
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

21 January 2009

Dear Sir or Madam

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

The NSW Disability Discrimination Legal Centre (**NSW DDLC**) welcomes the opportunity to comment on the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (**the Bill**).

Attached to this submission, at Appendix 1, is a description of the work of our organisation.

From the outset we would like to congratulate the government on the Bill which we believe substantially improves the operation of the *Disability Discrimination Act 1992* (**the DDA**). That being said, it is our position that ultimately the individual complaints based model, as provided by the DDA and retained in the Bill, is an ineffective mechanism for addressing breaches of discrimination legislation and may fail to meet Australia's obligations under Article 5 of the Convention on the Rights of Persons with Disability (**the CRPD**). Attached to this submission, at Appendix Two, is our submission on the National Disability Strategy, which details why we believe this to be the case.

Notwithstanding this position, we make the following comments on the Bill. Please note that we have only commented on sections of the Bill which we believe require further consideration.

## Reasonable adjustment

NSW DDLC notes that the intention of the Bill is to introduce into the DDA 'an explicit positive duty to make reasonable adjustments for a person with disability.'[1]

We strongly support the inclusion of a duty to make reasonable adjustments. Many cases which come to NSW DDLC involve situations where employers, educators and service providers will not do anything 'different' to accommodate a person's disability, whether through ignorance, fear or otherwise. Many respondents believe that all that is required is formal equality, that is consistency in treatment between people with and people without disability. Unless their refusal to provide adjustments for people with disability can be construed as indirect discrimination, which is extremely difficult to do as outlined below, our advice is that they have no recourse against the perpetrator. Many cases that come to NSW DDLC are therefore not pursued on this basis.

The inclusion of a positive duty to make reasonable adjustments will assist in achieving substantive equality, and in meeting Australia's obligations under Article 5 of the Convention on the Rights of Persons with Disability, which Australia recently ratified. Further, the normative value of such a duty cannot be understated. For our clients it may mean that employers, educators and service providers would comply with discrimination law from the outset.

However, the expression of this duty in the Bill must be clearer. The location of the duty to make reasonable adjustments within the prohibition against direct and indirect discrimination is confusing and we are concerned it could be consequently misinterpreted.

It is our position that the duty to make a positive reasonable adjustment should be a separate stand alone provision that applies to those areas of public life set out in Divisions 1 and 2 of Part 2.

The definition of reasonable adjustment also requires further clarification. Section 4 defines a reasonable adjustment as 'an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.'

Section 11(d) provides that the onus is on a respondent to prove unjustifiable hardship. NSW DDLC submits that the appropriate way to interpret the interaction of these sections is that, when making out a *prima facie* act of discrimination, an applicant need only prove that there is an adjustment to be made. The assumption is then that the adjustment is reasonable, until the defendant proves that there is unjustifiable hardship, and accordingly that the adjustment is not reasonable.

[1]Explanatory Memorandum, *Disability Discrimination and other Human Rights Legislation Amendment Bill 2008*, p7.

In the past, there has been some judicial confusion around this point, and no doubt this amendment is an attempt to address that confusion.[2]

However, we are concerned that this amendment does not go far enough to clarify this issue. As it currently reads, section 4 may be interpreted as meaning that a person with disability has to, in effect, prove the adjustment that they are requesting is not an unjustifiable hardship to establish a *prima facie* act of discrimination.

It is our position that the definition of 'reasonable adjustments' should not refer to 'unjustifiable hardship', which is and should only be referred to as, a defence.

A clearer definition would align the term 'reasonable adjustment' with the definition of reasonable accommodation in Article 2 of the Convention on the Rights of People with Disability, as was the intention of the drafters of the Bill.[3] For the reasons stated above, the reference to unjustifiable hardship (or the equivalent 'disproportionate or undue burden' in the Convention) should not appear in the definition of reasonable adjustment.

## Section 5- Direct Disability Discrimination

The NSW DDLC is concerned that Section 5(1) and 5( 2)(b) maintains both the comparator test and the requirement that the discrimination is 'because of the disability.'

The interaction of these two tests has been widely criticised by academics, in particular in relation to the decision of the High Court in *Purvis v New South Wales (Department of Education & Training)*[4] (***Purvis***) which found that it was necessary to compare the treatment of a student with the disability with that of a student who exhibited violent behaviour but did not have the disability. Dr Belinda Smith says:

> 'The *Purvis* approach leads the courts merely to ask whether the employer's or education provider's policy has been applied consistently. If the employer or school has identified an organisational need that underpins their decision and applied it consistently, without assumption or prejudice, then they have been able to argue that they have treated all likes alike.'[5]

This view is shared by Colin Campbell, who states:

---

[2] See *Slugget v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561 and *Daghlian v Australian Postal Corporation* [2003] FCA 759.
[3] Explanatory Memorandum, Disability Discrimination and other Human Rights Legislation Amendment Bill 2008, p7.
[4] (2003) 217 CLR 92 at 166
[5] Belinda Smith 'From *Wardley* to *Purvis*: How far has Australian anti-discrimination law come in 30 years?' (2008) 21(1) *Australian Journal of Labour Law*, at p 23.

> 'However poorly the alleged discriminator might treat a disabled person, it is difficult to aver from the suspicion that they would accord even worse treatment to a person who displayed all of the troublesome and difficult aspects of the disabled person's disability – the disability's manifestations – without the mitigating factor of actually being disabled.' [6]

Dr Smith continues:

> 'This approach makes clear that our direct discrimination laws are underpinned by a formal rather than substantive model of equality, and are thus limited in their capacity to eliminate all but a small subset of discrimination and able to do little more than promote procedural fairness. All citizens are ostensibly *permitted* to participate in education and work and other public realms of life, but our laws do little to *enable* the participation of those who don't fit the norm of benchmark man.'[7]

This academic analysis correlates with our experience of the operation of the law in practice.

A large proportion of NSW DDLC's cases involve incidents of direct discrimination because of a manifestation of a disability, for example where children are suspended or expelled from school because of behavioural disabilities, where employees are dismissed after being absent from work for a period of time because of an illness or where a person is evicted from an apartment because of anti-social behaviour. Our advice to these clients is that, unless they can construe what happened as indirect discrimination, which is extremely difficult to do, as discussed below, they are not protected under the DDA. Another employee, student or tenant, who behaved the same way in the same circumstances, but without the disability, would have been treated the same way. Unfortunately, our clients are left without recourse in these situations.

It is NSW DDLC's position that the comparator test be removed and replaced with the model found in the *Discrimination Act* 1991 (ACT) which provides that discrimination occurs when the discriminator 'treats or proposes to treat the other person unfavourably because the other person has a protected attribute.' The reasons why this model is preferred are laid out in other submissions, including the submission of the Australian Human Rights Commission. It was also endorsed by this Committee in its report on the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating sex discrimination and promoting gender equality (the SDA report). We do not propose to repeat these arguments here.

Should the comparator test remain in the DDA, the NSW DDLC's position is that the Bill should at the very least clarify what we perceive to be a misapplication of the phrase 'because of a disability'.

[6] Colin D Campbell, 'A hard case making bad law: *Purvis v New South Wales and the role of the comparator under the Disability Discrimination Act 1992 (Cth)* (2007) 35 Federal Law Review 111, at p 116.
[7] Ibid, p14

Notwithstanding section 10 of the DDA, which provides that a person's disability does not need to be the sole or dominant reason for the discrimination, case law has interpreted the phrase 'because of a disability' as being the real reason or true basis for the decision.[8] In *Purvis*, McHugh and Kirby JJ suggested that the appropriate test of causation is one which focuses on the 'real reason' for the discrimination.

Gleeson CJ in *Purvis* held:

> 'The fact that the pupil suffered from a disorder resulting in disturbed behavior was, from the point of view of the school principal, neither the reason, nor a reason, why he was suspended and expelled ... If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 [of the DDA] are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil. In the light of the school authority's responsibilities to the other pupils, the basis of the decision cannot fairly be stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people.[9]'

In essence, *Purvis* and the case law that follows it, makes it clear that the reason the aggrieved person acted as they did, and the consequent association with disability is no longer relevant to the legal question of direct discrimination.[10]

It is NSW DDLC's position that this misapplication could be easily clarified by relocating the element of causation, 'because of a disability', from Section 5 to the definition of reasonable adjustment so that 'the adjustment is required for the person's disability'. The onus would then be placed on the applicant to prove that they required the adjustment because of their disability as opposed to the more difficult task of proving that the discrimination was because of their disability.

---

[8] Human Rights and Equal Opportunity Commission, 2008, Federal Discrimination Law, at p174.

[9] (2003) 217 CLR 92 at 101-102. There have been a number of cases which have adopted this interpretation in relation to causation. For example, in a similar fact scenario, Driver FM in *Tyler v Kesser Torah College* [2006] FMCA 1 found that a student with Down's syndrome was not discriminated against when he was temporarily excluded from school due to his anti-social behaviour as the school would have treated the comparator in the same way. This approach to the comparator test was also applied in *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254, where Selway J found that it was not discrimination to dismiss the applicant from work following absences due to extended illness.

Other cases following the precedent set in *Purvis* include *Featherston v Peninsula Health* [2004] FCAFC 95, *Hollingdale v North Coast Area Health Service* [2006], and *Huemer v NSW Department of Housing* [2006] FMCA 1624.

[10] Belinda Smith, op.cit., p21

## Section 6- Indirect disability discrimination

The Bill makes many positive changes to the definition of indirect discrimination, including the removal of the proportionality test. However, NSW DDLC is concerned that the Bill maintains a requirement that has proven particularly problematic in the past, that is that the applicant must show that they could not comply with a requirement or condition in order to make out a case of indirect discrimination. While courts generally have emphasised the need to take a broad and liberal approach to the question of inability to comply, a narrower approach has been taken on some occasions which we submit has the effect of limiting the participation of people with disability. In *Hinchliffe v University of Sydney*[11], Driver FM decided that the Applicant could comply with the University's requirement that she use the course materials in the form provided because she could reformat the materials herself, despite the fact that it inconvenienced her relative to students without her disability.

In practice, this decision means that where people with disability, through perseverance or assistance from a carer, are able to comply with a requirement or condition, they are not protected by the DDA.

NSW DDLC recently acted for a high school student in a complaint of disability discrimination against her school. She has a form of dyslexia which makes it difficult for her to read information on white paper or from a blackboard. The solution developed by the school to deal with this issue was that she be provided with the information on handouts at the start of each of class and then she leave class to photocopy her notes onto different paper so that she could read the material. Our advice to our client was that although she missed ten minutes at the start of every class to reformat the material, it was likely that a court would find she could comply with the requirement or condition that she use the materials provided, and accordingly she had limited prospects of succeeding in a disability discrimination claim. Our client is continuing to experience difficulties at school and has fallen behind in her studies.

The 'disadvantage' test as outlined in s 5(2) of the *Sex Discrimination Act 1984* (**SDA**) overcomes the hurdle of proving an inability to comply and NSW DDLC strongly supports the inclusion of this definition.[12]

Should the current formulation of the Bill be retained, the inclusion of the phrase 'because of the disability' in subsections 6(1) and 6(2)(b) is problematic given the reasons outlined above in relation to the proposed subsections 5(2) and 5(2)(b) and our comments above apply here also.

[11] [2004] FMCA 85

[12] We note that the recent Inquiry into the effectiveness of the SDA recommended that the reasonableness test be replaced with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate. It is not within the ambit of this submission to consider, whether this proposed amendment should be incorporated into the DDA, but we are happy to re-visit the issue should the Committee be willing to consider this amendment.

## Section 8- Discrimination in relation to carers, assistants, assistance animals and disability aids

While we support the inclusion of assistance animals and disability aids in the Bill, we are concerned about including assistance animals and disability aids in the same section as carers and assistants, as it may insult carers and assistants.

## Section 9- Carer, assistants, assistance animal and disability aid definitions

While this amendment provides for greater certainty for both applicants and respondents in relation to defining whether an animal is an assistance animal and deals with many of the issues raised in *Forest v Queensland Health*[13], we are concerned that it does not go far enough.

Where an animal is trained to alleviate the effects of the person's disability, but not accredited, there is little guidance for applicants or respondents to assess whether it will meet the requirements of section 9(2)(c)(ii).

The issues this presents are highlighted by a recent case run by NSW DDLC. NSW DDLC represented a client in the Federal Magistrates Court in relation to a situation where the animal was trained by the Applicant to alleviate the effects of his psychological disability. The Respondent, an airline, refused to allow the animal to travel with the Applicant onboard unless it was accredited. NSW DDLC was unable to find an accreditation body in Australia willing to accredit an animal it did not train itself from birth, and accordingly the only option was for a Judge to determine whether the assistance animal was appropriately trained. The lack of certainty for the Applicant was a primary motivation in his decision not to continue the proceedings.

This situation could be overcome by the development of a national accreditation scheme for assistance animals. Such schemes exist in some states and territories.

## Section 45 Special Measures

In theory, we support the Bill's amendments as they narrow the exemption.

[13] (2007) 161 FCR 152

However, we are concerned that the phrase 'implementing a measure' is ambiguous, as it is not defined. For example, it is unclear as to whether charging a service fee for a particular service which is offered only to people with a disability would be classified as an 'implementing a measure' or a special measure. This is confusing because in the absence of a comparator, ascertaining whether a service fee is part of the measure or implementation of the measure is difficult.

# Parts of the DDA which have not been subjected to substantive amendments

## Broadening of the Australian Human Rights Commission (AHRC) powers

It is our position that the Disability Discrimination Commissioner be granted the power to investigate breaches of the DDA where there are cases of broader systemic non-compliance, without requiring an individual complainant. This recommendation was made by the Allen Consulting Group in its Draft Report reviewing the Standards for Accessible Public Transport.[14]

The emotional, physical and financial costs are one of the greatest barriers for individuals in pursuing an individual complaint under discrimination law, particularly beyond the AHRC level. People with disability, who have higher levels of unemployment, and who sometimes face personal hardship are more likely to be disadvantaged by the individual complaints based model.[15]

## Guidance on issues concerning standing

In *Access For All (Harvey Bay) v Harvey Bay City Council*[16] it was found that the Applicant did not have standing to commence proceedings in the Federal Court, because it was not itself affected by the relevant conduct, but only had an intellectual interest in the proceeding.

This decision came out of a conflict between the representative complaints provisions in the *Human Rights and Equal Opportunity Act 1986* (***HREOC Act***) and those in the *Federal Court of Australia Act 1976.*

[14] Allen Consulting Group (2008), *Draft Report Reviewing the Standards for Accessible Public Transport* at p165. (Note the final report is not yet released.)
[15] *Human Rights and Equal Opportunity Commission 'Final report of the National Inquiry into Employment and Disability' February 2006*
[16] [2007] FCA 615

Under section 46P(c) of the HREOC Act a complaint can be made 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.' However, under section 46PO(1) in order to proceed beyond the AHRC to the Federal Court or the Federal Magistrates Court with such a complaint only an individual 'who was an affected person in relation to the complaint' may make a complaint. In order to proceed as a representative complaint, a member of the representative class must commence the proceedings and be able to name at least seven members of the class who consent.

The result is that systemic issues cannot be dealt with through representative organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can prove that it itself is affected by the conduct, which, given the barriers noted above, happens very rarely. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory.

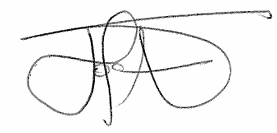
Amending the *Federal Court of Australia Act* to make the standing provisions consistent with those in the *HREOC Act* would address this issue.

We look forward to the opportunity to participate further in the Inquiry into the *Disability Discrimination and Other Human Rights Legislation Amendment Bill* 2008.

Yours Sincerely,

**Fiona Given**

**Policy Officer, DDLC**



**Joanna Shulman**

**Attachment One**

***NSW Disability Discrimination Legal Centre (NSW DDLC)***

NSW DDLC was established in 1994 to help people with disability understand and protect their rights under disability discrimination law. We do this through the delivery of direct legal services to people with disability, delivery of community legal education and undertaking policy work. NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- the ability to exercise rights.

NSW DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

NSW DDLC has most recently been involved in the development of the Convention on the Rights of Disability at the United Nations level. We also convene the National Network of Disability Rights Legal Organisation. More information about NSW DDLC and our work can be found at: http://www.ddlcnsw.org.au/

**Attachment Two**



Disability Discrimination Section
Human Rights Branch
Attorney-General's Department
Robert Garran Offices, National Circuit
Barton ACT 2600

17 December 2008

Dear Sir or Madam

**Submission on the development of a National Disability Strategy for Australia**

The National Association of Community Legal Centres (NACLC), the NSW Disability Discrimination Legal Centre (the NSW DDLC) and the National Network of Disability Discrimination Legal Services (NNDLS) welcome the opportunity to contribute to the development of a National Disability Strategy for Australia.

Attached to this letter, at Appendix 1, is a description of the work of these organisations.

## Summary of Position

We commend the Government for its decision to develop the National Disability Strategy. It is an opportune time to develop the National Disability Strategy given Australia's recent ratification of the *UN Convention on the Rights of Persons with Disabilities* (the CRPD) and its current focus on implementation. Accordingly, the National Disability Strategy is an appropriate starting point to translate the CRPD into an action plan relevant to Australia, in accordance with Article 4 (1) (b) of the CRPD. The disability sector has already commenced work on this with the development of the 'Human Rights Indicators for People with Disability' resource[17]. As a member of the Australian Taskforce on the UN Convention on the Rights of Persons with Disabilities (the Taskforce), we support its submission and that of

[17] *Phillip French Disability Studies and Research Institute For Queensland Advocacy Incorporated, 'Human Rights Indicators for Peopled with Disability- A resource for disability activists and policy makers'*

the Disability Advocacy Network of Australia which outlines why the CRPD and Human Rights Indicators provide a template for our National Disability Strategy.

We support all other aspects of the Taskforce's submission including the Commonwealth's obligation to:

- Provide leadership on the National Disability Strategy

- Ensure that the rights of people with disabilities are not violated and that the states do not interfere with the ability of people with disabilities to exercise those rights.

  > In circumstances where the laws and regulations relevant to the rights of people with disabilities are administered partly or wholly by State and Territory governments, the Commonwealth has a particular opportunity and responsibility to provide leadership in all aspects of implementation of the CRPD. Each Commonwealth department and agency should develop a disability strategy based on the CRPD in relation both to their areas of responsibility and also for elements common to all agencies. A National Disability Strategy should include this same commitment from each State and Territory government on behalf of its departments.

- Ensure that non-state actors, including individuals, private enterprises and social institutions do not violate or otherwise interfere with an individual's exercise or realisation of our human rights.

- Take positive action to ensure that people with disabilities can exercise and realise their human rights.

- Undertake a staged approach to the National Disability Strategy

  > The development of a National Strategy should be an ongoing process and dynamic process which should continue after June 2009. Central to this process should be ongoing consultation with people with disabilities and advocacy organisations. In addition, there should be periodic formal reviews of the strategy to ensure that it remains a living document.

As organisations working to assist people with disability to understand and assert their rights under disability discrimination law, our submission will comment on those areas of the CRPD relevant to discrimination law, that we believe must be considered in the development of the National Strategy that is based on the CPRD.

## Article 5 (Equality and non-discrimination)

Article 5 guarantees that people with disability are equal before the law and are entitled to equal protection of the law. It prohibits discrimination on the grounds of disability and requires states to ensure effective protection against such discrimination. It requires states to ensure the provision of reasonable accommodation and exempts positive measures to enhance the participation of people with disability in society from being considered as discrimination.

In Australia, disability discrimination is rendered unlawful in certain areas of life by the *Disability Discrimination Act 1992* (Cth) (the DDA).

The individual complaints based model, as provided by the DDA, has been criticised as an ineffective mechanism for addressing breaches of discrimination legislation for the following reasons:

- Complaints can be lodged by individuals, or by individuals or organisations on behalf of others; including on behalf of a class of people, to the Australian Human Rights Commission (AHRC). This means the onus continues to be on an already disadvantaged individual to enforce the breach of discrimination laws. The decision of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [18] means that advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If a complaint is not brought in relation to a specific issue or service, it will continue to be discriminatory.

- In Australia, alternative dispute resolution in the form of conciliation, is employed at first instance for discrimination complaints. The advantage of alternative dispute resolution is it is a relatively informal process and minimizes the expense to the parties. However, the conciliation process can disadvantage the complainant as there is often a power imbalance between them and the respondent, which is almost always a company or a government agency. This power imbalance is even more significant when the complainant is not represented, which due to insufficient resourcing of advocacy and legal organisations, is frequently the case.

- Even when a complaint is resolved at conciliation, the settlement is only binding between the parties to the complaint. This means that if the respondent fails to fulfill their obligations under the settlement agreement, only the complainant who is party to that settlement agreement can enforce the settlement. There is no enforcement agency and enforcement (usually through the local court) is not an easy process and rarely occurs.

- In circumstances where the conciliation has failed, the complainant may apply to have the allegations heard and determined by the Federal Court or the Federal Magistrates Court. Pursuing action at this level presents financial obstacles for the individual complainant which further disadvantage people with disability, who have higher levels of unemployment and are more likely to experience economic disadvantage.[19] Should the complainant be unsuccessful they will be ordered to pay the legal costs of the respondent. This increases the pressure on the complainant to seek a mediated settlement and reduces the chance of the matter reaching hearing and a judicial decision. In addition to the financial costs, barriers to physical access, the psychological costs and the time commitment more often than not deter complainants, and in particular complainants with disabilities from pursuing litigation. The result is that there is a dearth of decided cases, and expertise amongst the judiciary, in this area of law making it even more difficult for practitioners to provide advice on prospects of success to complainants. This again leads to more cases settling and fewer systemic outcomes, as discussed below.

[18] (2007) 162 FCR 313

[19] *Human Rights and Equal Opportunity Commission 'Final report of the National Inquiry into Employment and Disability' February 2006*

- In general, discrimination law remedies are compensatory in nature only and the amount of compensation awarded tends to be comparatively low to that awarded in other areas of law. There is no punitive element and it is unlikely that the relatively small sum of damages will prevent further discriminatory practice. It is also rare for policy change to be part of the settlement or court finding. In circumstances where a settlement provides for systemic outcomes, such as training or policy changes, conciliated agreements are often confidential which means the outcome cannot be used by other people as a precedent to seek improvements more generally. Court decisions are also often applicable to the facts of the case only.

  According to Belinda Smith:

  *While the stated objective of the Act is normative ... formal regulatory mechanisms seem designed to achieve only the implicit remedial objective of resolving discrimination claims as interpersonal disputes.*[20]

It is our position that the individual complaints based regulatory model is even less accessible to people with disabilities and may fail to meet Australia's obligations under Article 5 of the CRPD.

## Alternative models for addressing disability discrimination

Due to the flaws in the individual complaints model, most acts of discrimination remain unchallenged and even when complaints are made, only rarely are they pursued to the point of litigation. To ensure Australia meets its obligations under Article 5 of the CRPD, Australia should consider alternative systems for addressing disability discrimination.

A number of alternative models for addressing disability discrimination are used in other jurisdictions. Some aim to improve the effectiveness of the individual complaints based model, while others offer an alternative system which promotes equality by requiring actions from those in positions to promote equality, not only those who are victims of discrimination. For example, in December 2006 the UK introduced the *Disability Equality Duty*[21] which requires all public authorities, including government, schools and health trusts, to actively seek ways to ensure people with disabilities are treated equally across all aspects of their work. All public authorities covered by the duty must publish a Disability Equality Scheme, demonstrate that they have taken actions to achieve outcomes set out in the scheme and review and revise the scheme. People with disabilities must be involved in the production of the scheme. Canada and Northern Ireland have also adopted alternative systems to the individual complaints based model. For example, if the Canadian Human Rights Commission

[20] *Belinda Smith, "A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?" in C Arup, et al (eds), Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships, Federation Press: Sydney (2006), 105-124 p.109)*

[21] See *Disability Rights Commission ' Doing the duty, An Overview of the Disability Equality Duty for the public sector.'* http://www.dotheduty.org/

has reasonable grounds for believing a discriminatory practice has occurred, it may initiate a complaint itself.[22]

Broadening the scope and powers of the AHRC, as discussed in the National Monitoring section below, is perhaps an appropriate starting point in developing an alternative model for addressing disability discrimination in Australia. We also recommend that disability and human rights jurisdictions are cost free.

## Article 13 (Access to Justice)

Article 13 requires states to ensure effective access to justice for people with disabilities. It requires appropriate procedural and age-related adjustments to the legal process and training for those involved in the administration of justice. It applies to people with disabilities in all aspects of their interaction with the justice system.

Integral to any model that addresses access to the justice system, is the existence of a series of integrated and coordinated services which will allow people with disabilities to effectively access justice in circumstances where their rights are not protected and which deals with their issues using a wholistic approach.

This is especially important given that people with disabilities often experience the cumulative effects of more than one form of violation against their rights and are less likely to seek advice and support from multiple services.

There are a variety of services which provide legal, support and advocacy assistance to ensure that the rights of people with disabilities are protected and facilitate access to justice for people with disabilities should there be a breach of laws to protect these rights and these services are working more and more collaboratively. However, these services will not meet the needs of their clients, or be in a position to work together to address systemic issues unless they are adequately resourced. To realise this, the National Disability Strategy should significantly enhance resourcing for disability representative and advocacy organisations.

In relation to the Disability Discrimination Legal Services (DDLS) specifically, it is important to note that when we were established in each state and territory to assist people with disabilities to pursue their rights under the DDA, it was a very limited initiative and we have struggled to maintain our viability and stability.

In October 1999 the Attorney General's Department conducted a review of the Disability Discrimination Act Legal Services[23]. The review acknowledged that funding is an issue of ongoing concern for this sector and made a number of recommendations to improve the services delivered by these legal services. To date, these recommendations have not been implemented. NACLC and the NSW DDLC support the recommendations made in this review and stress that their implementation should be considered in the development of the National Disability Strategy.

In addition to the DDLS network being assured funding to maintain their current work, it would be optimal to avail additional funds to allow us to work together to address systemic

[22] See: *Human Rights and Equal Opportunities Commission, 'Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Gender Equality' Annexure C: Comparisons with the United Kingdom, New Zealand and Canada.*
[23] *Attorney-General's Department, 'Review of the Disability Discrimination Act Legal Services' October 1999*

issues. The network has recently begun holding bi-monthly phone hook-ups to discuss systemic issues. However the network lacks the resources to do anything to address these issues at a systemic level. There is clearly an absent voice from the non-government sector in relation to legal issues for people with disability. Funding for a one-day a week position to coordinate the network and draft submissions on its behalf would go someway towards achieving this.

Furthermore, as recent research has recommended there is a need for a Disability Rights Centre that can provide generalist legal advice, policy development and outreach programmes[24]. This is necessary given the fact that people with disabilities have a high level of engagement with institutions and service agencies in accessing support and services. This sometimes complex web of relationships can often mean that when issues arise they can cross specific legal remedies.

# Other Comments

## National Charter of Rights

NACLC and the NSW DDLC support the adoption of a National Charter of Rights. It is our position that the CPRD should be incorporated as a schedule to a National Charter of Rights. It is essential that a Charter of Rights be supported by enforcement and monitoring mechanisms.

## National Monitoring

In order for the CRPD to have a significant impact on the lives of Australians with disability, it is imperative that there is a national monitoring system in place.

For true equality to be achieved, human rights institutions must play an essential role in protecting and promoting the rights of people with disability. It will be necessary to broaden scope/role of the AHRC, as recommended in the Review of the Disability Standards for Accessible Public Transport, Draft Report. [25]

These changes should allow AHRC to have the capacity to perform the following functions:

- To intervene in proceedings in which CRPD rights are agitated or ought to be agitated
- To initiate own motion prosecutions in relation to CPRD rights violations
- To develop, issue and monitor guidelines and standards for compliance with CRPD rights

[24] Rudland, S. (2003) *A Question of Justice: access and participation for people with disabilities in contact with the NSW justice system.* Research paper jointly funded by the Disability Council of NSW and The Law and Justice Foundation [online] http://www.discoun.nsw.gov.au/page/publications.html
The report recommends: That a specialist disability legal and advocacy centre be established. The centre must be funded and structured to provide services to people with all types of disabilities. Staff must receive professional development training about working with people with all kinds of disabilities.
[25] *The Allen Consulting Group, 'Review of the Disability Standards for Accessible Public Transport, Draft Report' (January 2008), p150*

- To undertake policy and education in relation to all CPRD rights. [26]

We recognise that Article 33 of the CPRD requires State Parties to designate one or more focal points and coordination mechanisms within government to facilitate national CRPD implementation. In this light, we would recommend that the Australian Government establishes a National Office of Disability Policy Coordination within the Department of Prime Minister and Cabinet in consultation with people with disability, legal and advocacy organisations and advisory bodies.

The National Office of Disability Policy Coordination should promote Commonwealth – State/Territory co-operation, and ensure that the needs of people with disability are considered in relation to *all* mainstream policy areas, not just those areas specifically targeted at disability issues, the National Disability strategy should require each ministerial Council to conduct an audit of Convention compliance. Each Ministerial Council should develop an action plan to progress all issues identified. We note that article 4(1)(c) of the Convention requires parties to 'take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.'

The National Office of Disability Policy Coordination would assist the AHRC in the national monitoring of the CPRD.

Given the major emphasis on the participation of people with disabilities policy development, implementation and monitoring, it is imperative that the AHRC and the National Office of Disability Policy Coordination liaise with representative organisations for people with disability.

It is also imperative that Australia adheres to our obligations under Article 35. Australia is required to submit a comprehensive 'base-line' report to the treaty body on Australia's compliance with CPRD obligations within two years of ratification (by August 2010). This report is to be compiled in close consultation with people with disability.

NACLC, NNDLS, and the NSW DDLC urge the Federal Government to fund a two year development project to enable the disability advocacy sector to undertake significant consultation, research, policy development and consensus building that is required to effectively engage with government in the development of this report.

This project should also enable the disability advocacy sector to develop its own shadow report to the treaty body, which would highlight any areas of difference with the government position.

We recommend that the 'Human Rights Indicators Project' developed by Queensland Advocacy Incorporated be used as a guide in developing the base-line report.

The 'base-line' report should guide future directions of the National Disability Strategy.

## Conclusion

[26] *Adapted from Impacts in Australia of Ratification of the United Nations Convention on the Rights of Persons with Disabilities: Background paper for Roundtables for Australian disabled peoples organisations (2008), prepared by Phillip French and the Disability Studies and Research Institute.*

*NSW DDLC, and NACLC, commend the Government on the development of the National Disability Strategy and strongly support its introduction. Australia has recently ratified the UN Convention on the Rights of Persons with Disabilities and the National Disability Strategy should translate this Convention into an action plan relevant to Australia.*

*It is our position that the National Disability Strategy explore alternative models for addressing disability discrimination. We recommend that there should be an alternative to the individual complaints model and that the Australian Human Rights Commission be given broader powers to be able intervene in proceedings in which rights under the CPRD are agitated or ought to be agitated and to be able to initiate its own prosecutions in relation to CPRD violations.*

*It is also imperative that the Disability Discrimination Legal Services network be given additional funding to enable the network to work collaboratively on systemic issues.*

*The implementation of a national monitoring strategy is essential to ensure that the rights of Australians with disabilities are protected in accordance with the CRPD. We recommend the establishment of a National Office of Disability Policy Coordination to work in conjunction with the Australian Human Rights Commission and representative organizations of people with disabilities in monitoring Australia's performance under the CPRD.*

We look forward to the opportunity to participate further in the development of the National Disability Strategy.

Yours Sincerely,

**Fiona Given**

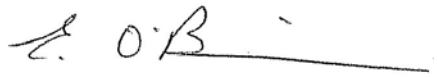
**Policy Officer, DDLC**

**Joanna Shulman**

**Principal Solicitor, DDLC**

**Rosemary Kayess,**

**Chairperson, DDLC**



**Elizabeth O'Brien**

**Coordinator, NACLC**

**Appendix One**

### *National Association of Community Legal Centres (NACLC)*

The National Association of Community Legal Centres (NACLC) is the peak body representing the state and territory associations of community legal centres (CLCs) and 207 CLCs nationally.

CLCs are located throughout Australia in metropolitan, outer-metropolitan, regional, rural and remote Australia. CLCs are experts in "Community Law" – the law that affects our daily lives. They provide services to approximately 350,000 clients per year. They are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

While there is much diversity amongst CLCs, there is also much in common. One of those features is a commitment to justice for everyone. Each CLC pursues this end in ways particular and appropriate to the region in which it is located, and the community it serves.

Many CLCs provide legal advice, casework and advocacy around legal and social justice issues. They also conduct community legal education and participate in law reform where laws and/or procedures that hinder justice are identified.

The National Human Rights Network is a network of people who work in CLCs around Australia and have an interest in human rights. The work of the Network varies greatly and includes encouraging human rights work within the CLC sector and lobbying government on human rights issues.

### *NSW Disability Discrimination Legal Centre (NSW DDLC)*

NSW DDLC was established in 1994 to help people with disability understand and protect their rights under disability discrimination law. We do this through the delivery of direct legal services to people with disability, delivery of community legal education and undertaking policy work. NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- the ability to exercise rights.

NSW DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;

- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.