

25 February 2004

Ms Helen Owens  
Commissioner  
Productivity Commission  
Locked bag 2 Collins Street East  
MELBOURNE VIC 8003

Dear Ms Owens

I refer to the Productivity Commission's Draft Report of the Review of the *Disability Discrimination Act 1992* released in October 2003. I wish to congratulate the Commission on a comprehensive and rights based approach to disability. The Anti-Discrimination Commission Queensland (ADCQ) agrees that the DDA has provided net benefits to the Australian community.

The ADCQ supports the key points of the draft Report, except for the recommendation concerning Disability Standards displacing Anti-Discrimination legislation. This issue requires further consideration by the ADCQ along with relevant Queensland Government agencies.

I have written to the Honourable Rod Welford, Queensland's Attorney-General and Minister for Justice, requesting that a working group be formed to further explore a number of alternative proposals which will have the effect of accessing the Standards in Queensland law so as to achieve certainty for service providers. I **enclose** a copy of this letter. As I indicated in the letter I expect to be able to meet the deadline of mid-March 2004 for the submission in response to the draft Report.

Given the importance of this issue I will not be providing oral submissions at the Brisbane hearings but will incorporate the findings of the working group and any other comments in the written submission provided to you in mid-March 2004.

If you require any further information do not hesitate to contact me on (07) 32470901.

Yours sincerely

**SUSAN BOOTH**  
**Anti-Discrimination Commissioner**  
**Queensland**

25 February 2004

The Hon Rod Welford MP  
Attorney-General and Minister for Justice  
GPO Box 149  
BRISBANE QLD 4001

Dear Mr Welford

**RE: Proposal to establish a Working Group between ADCQ, JAG  
and others to discuss a possible joint response to the  
Review of the Disability Discrimination Act 1992**

The Productivity Commission's Draft Report of the Review of the *Disability Discrimination Act 1992* (DDA) was released in October 2003. The Anti-Discrimination Commission Queensland (ADCQ) generally supports the provisions in the report that seek to strengthen the DDA.

One issue that does require further consideration concerns the effect of Disability Standards. So far, Disability Standards have been made in the public transport and building areas. Some preliminary work has also begun in the Education area.

The Productivity Commission's draft report recommends that when a Standard exists it should displace State legislation such as the Queensland *Anti-Discrimination Act 1991*. It states -

*"Disability standards provide certainty for people with disability and service providers. This certainty is reduced if State and Territory requirements differ from the standards. The DDA should make it clear that disability standards also displace the general provisions of State and Territory anti-discrimination legislation"*

The Productivity Commission now seeks responses to its Draft Report.

Displacing the Queensland ADA with a Standard does bring certainty, and to that extent is supported by the Queensland disability sector. It will however also mean that where previously an individual could bring a complaint notwithstanding compliance with Building Code of Australia (BCA), in future a complaint could not be accepted where the Standard applied.

Queensland's most famous building access case *Cocks v State of Queensland* was litigated on this very point. The respondent had complied with the BCA but still was found by President Atkinson (as she then was) to have discriminated against the complainant. Such a case could not be brought in future if the Standards over-ride Queensland legislation.

At this stage I can see no reason to support the overriding of State legislation by the DDA. There are better alternatives which provide certainty without overriding the ADA.

The first is the least interventionist. It would require no legislative intervention. After promulgation of the Standards it is likely that the Queensland Anti-Discrimination Tribunal will take notice of the Standard to ensure that a complaint would not succeed. By following this approach service providers could rely on the Standards when building in Queensland but without the need to override the ADA.

I am supported that this is a reasonable option in an opinion obtained by Ms Linda Matthews, the South Australian Commissioner for Equal Opportunity from the South Australian Crown Solicitor who sought advice on the effect of the Standards on the equivalent SA legislation. The Crown solicitor concluded-

*"..if a disability standard would provide a person with a defence against a complaint to the HREOC under the DDA, that person might be able to argue against a complaint to the (SA) Commissioner under the Equal Opportunity Act 1984 (SA) that the (SA) Commissioner's jurisdiction to entertain the complaint, and certainly to rule adversely to the person complained against, was invalidated, in relation to that specific complaint, by the existence of the disability standard and the defence it creates under Commonwealth law."*

A copy of this opinion has been provided to Ms Sharon Sergeant.

Another approach could be the adoption of the disability standards by Queensland. Such an approach would not require any change to the ADA and it may be that such an approach would remove any uncertainty whatsoever. I am happy to further explore this option.

Issues around access for people with disabilities and certainty for service providers are indeed important and need input from both the ADCQ and your Department. The Productivity Commission Report does raise a number of other issues that may be of interest to you. In particular, there is a proposal to have a "shop front" presence for the DDA at State Anti-Discrimination bodies. This would have budgetary implications.

I seek your support for a working group chaired by your Departmental officers, assisted by legal officers from the ADCQ and including other relevant departments and agencies. As a result of these meetings it may be possible to put a joint "Queensland" position to the Productivity Commission.

Ms Linda Matthews from South Australia is also of the view that this important issue is best progressed by consultation between their Justice Department and the South Australian Anti-Discrimination Commission. Further that she will be writing to Attorney-General in South Australia in similar terms.

I enclose for your information, a copy of a letter I have sent today to the Productivity Commission advising of this approach. The Productivity Commission would be prepared to accept a submission as late as mid-March. I would envisage that from the ADCQ's point of view this timetable would allow sufficient time to develop a clear position.

I look forward to your positive response on JAG establishing a working party to develop a cohesive and well considered Queensland response to the Productivity Commission Report.

Yours sincerely

**SUSAN BOOTH**  
**Anti-Discrimination Commissioner**  
**Queensland**