



Mr Mick Gentleman MLA  
Chair  
Standing Committee on Planning and Environment  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

Dear Mr Gentleman

### **Submission on discrimination in the provision of transport services, including buses**

Thank you for your letter of 18 May 2007 requesting advice on the application of anti-discrimination law to the operation of the ACTION bus services. We welcome your Committee's inquiry into ACTION and the ACT Government's Sustainable Transport Plan, as these issues are of great significance to many of the disadvantaged groups that the Human Rights Commission serves. We note that ACTION is also now conducting a full review of bus services with the aim "to build a better bus service for Canberra and one that meets the needs of the community while still providing value for money as a publicly owned service".<sup>1</sup> We understand from the Committee Secretary, Dr Hanna Jaireth, that your findings and recommendations will be provided to the ACTION review. Set out below are our views on human rights and discrimination issues, including access by disadvantaged groups.

#### **Human rights framework**

Your inquiry and the underlying concerns indicate a need for more thorough policy analysis and review of the needs of disadvantaged groups in the development and delivery of ACT transport services. To comply with the *Human Rights Act 2004* (HR Act), the goal of equality and non-discrimination should be at the heart of planning and decision-making by the ACT Government and its agencies. Section 8 of the HR Act protects the rights to equality and equal protection of the law – under s.31 this imports the international law concept of substantive equality, and allows for positive action that goes beyond temporary special measures to accommodate fundamental differences and achieve equal treatment.<sup>2</sup> The transport needs of the disadvantaged, including people with disabilities, should be at the centre of public transport planning and service provision.<sup>3</sup>

---

<sup>1</sup> <http://www.action.act.gov.au/default.cfm>.

<sup>2</sup> See p.13, *Human Rights Act 2004, A Plain English Guide*, Department of Justice and Community Services, 2004.

<sup>3</sup> See Frances Butler, *Improving Public Services: Using a Human Rights Approach*, June 2005, UK Institute for Public Policy Research, [www.ippr.org](http://www.ippr.org).

## **Questions of discrimination**

You ask if “*the administration of ACTION concession fares, and the operation of its services can be regarded as discriminatory in a legal or practical sense.*” We note that you specifically ask whether “*the low frequency of services during off-peak times and restrictions on the use of pensioner concession fares to off-peak times discriminates against the aged, persons with a disability, and people not in regular employment.*”

You also request “*information about the number of complaint allegations lodged against ACTION over the last 5 years, the ground of discrimination alleged, the category of complainant, and the outcomes of the complaint allegations.*”

You refer to a number of submissions in which organisations and individuals detail the problems they have been experiencing with the ACTION bus services due to infrequent services and poorly connected routes and we have read these. The constituencies involved include youth, the aged, carers and people with disabilities.

## **Role of Human Rights Commission**

Under the *Human Rights Commission Act 2005* (the HRC Act) the Commission’s functions include promoting the right of people to be free from unlawful discrimination in the provision of goods, services, and facilities.<sup>4</sup> The functions also include “*identifying, inquiring into and & reviewing issues relating to the matters that may be complained about under this Act*”.<sup>5</sup> This includes discrimination complaints, and would give the Commission scope for conducting its own inquiry into services that appear to be operating in a discriminatory manner. The general transport services provided by ACTION buses would not meet the specific definitions in the HRC Act of a disability service,<sup>6</sup> or a service for older people,<sup>7</sup> but they may be the subject of complaint under the Discrimination Act.

## **Discrimination complaints**

To our knowledge, there are no decided ACT Discrimination Tribunal cases involving ACTION buses. We are aware of two discrimination complaints on the public record that were lodged in the Discrimination Tribunal against ACTION as an employer, both of which were subsequently withdrawn.<sup>8</sup> Information provided in the former Human Rights Office’s Annual Reports shows the number of complaints against a ‘government authority’, but it is not possible to identify how many relate to ACTION bus services. The confidentiality provisions in s.121 of the *Discrimination Act 1991* and s.99 of the *Human Rights Commission Act 2005* prevent us from disclosing specific information about complaints received by the Commission, including the identity of complainants and respondents, unless we obtain their consent. However, we can report in general terms that we have considered disability discrimination complaints in the area of transport services, including ones that relate to the alleged inadequacy of the services for people using wheelchairs. Several have been conciliated, but the terms of the agreement are usually not public. Discrimination on the ground of disability is the leading cause of complaint under

---

<sup>4</sup> s.23(2)(a)(ii) of the HRC Act.

<sup>5</sup> s. 14(1)(e) of the HRC Act.

<sup>6</sup> s.8 of the HRC Act.

<sup>7</sup> s.9 of the HRC Act.

<sup>8</sup> *John Best v ACTION* No DT 515 of 2004, withdrawn on 22 November 2005, and *Rebecca Jarvis v ACTION* Ref DT03/347 of 2004, withdrawn on 17 December 2004.

the Discrimination Act across all areas of public life – education, employment, access to premises, provision of goods, facilities and services.

In our view the matters you canvass and the material in the submissions made to your committee’s inquiry raise issues of possible unlawful discrimination and we set out below the basis for this view. This does not mean a discrimination complaint is bound to succeed as each complaint turns on its facts and we cannot prejudge an issue. However, we note that even an unsuccessful discrimination complaint in the Discrimination Tribunal can lead to negative publicity, and expose deficiencies in service provision. For example in the case of *Crowley v Canberra Cabs Limited (and ors)*, the disability discrimination complaint failed, but the Tribunal said:

There was a significant amount of evidence that the taxi service provided to the complainant was not on an equal footing as that provided to citizens without any such disability... the particular delay the subject of the complaint was not an isolated incident but rather, unfortunately, a constant occurrence.<sup>9</sup>

### **Application of the Discrimination Act 1991**

We set out below the relevant provisions of the Discrimination Act and their application to the services provided by ACTION.

The objects of the *Discrimination Act 1991* (the Act) include “to eliminate as far as possible discrimination to which this Act applies in the area of ...the provision of goods, services, facilities”.<sup>10</sup>

The relevant area of public life is the provision of “goods, services and facilities”, which is covered by s.20 of the Discrimination Act:

#### **s.20 Goods, services and facilities**

It is unlawful for a person (the *provider*) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—

(a) by refusing to provide those goods or services or make those facilities available to the other person; or

(b) in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or

(c) in the way in which the provider provides those goods or services or makes those facilities available to the other person.

A broad range of services and public sector activities may be characterised as services for the purposes of anti-discrimination law.<sup>11</sup> The Dictionary to the Act specifies that “*services includes – (c) services relating to transport or travel*”. It also includes “(e) *services provided by a government, government authority, local government body or corporation in*

---

<sup>9</sup> (2006) ACTDT 4, paras 36 – 38.

<sup>10</sup> s.4(a).

<sup>11</sup> *Sydney University Postgraduate Representative Association (SUPRA) & Ors v Minister for Transport Services & Ors* (2006) NSWADT 83 paras 39-40.

which a government has a controlling interest”. Both as a provider of transport or travel services and as a service provided by government, ACTION is clearly subject to the Discrimination Act.

The concept or definition of discrimination includes both direct and indirect forms and is set out in s.8 of the Discrimination Act as follows:

### **s.8 What constitutes discrimination**

- (1) For this Act, a person discriminates against another person if—
  - (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7, or
  - (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.
- (2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.
- (3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—
  - (a) the nature and extent of the resultant disadvantage; and
  - (b) the feasibility of overcoming or mitigating the disadvantage; and
  - (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.

The ‘protected attributes’ or prohibited grounds of discrimination are set out in s.7. Those of particular relevance to the issues raised by the Committee include sex,<sup>12</sup> status as a parent or carer,<sup>13</sup> pregnancy,<sup>14</sup> disability,<sup>15</sup> and age.<sup>16</sup> It is important to note that the protected attributes include “a **characteristic** that people with that attribute generally have”, and “are generally presumed to have”.<sup>17</sup>

Discrimination does not have to be intentional to be unlawful,<sup>18</sup> nor does it have to be the only reason for the unfavourable treatment. Omissions as well as actions may constitute discrimination as the Act provides that doing an act includes failing to do an act.<sup>19</sup> In this sense, the Act has potentially broad application. In bringing a complaint, the onus is on the person complaining of unfavourable treatment to show a link with their ‘protected attribute’, or in the case of indirect discrimination, to demonstrate that a condition or requirement has been imposed that disadvantages them. The ACT legislation is unusual in not having a comparator test of unfavourable treatment, as the comparative model applies in most other jurisdictions in Australia. A complainant has to show that they have suffered a detriment because of their protected attribute, but does not have to provide a comparison with someone in similar circumstances who does not have the protected attribute.<sup>20</sup> The

---

<sup>12</sup> s.7(1)(a).

<sup>13</sup> s.7(1)(e).

<sup>14</sup> s.7(1)(f).

<sup>15</sup> s.7(1)(j).

<sup>16</sup> s.7(1)(l).

<sup>17</sup> s.7(2)(a) and (b).

<sup>18</sup> *Reddrop v Boehringer Ingelheim Pty Ltd* (1984) EOC 92-031.

<sup>19</sup> s.4A.

<sup>20</sup> See *Prezzi and Discrimination Commissioner & Anor* (1996) 39 ALD 729 and *Lewin v ACT Health & Community Care Service* (2002) ACT DT 01/257.

test to be applied under the Act, sometimes called the ‘detriment test’, gives a greater breadth of coverage than in other jurisdictions, and has been endorsed by both the NSW Law Reform Commission and the Australian Law Reform Commission.<sup>21</sup>

### **Indirect discrimination**

Indirect discrimination is a mechanism for examining the impact of policies and practices which on their face appear neutral, but which in fact have a disproportionate detrimental impact on or outcome for people with a protected attribute and which are not reasonable in the circumstances. In the ACT, the test focuses on the disadvantage that flows from the imposition of a requirement or condition, whether imposed implicitly or explicitly. The onus is on the respondent (eg the service provider) to prove that the detrimental condition or requirement is reasonable in all the circumstances.

### **Access by disadvantaged groups**

Low frequency of services in off-peak times, lengthy routes and poor connections have been identified as a concern for many disadvantaged groups. The protected attributes that may apply in relation to reduced or inadequate bus services include sex, status as a parent or carer, pregnancy, disability, and age.

### **People with disabilities**

Disability discrimination in the provision of public transport services was at the centre of one of the leading anti-discrimination cases, involving indirect discrimination. In *Waters v Public Transport Corporation*,<sup>22</sup> the High Court found in favour of the complainants who had argued that the removal of conductors from trams in Victoria and the introduction of a scratch ticket system indirectly discriminated against them on the ground of disability by imposing a condition or requirement that disadvantaged them. There were nine complainants each of whom had a disability that made using the ticket system difficult or impossible – including cerebral palsy, intellectual disability, and vision impairment. The judgement in this case found that the new ticketing system constituted a condition or requirement that disadvantaged people with a disability. The High Court emphasised the purpose of anti-discrimination law as being to protect human rights, prevent disadvantage on the basis of protected attributes, and achieve substantive equality.<sup>23</sup> The practical outcome of the case was the discontinuance of the scratch ticket system, but not the reinstatement of tram conductors. In that case it was also held at first instance that a decision to make future changes to the Victorian public transport system, that had yet to be implemented, was capable of amounting to discrimination.<sup>24</sup> The High Court did find that the Equal Opportunity Board had been incorrect in not taking into account financial or economic considerations when considering the reasonableness of the proposed changes to the tram service.

---

<sup>21</sup> NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977*, Report 92, Vol 1, paras 3.51-3.57, 1999 and also ALRC, *Equality Before the Law*, Report 69, 1994.

<sup>22</sup> [1991] HCA 49.

<sup>23</sup> See discussion of the judgements in this case in Patmore G, ‘Moving Towards a Substantive Conception of the Anti-Discrimination Principle: *Waters v Public Transport Corporation of Victoria* Reconsidered’ [1999] *Melbourne University Law Review* 4.

<sup>24</sup> *Waters & Ors v Rizkalla (constituting the Equal Opportunity Board) & Anor* (1990) EOC 92-282.

The failure to provide accessible buses on sufficient scheduled routes meaning that a person using a wheelchair has to wait longer or travel a longer and/or less convenient route may also ground a complaint of disability discrimination. In *Waters*, Brennan J said: “Disabilities – physical, functional and mental – are almost infinitely various and they create needs which vary according to the nature and extent of the disability. Services may be required to satisfy those needs and, in many cases, public authorities provide the services. Indeed a measure of the civilization of a society is the extent to which it provides for the needs of the disabled (and of other minorities) and protects them from unjust discrimination which offends their human dignity.”<sup>25</sup>

I note that the need for transport assistance is one of the issues identified in the ABS *Survey of Disability, Ageing & Caring*,<sup>26</sup> which suggests that governments should predict and provide for an increased reliance on accessible transport services. The ABS forecasts a significant percentage increase in the number of people living in Canberra aged 65 and over and of a predicted increase in the prevalence of disabilities across all age groups. We also note the importance of accessible public transport to the employment opportunities of people with disabilities, and to their capacity to participate in society generally.

The Human Rights Commission of New Zealand published a report in October 2005 on “*The Accessible Journey: Report of the Inquiry into Accessible Public Land Transport*”, noting that the need for accessible public transport will only increase as the population ages. The Report found that:

many disabled people without accessible public transport are trapped in a lifetime sentence of poverty, marginalisation and dependency. They face enormous difficulties just getting to work, seeing the doctor, buying groceries and even meeting friends – all things that non-disabled people take for granted.<sup>27</sup>

### **Exceptions to disability discrimination**

There is an exception in s.53 of the Act that applies to provision of services to people with a disability.

#### **s.53 Discrimination in the provision of goods and services**

(1) Section 20 does not make unlawful discrimination on the ground of disability in relation to the provision of goods, services or facilities if—

(a) because of a person's disability, the goods, services or facilities would have to be provided in a special way; and

(b) their provision in that way would impose unjustifiable hardship on the person providing, or proposing to provide, the goods, services or facilities.

The onus is on the service provider to prove unjustifiable hardship, which is defined in s.47 of the Discrimination Act as follows.

---

<sup>25</sup> *Waters v Public Transport Corporation*, per Brennan J, para 2.

<sup>26</sup> ABS Cat No 4430.0, 2003.

<sup>27</sup> <http://www.hrc.co.nz/home/hrc/newsandissues/barrierstopublictransportdenyaccesstoopportunities.php>.

## s.47 Unjustifiable hardship

In deciding what is unjustifiable hardship for this division, all the relevant circumstances of the particular case must be taken into account, including the following:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by all people concerned;
- (b) the nature of the disability of the person concerned;
- (c) the financial circumstances of, and the estimated amount of expenditure by, the person claiming unjustifiable hardship.

Applying this defence, the NSW Administrative Decisions Tribunal dismissed a disability discrimination complaint against a bus company brought by a person who could not fully utilise the service because of limited wheelchair access.<sup>28</sup> On appeal, the Appeal Panel found that the Tribunal had erred in not expressly considering the factor listed at (a) above – that is the detriment to those affected by failure to provide this access.<sup>29</sup> The Commonwealth Disability Standards for Accessible Transport require compliance “to the maximum extent not involving unjustifiable hardship” and sets out a non-exhaustive list of factors that should be taken into account.<sup>30</sup> These include cost, and consultations with people with a disability and good faith efforts to comply. Implicit in the concept of unjustifiable hardship is that some hardship on the respondent will be justifiable in the interests of eliminating or preventing the harms caused by discrimination.<sup>31</sup>

### **Disability Standards for Accessible Public Transport**

The Federal Government is undertaking its first five-year review of the *Disability Standards for Accessible Public Transport 2002* made under the Disability Discrimination Act 1992 and effective from 23 October 2002. An Issues Paper published in May 2007 noted that the lack of sufficient accessible public transport is a contributing factor to the difficulties that people with disabilities face in participating in the recreational and social life of the community.<sup>32</sup> The Human Rights Commission will be making a submission to this review (submissions due by 24 August 2007). We urge the ACT Government to ensure that the Disability Standards for Accessible Public Transport are not reduced in any way, as it would be contrary to existing government policy.<sup>33</sup>

The Commonwealth Government’s recent signing of the *UN Convention on the Rights of Persons with Disabilities* prior to ratification, increases the likelihood of negative Commonwealth and international scrutiny if existing standards are decreased, which has been suggested. Article 9 of the Convention relates to accessibility. Section 31 of the

---

<sup>28</sup> *Moxon v Westbus Pty Ltd* [1999] NSW ADT 88.

<sup>29</sup> *Moxon (No 2) v Westbus Pty Ltd (2002) EOC 93-248* – and many other cases involving the ‘unjustifiable hardship’ defence are considered in this decision.

<sup>30</sup> Section 33.7 Disability Transport Standards for Accessible Public Transport 2002.

<sup>31</sup> See for example *Access for All Alliance (Hervey Bay) v Hervey Bay City Council (2004) FMCA 915*, discussed in Ch 5 Federal Discrimination Law 2005, HREOC.

<sup>32</sup> Review of the *Disability Standards for Accessible Public Transport 2002*, Issues Paper, The Allen Consulting Group, May 2007, p3.

<sup>33</sup> *Future Directions: A Framework for the ACT 2004-2008*; and *Challenge 2014: A Ten Year Vision For Disability in the ACT*.

*Human Rights Act 2004* provides that international law may be considered when interpreting rights and this would include the new Convention.

### **Women, carers and the aged**

Women are much more likely than men to work part-time and/or casually in order to fit their paid work around their caring responsibilities.<sup>34</sup> This means that they are less likely to be using the buses during the peak commuting times for which the majority of bus services are provided, and more likely to need bus services at other times of the day. The propensity of women to work part-time could be considered a characteristic of women and unfavourable treatment linked to this could therefore constitute unlawful sex discrimination.<sup>35</sup> It is also the case that women are less likely than men to own or have primary use of a car and to rely more heavily on public transport.<sup>36</sup>

In their report *“It’s About Time: Women, Men, Work and Family”* (2007), the Federal Human Rights and Equal Opportunity Commission (HREOC) noted the importance of accessible, efficient and affordable public transport for people with caring responsibilities. *“For people with disability, difficulties in combining paid work and care can be compounded by lack of access to and the high cost of transport”*.<sup>37</sup> They reported that submissions *“identified inadequate or expensive transport ...as a barrier to balancing paid work and family life/carer responsibilities”*. They also identified access to transport as a major issue for sole parents because of the complexities of getting children to childcare or school and then themselves to work on public transport.<sup>38</sup> HREOC focus groups and participants in their consultations *“drew attention to a lack of local public services such as transport and the need for investment in local infrastructure.”* HREOC concludes that *“public transport with better off-peak services and vehicles designed to accommodate prams and wheelchairs would assist those who cannot conform to the male breadwinner norm, as well as those who cannot afford private transportation.”*<sup>39</sup>

In the UK, the Equal Opportunity Commission commissioned a study on *Promoting Gender Equality in Transport* that identified significant differences in patterns of travel associated with women’s greater responsibility for caring, housework and shopping, and different needs in terms of women’s generally lower incomes.<sup>40</sup> It also shows that poor transport services inhibit access to other services, including health, education and training opportunities, pre-school and after-school childcare and leisure services.<sup>41</sup> Women are commonly the major users of public transport, especially buses. They also use transport in different ways from men, combining shopping, taking children to schools and to childcare, visiting relatives, escorting children to doctors and going to work. These issues are also relevant to many people with disabilities (see above), who are often on low incomes and dependent on public transport to go about their daily lives.

---

<sup>34</sup> Over seventy per cent of part-time workers are women – see *‘Striking the Balance: Women, Men, Work and Family, Discussion Paper’*, Human Rights and Equal Opportunity Commission, Sydney, 2005.

<sup>35</sup> See *Kemp v Minister for Education & Anor* (1991) EOC 92-34- and discussion in CCH EO Law and Practice 4-680; see also *Hickie v Hunt and Hunt* (1998) EOC 92-910.

<sup>36</sup> *Australian Social Trends*, 1996, Special features: Car use, ABS. Gender disaggregated data for the ACT is not provided and analysis of the more recent census data has not yet been completed.

<sup>37</sup> See HREOC Final Report, Chapter 9, p.193.

<sup>38</sup> *ibid* p.195.

<sup>39</sup> *ibid* p.197.

<sup>40</sup> Hamilton et al, EOC, Manchester, 2005.

<sup>41</sup> See also E. Breitenbach, *Gender Statistics: an Evaluation*, UK Equal Opportunities Commission, 2006, Chapter 6 on Transport.

You specifically ask “if restrictions on the use of pensioner concession fares to off-peak times discriminates against the aged, persons with a disability, and people not in regular employment.” The attribute of ‘not being in regular employment’ is not included in the list of protected attributes and would be a less clear cut ground of discrimination. Proposals have been made to amend the Discrimination Act to include the ground of ‘socio-economic status’, particularly by ACTCOSS, but the ACT Government has not yet taken these up. Meanwhile, it may be possible in some circumstances to establish indirect discrimination on the ground of sex, status as a parent or carer or disability if ‘being in full-time or regular employment’ could be shown to be (implicitly) a requirement of accessing a service and was not reasonable in the circumstances. As long as off-peak services are significantly inferior (eg longer and slower routes, less frequent service) to peak-hour services there is a risk that a discrimination complaint may succeed if it meets the tests outlined above. Similarly, the greater reliance of aged people in our community on public transport, particularly the frail aged and those on low incomes, to access health services and participate in a range of activities may expose ACTION to discrimination complaints on the ground of age if the way their services are provided disadvantages people in this group.

### **Exceptions**

There is an exception in s.57H of the Discrimination Act relating to ‘Benefits and concessions’ that provides as follows:

Division 3.2 does not make it unlawful to discriminate against a person in relation to the provision of genuine benefits, including concessions, to someone else because of his or her age.

This exception covers the granting of concessions but would probably not protect ACTION from restrictions on the use of concessions. While there may be an economic argument to support having attractive off-peak fares generally available to increase use of underused services, restrictions on access to services that amount to unfavourable treatment linked to a protected attribute may constitute unlawful discrimination.

The issue of transport concessions has been the subject of at least two discrimination cases, but they concerned access to the concession fares rather than any restrictions on services for concession holders.<sup>42</sup>

There is an exception under s.30 of the Discrimination Act for ‘acts done under statutory authority’. The onus would be on ACTION to show that it applied to its service delivery. In a case concerning the refusal of concession fares for fee-paying overseas students, the NSW Administrative Decisions Tribunal rejected the argument that the equivalent ‘statutory authority’ defence sanctioned the Transport Minister’s policy. It followed the High Court decision in *Waters*, which ruled that this exception or defence must be construed narrowly, and applied only where the requirements of another Act were “mandatory and specific”.<sup>43</sup>

In the recent Discrimination Tribunal decision of *Woodbury & Ors v ACT*,<sup>44</sup> the ACT Government argued that its actions were taken in accordance with budget measures

---

<sup>42</sup> *Sydney University Postgraduate Representative Association (SUPRA) & Ors v Minister for Transport Services & Ors* (2006) NSWADT 83, and *Christian Family Schools Association of Australia v Public Transport Corporation* (1990) EOC 92-300.

<sup>43</sup> Quoted in SUPRA case para 83 and discussed paras 83-87.

<sup>44</sup> [2007] ACTDT 5 April 2007.

sanctioned by the *Financial Management Act 1996*. In this case, a determination about the application of s.30 was not made, as the President of the Tribunal did not find evidence of discrimination. However, President R J Cahill concluded that “*all of the issues involved here arise from resource allocation and government budget allocation decisions*”.<sup>45</sup> He said, “*the question of budgetary allocations for individual service packages and for general levels of service ultimately remains a political decision to be made by government. It is only in a narrow class of cases that discrimination will be made out under the legal requirements of the ACT discrimination legislation.*”<sup>46</sup> The Tribunal appeared not to consider the High Court case of *Waters v Public Transport Corporation* or the ACT Discrimination Tribunal decision in *Butcher v The Key King*,<sup>47</sup> which both gave a narrow construction to the ‘statutory authority’ exception.

### **Systemic discrimination**

Whilst it may be open to individuals affected by inadequate bus services to lodge discrimination complaints against ACTION this would be onerous on individuals and may not be the most efficient method of challenging systemic discrimination. There is evidence both locally and internationally to demonstrate the many ways that poor public transport services impact on people’s lives, and entrench and exacerbate social disadvantage.

According to the Australian Bureau of Statistics, the ACT has the lowest level of public transport use in Australia, and has experienced a significant decline in use of public transport.<sup>48</sup> The proportion of people in the ACT who report using public transport to get to work or study has dropped from 12% in 1996 to 8% in 2006, while the national average has risen (from 12% to 14%). Perhaps of most significance to this inquiry is the finding that in the ACT “**the timing of the service**” was the most pronounced reason for not using public transport, ie that the service was not available at a convenient time, or the travel time was too long.<sup>49</sup> This data is not disaggregated by gender, age or whether or not a person has a disability. I understand that the most recent ABS Survey of Public Transport Usage in the ACT was conducted in October 1998.<sup>50</sup>

Structural mechanisms may be necessary to address systemic inequality. For example, in the UK the Department for Transport has a ‘Mobility and Inclusion Unit’, the aim of which is “to make policies and provision for public transport users, pedestrians and motorists that are acceptable, accessible, available, affordable and safe, and to promote diversity in transport policy development.”<sup>51</sup>

### **Duty to promote equality**

The Human Rights and Discrimination Commissioner has already proposed that the ACT Government should consider amending the Discrimination Act to include a requirement that public bodies actively promote equality. With the establishment of the Human Rights Commission, and three years on from commencement of the *Human Rights Act 2004*, it is appropriate to consider implementation of a positive duty on public bodies to prevent discrimination and promote equality. This would be consistent with emerging international

---

<sup>45</sup> para 120.

<sup>46</sup> para 119, emphasis added.

<sup>47</sup> (2000) ACTDT 2.

<sup>48</sup> *ABS Environmental Issues: People’s Views and Practices 4602.0, March 2006.*

<sup>49</sup> *Ibid*, pp62-64.

<sup>50</sup> ABS 1365.8.

<sup>51</sup> <http://www.dft.gov.uk/transportforyou/access/>.

trends and would give better effect to the guarantees in existing treaties, that is the ICCPR, CEDAW, CERD and CRC as well as the new Convention on the Rights of People with Disabilities.<sup>52</sup> There is a trend internationally towards a more pro-active model of eliminating discrimination, and it would be consistent with the human rights framework in the ACT to adopt such a model.<sup>53</sup> It would mean in relation to gender equality for example that transport service providers would need to consider the different ways in which women and men make use of public transport and ensure that women's needs were being met. In Dublin, Ireland, where public bodies have a duty to promote equality, Dublin Buses surveyed users and non-users to identify unmet needs and as a result extended existing bus routes, provided cheaper multi-trip fares, and targeted women and elderly people. There was excellent take-up of the new routes and an increase in city centre economic activity as a result.<sup>54</sup>

The international human rights framework supports a substantive duty on public bodies to take necessary and proportionate steps for the progressive realisation of equality, backed by a series of procedural requirements.<sup>55</sup> In the absence of this or other positive measures designed to achieve systemic change it is left to individuals to challenge discrimination on a case-by-case basis, which is more onerous, less effective and less strategic. A statutory duty to promote equality would put the onus on employers and service providers to be more proactive in carrying out their functions in a non-discriminatory way. It would require that organisations take steps to address barriers to equality and ensure that their policies, practices and services do not have an adverse impact on women, disabled people or other disadvantaged groups. It would embed equality performance measures in service/agency planning, evaluation and accountability frameworks. The steps involved for an agency in fulfilling a public duty include:

- Collect baseline evidence on discrimination and equality across its functions. This would include agency data, material from complaints and submissions, research, consultations with staff and service users.
- Ensure data is disaggregated by 'protected attribute' – eg sex, age, race, and disability.
- Analyse the causes of inequalities identified or barriers to equality.
- Consult and involve employees and service users in the analysis and in developing solutions.
- Develop an action plan setting out the steps to be taken, and build it into the agency core business plan.
- Assess the potential impact of new policies/measures on disadvantaged groups.
- Monitor and report on progress

The ACT Government should move to enact progressive legislation in this area as part of its commitment to the practical realisation of human rights. I expect that jurisdictions, such as Victoria, that already have direct application of human rights legislation to government agencies (in addition to interpretative provisions), may take this approach.

---

<sup>52</sup> See *Time for Equality at Work, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, ILO, Geneva, 2003* (p.xii).

<sup>53</sup> Examples of jurisdictions where the duty applies include South Africa, Northern Ireland, England, Scotland and Wales.

<sup>54</sup> See report at <http://www.eoc.org.uk/Default.aspx?page=15184>.

<sup>55</sup> See discussion in Fredman s & Spencer S, *Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to promote Equality Outcomes*, 2006, E.H.L.R, Issue 6, pp 599- 606.

## Recommendations

The Commission recommends that:

1. ACTION conduct a comprehensive review of user needs, including unmet needs, with particular attention to the needs of disadvantaged sections of the community discussed in this submission and elsewhere considered in this Inquiry. This should include the collection of data disaggregated by sex, age and disability, with the assistance of the ABS if possible.
2. ACTION should be required to monitor the adequacy and affordability of bus services for disadvantaged groups, and report regularly on the outcomes to the Legislative Assembly.
3. ACTION should, in redesigning its services, put in place a human rights compliant planning framework with the goal of ensuring equitable service outcomes.
4. ACTION involve disadvantaged user groups in the planning and review of public transport services is a key strategy to ensure accessible and appropriate services, Such an approach is recommended by the research in this area.<sup>56</sup>
5. The Committee recommend that the ACT *Discrimination Act 1991* be amended to provide for a positive duty on public authorities to promote equality.

Thank you again for the opportunity to comment. We look forward to the opportunity to discuss this submission further at the Committee's public hearing on Tuesday 7 August 2007.

Yours sincerely

Dr Helen Watchirs  
Human Rights and Discrimination Commissioner

Linda Crebbin  
Children and Young People Commissioner  
Disability and Community Services Commissioner

25 July 2007

---

<sup>56</sup> See for example Dodson J et al, *Transport Disadvantage and Social Status: A Review of Literature and Methods*, Griffith University, Urban Policy Program, Research Monograph 5, 2004.