agreed monitoring of implementation, and a method for resolution of complaints. Such mechanisms would support those attempting to comply with the Disability Standards for Public Transport.

It could be argued that co-regulatory approaches are less appropriate where there are weak commonalities across a sector such as transport. This could be addressed by codes for the various modes of public transport.

Public transport industry bodies and some jurisdictions accept that a co-regulatory approach would provide a means of addressing mode specific issues more effectively through a series of mode specific guidelines.

Where an agreed standard or code is not developed, then the existing provisions of the Standards could apply.

This would provide a significant incentive for jurisdictions or industry to develop mode specific guidelines which would give certainty of compliance with Standards.

DTEI is advised that the Rail Industry Safety and Standards Board (RISSB) has started developing a code on accessibility for the rail industry, in co-operation with the Australian Federation of Disability Organisations, (AFDO) and that industry representatives and AFDO are supporting in principal amendments which could give rise to codes that have been developed through open and inclusive processes.

Clear revision of the DDA could ensure appropriate quality control measures were used to develop co-regulatory practices.

It is suggested that consideration be given to co-regulatory models which are developed between industry representatives and jurisdictions in discussions with the Accessible Passenger Transport National Advisory Committee.

Some Current Problems

Example 1 – Orientation

A recent ruling by the Equal Opportunity Commission in South Australia involving a passenger who wished to face the front of a bus has highlighted a significant legal dilemma now faced by transport providers. The hearing found that that “consideration of the individual, rather than adherence to a generalised set of rules formulated to suit a conceptualised average user, is what the Act requires.”

<http://www.austlii.edu.au/au/cases/sa/SAEOT/2008/11.html>

Acting EO Commissioner Anne Burgess said following the hearing that

- "Access to public transport is essential for people with a disability to participate in the community. This decision could lead the way for people in wheelchairs who feel they have the right to choose which way they face on the bus."

Many of the assumptions that underpin the Standards are only referenced in the Guidelines and while they provide for an operator to determine the orientation of a passenger, the legal status of the Guidelines is questionable.

To ensure the Standards are effective and responsive to their statutory objectives, many of the Transport Standards should be redrafted to ensure they are given the clear force of law.

Under the Guidelines: 1.19 Orientation and motion - it states

- (1) Operators may determine the orientation of passengers in conveyances but should note that many people have a preference for facing forwards.

Significant redrafting of the Guidelines and the Standards is required to ensure problems associated with interpreting the guidelines and their legal status is addressed. Failure to deal with these issues may lead to Governments and service providers being presented with requests to make adjustments which may have significant implications.

Example 2 - Mobility Aids

The basis for bus design for wheelchair carriage revolves around the minimum wheelchair footprint. However, the performance criteria for mobility aids that may be carried on public transport are only found in the Guidelines (40.1). Hence to discriminate on the grounds of the performance of mobility aids may be perceived as discriminatory, yet there are many reasons why some mobility aids should be excluded from public transport. For example the use of 3 wheeled gophers may be seen by some operators as unsuitable for use on public transport.

Currently, the allocated space in South Australian buses is designed to support the carriage of a mobility aid up against a bulk head with the user facing the rear of the bus. This is to ensure that they do not accelerate forward under emergency braking. It is not difficult to expect that a claim for reasonable adjustment would be that a customer wishes to face the front. With no requirement in the Standards relating to operators determining the orientation of passengers in conveyances, and no requirements in the Standards for minimum wheelchair design/performance, it is unclear on what basis a service provider could claim such a request is unreasonable. This situation is further exacerbated with no specific requirements relating to the design of wheelchairs within the Standards.

The implications for users of poorly designed mobility aids being used on public transport and their impact on other passengers as a result of being poorly positioned during an emergency stop, pose practical and safety problems that would be a major concern to service providers on a daily basis.

DTEI requests that changes to the DDA provide for effective administration of all aspects of the DDA Transport Standards. The current amendments to the Bill do not provide that certainty.

Transport providers support the provision of accessible transport and seek clarity to ensure they can deliver services which are compliant. We all need certainty to avoid costly legal argument and potentially damaging judgements.

Example 3 - Assistance Animals

A major concern for Transport providers has always been the carriage of assistance animals. Proposed changes to the bill to address this are welcome, however, under schedule 2 Part 1 – 76 : 54A it states:

(5) This Part does not render it unlawful for a person to request the person with the disability to produce evidence that:

- (a) the animal is an assistance animal; **“or”**
- (b) the animal is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The use of the word **“or”** provides for a discretionary function on behalf of the owner of the assistance animal to claim it is only an assistance animal.

It is suggested that if the **“or”** is to be retained it is followed with a requirement that

Where a State or Territory has an approved program for the assessment of assistance animals, evidence that animal is also trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place must be provided.

Subsequently clause (6) should be amended to provide congruity between the clauses.

The Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 aims to improve the operation and effectiveness of the Disability Discrimination Act 1992 and reaffirm and strengthen the rights of people with disability. It is important to ensure the legislative changes can be effectively administered and applied.

DTEI recognises that the Bill is an important step in promoting greater equality for people with a disability and enhancing the human rights and anti-discrimination framework in Australia. However, while the changes being proposed will make the DDA more comprehensive, additional amendments are required in order to provide for effective administration and implementation of the Transport Standards under the Act.

We are advised that amendments to the Bill have been assessed in accordance with the Federal Government's *The Best Practice Handbook* and that the Bill was found to have a low financial impact on business and individuals. DTEI asserts that this assessment fails to consider the potential costs to industry of implementing aspects of the Transport Standards that are found by a court not to be compliant. No transport provider wishes to implement works that are not compliant but no mechanism exists to provide certainty of compliance to providers of infrastructure or services.

Under the Competition Principles Agreement signed at the Council of Australian Governments meeting in April 1995, all Australian governments agreed to review and, where appropriate, reform all existing legislation that restricts competition. The Australian Government decided to extend this to legislation that affects business. The DDA was included in the review because of its potential to impose costs on business. Failure to effectively modify the DDA in order to provide for the capacity to develop co-regulation or industry codes may be seen as negating the benefits from including the DDA into the Productivity Commission review due to its impact on business.

Summary

- 1: The Bill should be amended to provide for the development of co-regulatory models.
- 2: That provision be made for co-regulatory regimes to be developed in conjunction industry the disability sector and HREOC
- 3: That HREOC be appointed to advise and sign off on conformity with co-regulatory requirements and subsequent compliance with the DDA.