

**PROMOTING THE RIGHTS OF PEOPLE WITH DISABILITIES:  
TOWARDS A NEW UN CONVENTION**

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Promoting the Rights of people with Disabilities  
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**Dr Sev Ozdowski OAM  
Human Rights Commissioner and Disability Discrimination Commissioner  
Human Rights & Equal Opportunity Commission, Sydney, Australia**

## **Introduction**

I have been asked to contribute some remarks on the role of national human rights institutions in promoting the rights of people with disabilities.

In presenting this account of the Australian experience I am not suggesting that it is a model, or the only model, to be followed in all respects.

In my remarks in the first session for this meeting I referred to some serious limitations in what we have been able to achieve: in the discrimination area with reference to employment issues in particular, and in addressing human rights issues beyond the reach of the model of discrimination law we have.

I do think though that the Australian experience offers some useful lessons in a positive sense as well as indicating areas where a different approach may be merited.

## **Mechanisms for eliminating discrimination**

When the Disability Discrimination Act was being developed it was recognized that, of course, simply passing a law to prohibit discrimination would not be sufficient to ensure that discrimination was eliminated or

reduced. The legislation provided for a range of implementation mechanisms:

- investigation and attempted conciliation of complaints of unlawful discrimination, and reference of complaints to the courts where resolution by conciliation cannot be achieved;
- provision for the Human Rights and Equal Opportunity Commission to deal with a matter on its own initiative as if a complaint had been made;
- a role for the Commission to intervene as a party in court proceedings raising disability discrimination issues (and, more recently, for the Disability Discrimination Commissioner to seek leave to appear as an *amicus curiae*, or friend of the court, without taking sides as a party in a case);
- development of standards on what is required for non-discriminatory access, and to set timetables for achieving it, including in employment, accommodation, education, public transport services and access to premises;
- granting by the Human Rights and Equal Opportunity Commission of temporary exemptions from the legislation, to manage the transition from inaccessible to accessible systems and facilities;
- voluntary development of action plans by service providers to achieve the objects of the legislation;
- conducting inquiries, including when requested by the Attorney-General;

- promotion of awareness of and compliance with the legislation by the Human Rights and Equal Opportunity Commission, including publishing guidelines for avoiding discrimination.

## **Complaints**

There have been over 5500 complaints lodged under the DDA.

Compared to other legal processes, there are very few formal requirements for discrimination complaints. Complaints do need to be put in writing but people who have difficulty with this can ask Commission staff to assist. Complaints can now also be made by email.

In some circumstances the Commission can also assist complainants to find other supports they might need, like an interpreter or advocate. A network of disability discrimination legal services was funded by the federal Attorney-General's Department from the outset of the legislation and there are also specific legal services focused on mental illness, HIV/AIDS and intellectual disability.

## **Intervention and amicus role**

The Commission may intervene in (become a party to) court proceedings that involve disability discrimination issues, where it considers it appropriate to do so and where the court hearing the proceedings gives leave.

The amicus curiae function means a 'friend of the court'. It does not involve the Commission appearing as an advocate for parties to complaints.

The role does, however, allow the Commissioner to present views on the interpretation of the DDA and how it should apply in particular situations. This includes putting information before the court which the Commission has gathered through public inquiry processes or through other processes of consultation with the disability community and other experts.

So far, opportunities to appear as amicus or intervene in court proceedings under the DDA have been limited. In several cases where I had indicated an interest in joining the proceedings the matter has settled before going to hearing. However I think this function could become a significant one in future.

## **Standards**

The DDA permits "disability standards" to be made by the Attorney-General in specified areas, presently accommodation, administration of Commonwealth laws and programs, education, employment and public transport. When the Act was being developed it was recognised that general anti-discrimination provisions alone would not be sufficient to achieve equality in many areas.

Building accessible buildings or transport systems, for example, involves decisions on many detailed design issues. People responsible for these facilities will be more ready to invest effort and money in making changes if the law gives them some certainty about what is needed and some security while they implement the changes required.

In other areas such as employment and education, it is more difficult to set detailed specifications on every issue that could arise, but standards

could still perform valuable functions by setting out in more detail the principles or processes to be applied in achieving equal opportunity.

The process of developing disability standards involves negotiation and consultation with groups that have an interest in the area. Concern has been expressed about the resources of the disability community to negotiate on an equal footing. While acknowledging those concerns the Commission supports the adoption of disability standards as offering potential for consistent change across Australia. In particular, the process of developing standards was essential to the progress we have seen in public transport access.

### **Temporary exemptions and action plans**

There is also a power for Australia's national human rights commission to grant temporary exemptions from the DDA for up to five years. This power can be used as a tool to promote equality where organisations are seeking some protection from complaints while acting to overcome barriers to access. The Commission has not been prepared to grant an exemption to organisations who simply want to avoid doing anything to comply with the DDA.

The number of exemption applications to date has been quite small, except in the public transport area, where exemptions have been a critical part of the progress that has been achieved.

The DDA states that service providers may lodge voluntary Disability Action Plans with the Commission. Having an Action Plan does not give a complete defence against complaints but it can be taken into account in dealing with a complaint.

The Commission believes that developing an Action Plan is a good way for organisations to plan and prioritise their movement towards compliance with the legislation.

There has been particularly strong take-up of Action Plans from local government and from universities. It has been clear that staff within these organisations have welcomed the opportunity that the development of an Action Plan gives to make significant changes.

In the public transport area, several exemptions have been granted on the condition that actions set out in an Action Plan should be implemented. Where service providers are able to identify meaningful and measurable targets for moving towards non discriminatory service, there appears to be considerable further potential for this type of approach.

The first edition of the federal government's Commonwealth Disability Strategy included a policy requirement for Commonwealth agencies and departments to develop action plans under the DDA. While there was not complete compliance with this policy, the number of Commonwealth agencies and departments which do have Action Plans is relatively high.

It has also been encouraging that State and Territory departments have been prepared to lodge action plans under Federal legislation. NSW and Western Australian government agencies are required to produce disability plans under their own Disability Services Acts and some of these agencies have provided these plans to the Commission under the DDA.

In 2000 South Australia also adopted a whole of government disability strategy which provides for preparation of action plans under the DDA by government agencies.

While the number of plans from major businesses remains small, the Commission has been very pleased to receive plans from major banks, telecommunications providers and transport operators.

The Commission does not have the resources to perform any detailed evaluation of the effectiveness or quality of Action Plans received, except where an action plan has been part of the conditions on a temporary exemption.

The principal accountability mechanism for Action Plans have been to make them available for public scrutiny (through the internet wherever possible) and to encourage service providers to include public participation in development of Action Plans and in their own reviews of implementation.

### **Promotion of awareness and compliance**

In the first year of the DDA a substantial part of the Commission's work and budget was dedicated to a community information and education campaign. This was aimed at people with a disability and at organisations with responsibilities under the legislation. This campaign was carefully planned to make effective use of a limited budget. Much more impact, however, has been seen from some high profile complaint outcomes, such as *Scott v Telstra* in relation to telecommunications, *Finney v The Hills Grammar School* regarding education, and *Maguire v SOCOG* regarding information accessibility.

The Commission has produced advisory notes or guidelines in a number of areas covered by the DDA: access to premises, insurance, public transport, and world wide web access.

The development of the World Wide Web has greatly increased the Commission's ability to publish information and advice. This has included "frequently asked questions" material, the text of speeches, Commission and court decisions, and links to other sources of information and advice. These materials are also made available in print or other formats on request.

Over 50,000 page views per month are now registered for the disability rights section of the Commission's web site.

We also promote awareness and compliance through participation in many formal and informal educational events, conferences, public forums, workshops and consultations.

In addition, there is significant community education and awareness activity on rights and responsibilities undertaken by disability community groups, State and Territory anti-discrimination bodies, industry and government organisations and in particular through the network of Disability Discrimination Legal Services.

### **Public inquiries**

One of the major means for promoting awareness and compliance with the DDA has been the conduct of public inquiries. These have been conducted at the Commission's own initiative; in response to selected complaints raising systemic issues; on exemption applications; and at the request of the Attorney General.

Conduct of public inquiries on discrimination and human rights issues, and publicity for complaint outcomes, have been the major strategies

adopted to seek to affect public awareness and attitudes on disability issues. An initial public awareness campaign when the legislation was introduced had only limited results.

In the Australian context at least, information, education or advertising campaigns directed at changing attitudes have, and always have had, at best a subsidiary place in eliminating disability discrimination. Attitudes towards people with a disability as objects of pity or fear, best segregated in separate accommodation, education, employment and services (if they are thought of at all) seem far more likely to change under the impact of experience of people with a disability as equal participants in ordinary and mainstream activities: as work colleagues; as classmates in school or university or college; as customers and so on. Our principal focus has therefore been on the institutions and structures that perpetuate exclusion and marginalisation, with attitudes seen as secondary to this.

The public inquiry process does not guarantee a successful outcome, but it can have several benefits. It enables broad community participation in discussion of important policy issues, including participation by disability NGOs. It may enhance the prospects for agreed resolution of issues (including issues which have been or could be the subject of complaints) by gathering a wider range of information, perspectives and options. It may also secure publicity both for discrimination issues and for positive outcomes.

Public inquiries under the DDA have been conducted with modest resources, using the internet as far as possible to gather and publish submissions, and supplementing this with face to face hearings where required to gain more information or pursue resolution of issues.

A major public inquiry on the human rights of people with a mental illness was commenced in 1990 and reported in 1993.

We have also conducted a public inquiry on accessibility of electronic commerce and new service and information technologies to people with disabilities and older people.

Other public inquiries have been conducted into selected complaints presenting broad systemic issues: in particular, inquiries into cinema captioning and television captioning for deaf and hearing impaired people; accessibility of mobile phones to people with hearing impairments; accessibility of electoral processes; and accessibility of railway stations to people using wheelchairs.

[Further details of some of these inquiries are set out below.]

### **Captioning issues**

Several complaints regarding captioning for deaf and hearing impaired people have been dealt with by open inquiry processes including publicly calling for submissions or convening a public forum involving industry and people with disabilities. An inquiry of this type on cinema captioning has led to a national program of captioning first release films. An inquiry on free to air television captioning contributed to regulatory requirements being set for captioning of all news, current affairs and prime time broadcasts, and further increases are being discussed in a forum convened by HREOC. A similar inquiry on captioning of pay television is at an earlier stage but appears promising.

## **Mobile phones and hearing aids**

Interference from some digital mobile phones can be so severe that some people who use hearing aids are unable to use these phones. In September 1999 the Commission announced a public inquiry into the issue, prompted by a representative complaint under the DDA on behalf of people who use hearing aids or cochlear implants. This inquiry was successfully concluded in April 2001 with the announcement by Telstra, Optus and Vodafone of schemes to provide remedies.

## **E-commerce**

In 1999-2000 at the request of the Attorney-General the Commission conducted a public inquiry on accessibility of electronic commerce and other new service and information technologies for people with disabilities and older people.

Following the inquiry the Commission has been assisting government and industry bodies to develop initiatives in this area, including through an Accessible Ecommerce Forum sponsored by the Commission and the Australian Bankers' Association.

A major outcome has been agreement by the Australian Bankers' Association to develop a series of industry accessibility standards, on internet banking, phone banking, EFTPOS facilities and automatic teller machines. These standards, developed in consultation with community representatives, were launched in April 2002. Individual banks have now begun to release plans for implementation of these standards.

## **Limitations and lessons**

We do not have a comprehensive, objective stocktake available on progress towards equality and accessibility for people with disabilities since the passing of the Disability Discrimination Act. There is enough evidence to show, though, that there have been some substantial achievements. However, experience has also highlighted some of the limitations of the legislation.

### **Lack of specific requirements for standard setting**

Setting of detailed standards on accessibility has been identified as a key requirement in the disability area. So it is a serious concern, that almost ten years since the Disability Discrimination Act was passed no standards are yet in force.

In the United States, under the Americans with Disabilities Act and related provisions of other laws, regulations had to be made by particular dates. In Australia, without the backing of a definite legislative timetable, progress towards standard setting has had to be achieved by slow negotiations (and to some extent by the threat of complaints).

### **Lack of comprehensive provision for standards**

Setting of standards is only provided for in some of the areas covered by the legislation. No good reason is apparent for this limitation.

Some progress has been made in areas such as telecommunications, television captioning and banking accessibility, through voluntary development of industry codes or through setting of standards by other regulators.

But an explicit provision under the DDA for standards in these areas - or some other means for certifying these other codes as sufficient for DDA compliance - could have assisted in achieving broader and faster progress.

### **Limits of compliance and reporting functions**

The legislation provides for organisations to submit voluntary action plans to achieve movement towards equal accessibility of services. But only two hundred or so action plans have been submitted to date, out of all the government departments, businesses and other organisations in Australia. The legislation also provides only very general indications of what a plan should contain, so the quality of plans varies widely.

The position is very different to that with affirmative action for women, where reporting is compulsory for employers of more than 100 people and where reports are made to an agency with substantial resources to assess the reports received.

### **Lack of HREOC enforcement or complaint initiation power**

As I said earlier, the Commission has experimented with public inquiry approaches, either as part of the investigation of a complaint or in response to a pattern of complaints, to widen the strategic impact of the legislation. But this still requires that complaints be lodged by someone in the first place.

Surveys of people who have used the complaints mechanism indicate that most people find the Commission's conciliation service accessible and valuable.

Some have also found the process to be stressful and time consuming and at times unable to deliver the sort of outcome they were looking for.

I would like to see more strategic use of the legislation by organisations and activists in the disability community. But when the Disability Discrimination Act was introduced there was also provision for the Disability Discrimination Commissioner to pursue discrimination issues as if a complaint had been lodged.

However, this "self-start" power had some technical defects which in practice made it unusable, and it was removed when the machinery provisions of the legislation were revised in 1999. It would be timely to consider how an enforcement role such as this could be reinstated in Australia. This sort of power is standard for regulatory agencies outside the human rights area, for example in consumer protection. I cannot see why human rights agencies should not have the same range of tools at their disposal as other modern regulatory agencies.

### **Disability mandate for all agencies of government**

A last point to emphasise is that human rights of people with disabilities cannot be effectively advanced if they are only the responsibility of a human rights agency. Some of the major areas of success in Australia have involved negotiating to get other areas of government responsible for regulation in areas such as transport, buildings and telecommunications to address disability access issues within their areas of responsibility.

A better legislative model though would be one which assigned this level of responsibility at the outset. This was done in the United States for example with the specialist transport and telecommunications regulators having responsibilities to bring forward disability access regulations in these areas rather than all responsibility resting with the civil rights division of the Department of Justice.

As we work towards the possibility of an international convention on disability and towards ensuring that such a convention draws on as broad a range as possible of national experience, I think it is important to keep in mind that we also have much to gain from direct exchange of national experience in addressing disability issues.

### **Accountability, reporting and auditing**

One of the motivations for development of a binding international Convention or treaty on human right and disability is to increase the level of accountability at the national level on these issues.

The binding instruments in most cases do not refer to disability or to the additional dimensions which disability brings to protection of human rights, while those instruments which do deal more specifically with disability (in particular the Standard Rules and the relevant General Comments adopted by treaty bodies) do not have the same authoritative status and profile as direct treaty provisions.

However, it is important that in discussing a possible Convention we do not lose sight of what is already there in the Standard Rules and what roles national commissions might have in improving awareness and implementation of those Rules.

The history of attempts to develop an international treaty on disability is already a long one, and the latest attempt is not guaranteed to succeed. So we need to ask, is it necessary to wait for a Convention to be developed and ratified before we can see improved public accountability for human rights outcomes for people with disabilities?

I do not think so.

At the last major summit meeting I held with disability peak organisations one of the major issues raised was monitoring of implementation of the Standard Rules.

Participants at the summit discussed some of the difficulties in meaningful auditing or benchmarking of human rights outcomes. But there was agreement that at the least we need to have collected together more accessibly what information there is, on what is being achieved and what remains to be done.

Of course, there is the issue of how much time and resources to spend in describing the present reality in various ways - when the point, after all, is to change it.

But I do think national commissions should do all they can to increase the effective accountability of their governments for performance against the Standard Rules.

One obvious possibility would be for us to receive and publish regular NGO reports on our own web sites and seek to achieve publicity for and responses to these.

Depending on resources, there may be other roles we can also play in relation to the standard rules. On this issue also I hope we can share ideas and experience. Thank you.