Review of the Disability Discrimination Act 1992

A Submission by the Australian Industry Group to the Productivity Commission

February 2004

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Preamble

The Australian Industry Group (Ai Group) welcomes the opportunity to comment on the Draft Report released by the Productivity Commission in October 2003 on the *Review of the Disability Discrimination Act 1992* (DDA).

Ai Group supports the objects of the DDA which seek to eliminate discrimination against disabled people and to protect and promote their right to equality of opportunity as far as possible in such key areas of life as employment, education, access to Commonwealth laws and programs and equality before the law.

This submission is directed largely to the impact which the DDA has on business, including small business, in employment areas. However we recognise that the scope of the Productivity Commission's review is much broader than this. The submission only addresses a limited number of matters of particular importance.

We acknowledge that the review of the DDA must balance the social issues associated with the employment of people with disabilities, with various economic matters. The capacity of people with disabilities to enter employment is in many instances more limited than that of other minority groups because of the nature and degree of their impairments. The DDA recognises that elimination of discrimination involves trade-offs between benefits and costs and it is Ai Group's view that this principle is of paramount importance and must be preserved in any amendments to the DDA which may result from the Productivity Commission's review of it.

Ai Group

Ai Group is one of the largest national industry bodies in Australia, representing approximately 10,000 employers, large and small, in every state and territory. Members provide more than $100 billion in output, employ more than 1 million people and produce exports worth some $25 billion dollars.

Ai Group represents employers in manufacturing, construction, labour hire, information technology, telecommunications, call centres, aviation and other industries.

This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers Association, South Australia (EEASA).

The DDA's Effectiveness in Eliminating Discrimination[1]

Ai Group agrees with the Productivity Commission's view that *"ten years is not a long time in which to achieve the fundamental changes sought by the DDA[2]"* and that *"Given its relatively short period of operation, the DDA appears to have been reasonably effective in reducing overall levels of discrimination"[3].*

Ai Group also concurs with the Productivity Commission's assessment that *"knowledge of the DDA among many people with disabilities and the general community still appears to be limited. There is significant scope to improve awareness"[4].*

Given the relatively short time that the DDA has been in operation and the relatively low level of awareness of the legislation, amendments should only be made to the Act where there is very clear evidence that such amendments are warranted. Imposing further costly and burdensome regulatory arrangements upon employers will reduce their ability to employ persons – both those with and those without disabilities. There is also the risk that an overly prescriptive approach will foster negative attitudes amongst employers regarding the employment of people with disabilities.

[1] Review of Disability Discrimination Act 1992, Draft Report, October 2003, Chapter 5.
[2] Draft Report, p.XXXII and Draft Finding 5.8.
[3] Draft Report, p.XXXVI

Ai Group would be pleased to work with the Human Rights and Equal Opportunity Commission (HREOC) and other relevant bodies to promote the importance of ensuring that people with disabilities are encouraged to apply for employment positions and are not discriminated against when selection decisions are made. There are many "good news" case studies relating to the employment of people with disabilities and many favourable statistics (eg. high levels of motivation, low absenteeism rates, etc). These positive messages and case studies need to be better communicated. Ai Group has already taken some steps in this regard (eg. arranging for various expert speakers to address groups of Ai Group members at Conferences and Seminars) but more can and should be done.

HREOC should devote more resources to working with Ai Group and other employer groups to educate their member companies about the issues in a positive way, rather than just focusing on legal obligations. Joint seminars and publications would be worthwhile. Ai Group maintains close links with its members, and member companies rely on Ai Group for advice and leadership. Education and awareness programs which are channeled through respected industry bodies, such as Ai Group, are likely to be more effective than "broad-brush" approaches.

In Ai Group's view (notwithstanding Chapter 7 of the Draft Report), the Productivity Commission has devoted inadequate attention within the Draft Report and Recommendations to the benefits of such a positive approach in the employment area. The focus is weighed heavily towards increasing the regulatory burden upon employers, rather than on the benefits that would undoubtedly flow from devoting more resources to educating employers in a positive manner.

Given the Productivity Commission's Draft Finding that *"disability discrimination in employment remains a significant issue"*, there would be benefit in the Commission specifically recommending that HREOC work with industry / employer organizations to educate the members of such organizations about the issues in a positive manner.

[4] Draft Report, p.XXXIII

Competition and Economic Effects of the DDA[5]

Economic Effects

Ai Group recognizes that significant economic benefits would flow from increasing the participation of people with disabilities in employment. Each additional employed person would earn wages, spend more on goods and services, pay taxation, and contribute to innovation efforts. There would also be substantial savings in welfare costs.

In addition to the above very measurable benefits, the increased quality of life which people with disabilities would enjoy would provide a wide range of other benefits, including savings in health costs, stronger family relationships, and so on.

Competition Effects

Ai Group has considered the Commission's comment in the Draft Report that *"the distribution of compliance costs under the DDA could affect competition if costs are imposed on some businesses and not others"* and that *"this could happen where compliance with the DDA is based on individual complaints"*[6]*.*

As set out in a later section below, there are very sound reasons why a compliance regime based primarily upon individual complaints is appropriate. Concern about competition effects is not a sound reason to impose additional compliance costs upon all employers.

[5] Draft Report, Chapter 8
[6] Draft Report, p.XXXV

Defining Discrimination[7]

As noted in the Draft Report[8], the definition of disability in the DDA is very broad. It includes physical disabilities, intellectual disabilities, mental illness and many other forms of disability. It covers people who have had a disability in the past, currently have a disability, or might have a disability in the future.

Section 4 – Interpretation, of the DDA, states that:

> *"disability", in relation to a person, means:*
>
> *(a) total or partial loss of the person's bodily or mental functions; or*
> *(b) total or partial loss of a part of the body; or*
> *(c) the presence in the body of organisms causing disease or illness; or*
> *(d) the presence in the body of organisms capable of causing disease or illness; or*
> *(e) the malfunction, malformation or disfigurement of a part of the person's body; or*
> *(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
> *(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*
>
> *and includes a disability that:*
>
> *(h) presently exists; or*
> *(i) previously existed but no longer exists; or*
> *(j) may exist in the future; or*
> *(k) is imputed to a person."*

[7] Draft Report, Chapter 9

Ai Group strongly supports Draft Finding 9.2 that *"A definition of disability based on the 'social model' is not practical"*. It is essential that the definition of "disability" remain as tangible and precise as possible.

Ai Group opposes any broadening of the definition of "disability" without clear evidence that such broadening is warranted due to the fact that unfair and unintended consequences have arisen regarding the existing definition. The Draft Report does not point to the existence of any such clear evidence, but rather the Report identifies that some doubts exist in certain areas.

Important definitional changes should not be made to the Act without clear evidence that such changes are necessary. Some of the definitional changes set out in Draft Recommendation 9.1 would cause significant operational difficulties for employers, as set out below.

Medical Conditions and Genetic Conditions

In Ai Group's view, the existing definition adequately deals with:

- medical conditions that are not easily diagnosed or well recognized; and
- genetic conditions.

Behaviour as a Symptom or Manifestation of a Disability

Ai Group strongly opposes the Productivity Commission's proposal within Draft Recommendation 9.1 that the definition of disability be amended to ensure that it includes *"behaviour that is a symptom or manifestation of a disability".*

It is essential that employers retain their ability to deal with unacceptable behaviour in the workplace, without being faced with discrimination complaints from persons arguing that their unacceptable behaviour was a symptom of, say, their depressed state or their addiction to a prohibited substance. Under occupational, health and

[8] Draft Report, p.XXVII

safety laws, employers have a duty of care towards employees, contractors, customers and all other persons in the workplace. Very large penalties apply if duties of care are breached. Employers need the ability to deal with violent and other forms of unacceptable behaviour promptly and effectively.

Federal and State unfair dismissal laws ensure that persons dismissed for unacceptable behaviour are not treated in a "harsh, unjust or unreasonable"[9] manner and that they receive a "fair go all around"[10]. Federal unlawful termination laws also operate to ensure that persons are not dismissed for prohibited reasons, including *"physical or mental disability"*[11].

The *Workplace Relations Act 1996* and *Workplace Relations Regulations* define *"serious misconduct"* (which may warrant summary dismissal) as including[12]:

- willful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- conduct that causes imminent, and serious, risk to: the health or safety of a person; or the reputation, viability or profitability of the employer's business;
- theft, fraud or assault;
- the employee being intoxicated at work;
- the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

It is essential that employers retain their ability to dismiss employees who engage in serious misconduct without finding themselves in breach of the DDA.

[9] Workplace Relations Act 1996, s.170HB
[10] Workplace Relations Act 1996, s.170CA(2)
[11] Workplace Relations Act 1996, s.170CK(2)(f)
[12] Workplace Relations Act, s.170CM(1)(c) and Regulation 30CA

The Full Court in the *Purvis* case[13] specifically rejected the interpretation that the definition of "disability" includes behaviour that is a "manifestation of a disability" as is being proposed in Draft Recommendation 9.1. In doing so, the Full Court highlighted the significant problems that would be caused by including the "manifestation of a disability" within the definition of "disability". The following extract from the decision is relevant:

> *"**[25]** It must steadily be borne in mind that the expulsion of the complainant followed repetitive anti-social and violent conduct towards other students and staff which was plainly unacceptable in a primary school. It was disturbing to the function of education and threatened the safety of other students and staff. Those responsible for administration of the school owed a duty of care to the other students in the school, the teachers and the teacher's aides, with potential liability for any breach of that duty (Commonwealth v Introvigne (1981) 150 CLR 258). The disorder as such was ultimately not relied upon by the school in order to prevent enrolment (cf s 22(1)), notwithstanding the potential for anti-social conduct which it involved. If it had been, then it may be that there would have been discrimination, subject to the operation of s 22(4). We do not need to decide that question. The problem was that, once enrolled, the school was not able to cope with the conduct of the complainant which in fact ensued, despite considerable time and effort.*
>
> ***[26]** The consequence of the argument for the appellant and the HREOC decisions to the same effect (if correct) is that, once enrolled, any treatment of the student by the school authorities as a result of conduct caused by his disorder which restricted or disadvantaged him compared with the ordinary student would be discrimination in breach of the Act, no matter how necessary to preserve the discipline of the school and safety of staff and students. On this argument, any exclusion from ordinary classes, or special physical or other restraints imposed as the price of attendance at ordinary classes, would be a breach of s 22(2)(a) or (c), as the antisocial behaviour caused by the brain damage would be the cause of the special and detrimental treatment.*

[13] Purvis v State of NSW (Department of Education and Training), [2002] FCA 503, 24 April 2002.

The findings of discrimination which were made by HREOC in relation to acts or omissions other than expulsion go further and impose positive duties on the school to manage the conduct of the student, presumably regardless of cost or impact upon other school activities, without explaining why such special measures would not involve a breach of s 22(2)(a) or (c). The critical points are that there is no criterion of reasonableness in s 22(2) and no equivalent of s 22(4) in relation to a student once enrolled.

[27] *Counsel for the appellant accepted that if the school could not manage the student, once enrolled, because of the violent and antisocial behaviour of the student, the only escape would be an application for exemption pursuant to s 55. Such a counter-intuitive, indeed extraordinary, result would require a very clear statutory basis. We do not regard s 55 as providing an escape from the otherwise draconian consequences of the construction of s 22 urged upon us on behalf of the appellant. The problems inherent in such a discretionary application for exemption are illustrated by this case. Consideration of the present question took many days of hearing and took over a year to decide, to which must be added the time taken by the judicial review which is still in progress. The time involved would be exacerbated in relation to an application under s 55 by the merits review provided for by s 56. Apart from the time, expense and staff disruption involved, the school would ultimately be subject to a discretionary judgment by a body which does not have the responsibility for managing the student. Even if s 55 can be read as authorising an exemption in the case of an individual student, it is ill-designed to deal with such an issue in a case like the present. Most importantly, what is the position of the school and those at the school whilst the availability of an exemption is being decided? The staff and other students will live with the threat of injury or abuse, may suffer actual injury or abuse, and classes and other educational endeavours will be disrupted. In addition, those affected may be without remedy, as the school authorities are hamstrung by the law in adopting normal measures of control. It is also obvious that if s 22 works in the fashion contended for, there would be great pressure upon a school to refuse admission and rely upon s 22(4), rather than take any risk as to handling a*

student after admission. This is counter-productive so far as the objects in s 3 of the Act are concerned.

[28] *In our opinion, given the findings by HREOC as to primary fact, Emmett J was correct in holding that HREOC had misdirected itself as to the proper construction of s 4 of the Act in regarding the conduct of the complainant which occasioned the actions of those in charge of the school as part of the disability of the complainant. In our opinion, that conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes. The same may be said of subs (f). The other subsections do not involve conduct.*

[29] *In the particular circumstances of this case, the proper comparison for the purposes of s 5 of the Act, in order to test the relevance of the disability, as such, is between the treatment of the complainant with the particular brain damage in question and a person without that brain damage but in like circumstances. This means that like conduct is to be assumed in both cases. The failure to make this comparison led to the capricious result arrived at by HREOC. Each alleged act of discrimination is to be judged in the light of the conduct of the complainant which had taken place up to that time. The question to be answered at each point (including expulsion) is whether the consequence would have been the same (or worse) if the conduct had been that of a pupil not affected by brain damage. As pointed out by Emmett J, it is at least possible that inquiry may show that the complainant was treated more harshly than another exhibiting similar conduct at school, but without the disability, would have been. This essential comparison was not carried out by HREOC, which accordingly fell into error of law in the application of s 5 of the Act.*

> ***[30]*** *It follows that we do not agree that the statement summing up earlier HREOC decisions, and applied in the HREOC decision under review, that to discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that disorder is to discriminate against that person because of the mental disorder, is applicable in circumstances such as the present. In the first place, it assumes, rather than demonstrates, the existence of discrimination and does not reflect the language of ss 4 or 5 of the Act. In the second place, it is, in reality, an application of the "but for" test, the difficulties of which in this field (albeit in relation to another statute) are explained by Lockhart J in HREOC v Mt Isa Mines Ltd at 326.* Emphasis added.

In the face of such unambiguous and strong views from the Full Federal Court that to include behaviour that is a "manifestation of a disability" within the definition of a disability would lead to very unfair and unworkable consequences, it is highly inappropriate that the Productivity Commission recommend that the DDA be amended to enshrine such an interpretation. In the extract above, the Federal Court described HREOC's interpretation (which has been adopted by the Productivity Commission in the Draft Report) as "counter-intuitive" and "draconian".

The Full Federal Court's decision was appealed to the High Court of Australia and was subsequently upheld by the majority[14]. While the reasoning amongst the various judges differed, in general, the Court's view was that unacceptable behaviour can result from a variety of causes, only one of which is disability. The key issue remains – that is, would a person without the disability have been treated any differently.

As set out in the joint judgment of Gummow, Hayne and Heydon JJ:

> *"..the central question will always be – why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of', 'by reason of', that person's disability? Motive, purpose, effect*

[14] Purvis v New South Wales (Department of Education and Training) [2003] HCA 62, 11 November 2003.

may all bear on that question. But it would be a mistake to treat these words as substitutes for the statutory expression of 'because of'"[15]

Chief Justice Gleeson described the flaw in the interpretation of the Act pursued by HREOC in the *Purvis* case, in the following manner:

"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[16]*".*

Further, the Chief Justice said:

"There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members. It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent. In particular, it would leave out of account obligations and responsibilities which the principle was legally required to take into account"[17]*.* Emphasis added.

Accordingly, Ai Group strongly opposes the third dot point in Draft Recommendation 9.1. The proposed amendment to the definition would be very unfair on employers. The definition of "disability" should not be amended to include *"behaviour that is a symptom or manifestation of a disability".*

[15] Ibid, paragraph 236.
[16] Ibid, paragraph 13
[17] Ibid, paragraph 14

If any amendment to the definition of "disability" is to be recommended by the Productivity Commission to clarify whether or not *"behaviour that is a symptom or manifestation of a disability"* is included within the definition - the recommendation should be that such behaviour be specifically excluded.

Disability Discrimination Amendment Bill 2003

The decision of the Federal Court in *Marsden v HREOC & Coffs Harbour and Districts Ex-Servicemen and Women's Memorial Club Ltd [2002] FCA 169 (15 November 2000)* has created significant uncertainty and concern amongst employers regarding their ability to deal effectively with employees who are addicted to prohibited substances. In this decision the Federal Court held that opioid dependency could constitute a disability within the meaning of the DDA.

The NSW Government responded to the significant concerns expressed by employers about the impact of the *Marsden* decision in NSW by amending the State *Anti-discrimination Act 1977* to insert the following provision:

> *"**49PA Persons addicted to prohibited drugs***
>
> *(b) This section applies to the provisions of Division 2 (Discrimination in work), other than sections 49H, 49I and 49J[18].*
>
> *(b) Nothing in those provisions renders unlawful discrimination against a person on the ground of disability if:*
>
> *(b) the disability relates to the person's addiction to a prohibited drug, and*
>
> *(b) the person is actually addicted to a prohibited drug at the time of the discrimination.*
>
> *(b) However, nothing in this section makes it lawful to discriminate against a person on the ground of the person having hepatitis C, HIV infection or any medical condition other than addiction to a prohibited drug.*
>
> *(b) In this section:*

[18] 49H - Discrimination by Local Government Councillors; 49I – Industrial Organisations; 49J – Qualifying Bodies

prohibited drug means a prohibited drug within the meaning of the Drug Misuse and Trafficking Act 1985, but does not include:

(b) methadone or buprenorphine, or

(b) any other drug that is declared by the regulations not to be a prohibited drug for the purposes of this section."

The above legislative amendment came into operation on 15 April 2002.

The Federal Government has also responded to the concerns expressed by employers. It has introduced the *Disability Discrimination Amendment Bill 2003* into Parliament and, if passed, the DDA would provide that it would not be unlawful to discriminate against a person on the ground of his or her disability if:

- the disability is the person's addiction to a prohibited drug; and
- the person is addicted to the drug at the time of the discrimination.

The Bill does not amend the definition of disability under the DDA but rather creates an exemption. The exemption does not apply where:

- The person's use of the drug is authorized under a State or Federal law; or
- The person is undergoing a program, or receiving services, to treat the addiction to the drug.

Ai Group supports the provisions of the *Disability Discrimination Amendment Bill 2003*.

When the inclusion within the DDA's definition of "disability", of dependency to prohibited substances, is considered in the light of the Productivity Commission's Draft Recommendation to extend the definition to include "behaviour that is a symptom or manifestation of a disability" – the unfair impact on employers is further highlighted. An employer could be faced with an employee who engages in violent behaviour in the workplace as a result of his or her addiction to an illegal drug, yet the

employer would be hamstrung in dealing promptly and effectively with the situation because the behaviour would be recognized as a disability under the DDA.

Given the substantial merits of the *Disability Discrimination Amendment Bill 2003*, the Productivity Commission should recommend that the Bill be passed without delay.

Definition of Direct Discrimination

Ai Group recognizes that difficulties may have arisen regarding interpreting the term "not materially different" for comparison purposes, as used in the definition of "direct discrimination" in s.5 of the DDA. However, an overly prescriptive approach to clarifying the term could cause more problems than it solves. If the legislation is to be amended to clarify the term "not materially different", consultation with industry should occur on any proposed amendments at the drafting stage – that is, before the legislation is introduced into Parliament.

Ai Group acknowledges the inconsistent case law relating to whether or not a failure to provide "different accommodation or services" required by a person with a disability is "less favourable treatment". However, given that the Federal Court has not yet considered this issue[19], it would be preferable to allow further case law to develop before any legislative amendments are made. If the legislation is to be amended, as set out in Draft Recommendation 9.2, it is essential that the defence of justifiable hardship be retained and relevant conditions, such as inherent requirements in employment, continue to apply.

Definition of Indirect Discrimination

Draft Recommendation 9.3 proposes that the proportionality test be removed. As set out in the Draft Report, this test does not apply under several other State or Federal anti-discrimination Acts. If the proportionality test is to be removed, it should be replaced with another appropriate test. The following test may be appropriate:

[19] As set out in the Draft Report, p.224.

"s.6(a) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability of the aggrieved person."

The above test is based upon one of the tests in s.15 of the *Age Discrimination Bill 2003* and one of the tests of indirect discrimination in the ACT Anti-discrimination Act[20].

With regard to the proposal within Draft Recommendation 9.3 that criteria be included for determining whether a requirement or condition "is not reasonable having regard to the circumstances of the case", an overly prescriptive approach to clarifying the term could cause more problems than it solves. If the legislation is to be amended to include such criteria, consultation with industry should occur on any proposed amendments at the drafting stage.

Onus of proof

It is appropriate that persons who pursue an allegation of alleged discrimination against an employer, carry the onus of proving such allegation. This should apply for both direct and indirect discrimination.

Ai Group does not support the proposal within Draft Recommendation 9.3, to reverse the onus of proof for proving that a requirement or condition is reasonable.

Defences and Exemptions[21]

Ai Group supports Draft Recommendation 10.1. An unjustifiable hardship defence should be available in respect of all substantive provisions of the Act that make discrimination on the ground of disability unlawful.

Ai Group agrees with Draft Finding 10.3. The concept of unjustifiable hardship does not lend itself to a generic definition. It is best determined through the broad criteria in the DDA that can be applied flexibly to individual cases.

[20] Refer to p.227 of the Draft Report

Ai Group opposes the proposal within Draft Recommendation 10.2 that the criteria for determining unjustifiable hardship be amended to clarify that community-wide benefits and costs should be taken into account. Our opposition is due to the following factors:

- Courts are able to take such matters into consideration at the present time, given the requirement that "all relevant circumstances of the particular case are to be taken into account";
- The financial circumstances of the person or business who would have to make the adjustment must be paramount in determining whether unjustifiable hardship exists. It is unrealistic and unfair for an employer to bear the cost of an employment obligation because of certain community benefits that may result;
- The proposal would be particularly unfair on small businesses which have limited resources to make adjustments to their equipment and processes to accommodate the needs of people with disabilities; and
- It would be virtually impossible to calculate the community wide costs and benefits to be taken into account.

The Complaints Process[22]

Ai Group's exposure to the complaint process under the DDA has been principally focused on complaints made by people who sustain impairments or injury during the course of their employment.

We recognize that there may be considerable difficulties and costs associated with making complaints under the DDA for people who have particular disabilities. However, circumstances arise where employers are required to expend significant time and money to respond to complaints which have no substance. There is no easy way for respondents to challenge such complaints other than through the time-

[21] Draft Report, Chapter 10
[22] Draft Report, Chapter 11

consuming and costly processes which apply under the DDA. As a consequence, many respondents make a commercial decision to settle complaints even where a complaint has little or no chance of success.

Cooperative Arrangements for Complaint Handling Between HREOC and State Anti-Discrimination Bodies

Ai Group has no objection to Draft Recommendation 11.1, that HREOC enter into formal arrangements with State and Territory anti-discrimination bodies to establish a "shop-front" presence in each jurisdiction. However, the Draft Recommendation does not address a more fundamental problem. That is, employers are required to comply with anti-discrimination legislation which differs between the Commonwealth and the States and differs from State to State. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst anti-discrimination laws. The Productivity Commission should make a specific recommendation to this effect.

Cost Orders

With regard to Draft Recommendation 11.2, if there is to be any change in the existing arrangements regarding cost orders, Ai Group proposes that the approach which applies to unfair dismissal applications under the *Workplace Relations Act* be considered. This involves each party paying its own costs, except where:

- The applicant pursues an application in circumstances where it should have been reasonable apparent that he or she had no reasonable prospect of success; or
- The applicant has acted unreasonably in failing to discontinue a proceeding or in failing to agree to terms of settlement that could lead to discontinuance of the application[23].

[23] S.170CJ of the Workplace Relations Act 1996

There would also be merit in including provisions within the DDA similar to the following provisions of the *Workplace Relations Act*:

- S.170CIA, which requires representatives of applicants to disclose contingency fee arrangements;
- S.170HE, which requires advisers not to encourage applicants to make or pursue applications where there is no reasonable prospect of success.

Including a provision within the DDA along the lines of s.170HE of the *Workplace Relations Act* would better protect people with disabilities from any unscrupulous practices of advisers.

Time Limits

Ai Group does not support Draft Recommendation 11.3 which would more than double the time limit for lodging applications with the Federal Court or Federal Magistrates Court, from 28 days to 60 days. 28 days is consistent with the time limit which applies in many jurisdictions.

The 28 day period needs to be considered in the context of the lengthy 12 month time limit which applies to the lodging of complaints with HREOC (which can be extended). Often employers are faced with situations where key staff relevant to particular complaints have left the company at the time when the conciliation process commences. Further, even if the relevant staff members are still employed, they may have difficulty in recalling the details of alleged incidents given the significant time that has elapsed since the alleged incident.

Representative Complaints

Ai Group is concerned about any widening of the existing rights of disability organizations to pursue representative complaints. The DDA already provides disability organizations with rights in this area.

It is important that cases of alleged discrimination be based on specific facts and issues. Such an approach assists in achieving fairness for applicants and respondents – both procedurally and substantively. The easiest way of ensuring that cases focus on specific facts and issues is, wherever possible, for cases to relate to individual applicants. This does not preclude:

- Disability organizations providing support for individual applicants in relevant cases:
- The cases of individual applicants being used by disability organizations to develop new legal principles or to reinforce existing rights for people with disabilities.

Role of HREOC

Ai Group supports the suggestion made by Job Watch on page 313 of the Draft Report that HREOC take a more active role in assisting parties to reach agreement within the conciliation process. We agree that a more rigorous investigation process would be of benefit to both the complainant and the respondent.

In our experience HREOC rarely requires the respondent to put its position in writing and consequently when conciliation occurs the parties often do not have a full appreciation of the other party's position. It is not necessary to produce all relevant evidence and disclose all pertinent information at this point, as suggested by Job Watch, but having the HREOC conciliator delve into the complainant's case prior to the convening of a conciliation conference would be of assistance.

In addition it would assist the parties if the conciliator, at the conclusion of the conciliation process:

- Indicates to the parties, his or her assessment of the merits of the application;
- Where appropriate, recommends that the applicant not pursue a ground or grounds of the application; and

- Advises the parties, if he or she considers that the application has no reasonable prospect of success.

The above process applies to the conciliation of unfair dismissal matters under the *Workplace Relations Act*[24] and has proved to be beneficial, particularly where complainants have unrealistic expectations about the outcome of their case.

Advocacy Role of HREOC

Ai Group would not support HREOC being involved in advocacy for individual complainants beyond the existing arrangements which enable HREOC to intervene in proceedings, where leave of the court is granted.

It would be difficult for HREOC to be both the initiator of a complaint and also act as a impartial conciliator in respect of a complaint. Extending HREOC's role in the manner set out in Draft Recommendation 11.4, despite the proposed safeguards, would undoubtedly lead to perceptions of a lack of impartiality.

Regulation[25]

Ai Group strongly agrees with Draft Recommendation 12.1, that the scope of the DDA should only be altered via amendment of the Act, not via disability standards.

The existing process within s.31 of the DDA, whereby disability standards are to be laid before Parliament and can be disallowed by Parliament, is very important. This process ensures a degree of Parliamentary scrutiny applies to disability standards and better protects the rights of all parties.

Ai Group has concerns about the use of disability standards in the employment area. Each business is unique. Therefore, it is very difficult to draft standards which are appropriate for all businesses. There are a wide variety of premises, machinery, equipment and facilities used by businesses. This creates enormous practical

[24] S.170CF of the Workplace Relations Act

difficulties for the development of meaningful and useful disability standards. Not only would such standards need to be sufficiently flexible to have application to all workplaces and business operations, a further complication arises due to the vast array of disabilities which people have.

A further concern is that the cost of implementing a disability standard could be very significant for a business when the business may never employ a person with a disability.

Further, forcing companies to adopt overly prescriptive standards could be counter-productive and may discourage employers from employing persons with disabilities.

Given the obvious significant implications for employers of any employment-related disability standards, the Productivity Commission should recommend that industry groups be consulted at the drafting stage during the development or amendment of any employment-related disability standards.

Self-regulation / Co-regulation

Ai Group has no objection to the concept of industries having the option of developing an industry code of practice relating to people with disabilities. However, Ai Group strongly opposes the suggestion in the Draft Report[26] that industries which fail to do so or which develop a deficient code would be subjected to a disability standard issued by the Minister. Ai Group also strongly opposes the suggestion that a deadline be imposed on industry for the development of codes of practice[27].

Ai Group agrees with the Productivity Commission's view that co-regulation could increase the regulatory burden on business, which may lead to an industry backlash against the regulations[28]. This would be counter-productive and would not assist in furthering the objects of the DDA.

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[25] Draft Report, Chapter 12
[26] Draft Report, p.342
[27] Draft Report, p.344

Voluntary Action Plans

Voluntary action plans should remain an option under the DDA. Such instruments should remain voluntary.

De-listing of State Laws Prescribed Under the DDA

In Draft Recommendation 12.7, the Productivity Commission recommends that the laws currently prescribed under section 47 of the DDA should be de-listed unless the relevant States request their retention. Of course, the view of State Governments is relevant. However, equally relevant is the view of employers whose rights and obligations could significantly change if a State law is de-listed. Accordingly, employer representative bodies such as Ai Group should be consulted about any proposals to de-list State laws.

Broad Options for Reform[29]

The Productivity Commission has commented in its Draft Report that little information has been received from business on the cost of adjustments needed to allow people with disabilities to take advantage of employment opportunities.

Such costs can be very significant but it is very difficult to generalize. Each business is different. For this reason, it is essential that the DDA not be overly prescriptive.

Impact of a "Positive Duty" on Employers

The Productivity Commission is calling for comment on a possible amendment to the DDA to introduce a "positive duty" on employers to take "reasonable steps" to identify and prepare to remove barriers to the employment of people with disabilities.

The Draft Report indicates that "reasonable steps" could include:

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[28] Draft Report, p.342

- Examining recruitment practices for potential indirect discrimination;
- Looking at the characteristics of current staff and reasons for any under-representation of people with disabilities;
- Considering access issues or undertaking an access audit;
- Developing a voluntary action plan.

It is Ai Group's view that the proposed "positive duty" presents significant practical difficulties and would be unfair on employers.

One of the biggest difficulties for employers in addressing barriers to the employment of people with disabilities is the vast array of disabilities which different people may have. Any "positive duty" which requires employers to identify and be prepared to eliminate barriers which prevent or limit the opportunities for people with disabilities would present employers with the problem of identifying what physical and mental disabilities potential job applicants might have and how these could be addressed. For example, an employer who is preparing a plan for the modification of a workplace to accommodate a blind person will have a very different plan to an employer who is focusing on removing barriers for an employee with a hearing problem or for an employee who has a chronic condition such as epilepsy, or for an employee with an intellectual disability.

It is unreasonable for employers to be required to identify and develop strategies to remove barriers to the employment of people with disabilities when the employer does not know what form of disability a potential employee may have. It is equally unfair to expect an employer to develop strategies to remove barriers when a person with a disability may never apply for a job with the employer.

While the Productivity Commission's draft proposal would only require employers to do what is "reasonable" in the circumstances - in defending a discrimination complaint an employer would face significant hurdles in demonstrating that he or she had taken all reasonable steps to prevent discrimination occurring.

[29] Draft Report, Chapter 13

We do concur with the Draft Report's suggestion that the proposed positive duty should apply to large employers but not small employers. The proposed positive duty is unworkable and should not apply to any employers.

Impact of the Productivity Commission's Recommendations on Other Federal and State Anti-discrimination Acts

Given the fact that any recommendations made in the Productivity Commission's Review of the DDA will have implications for other Federal and State Anti-discrimination Acts, recommendations to amend the DDA should only be made where there is clear evidence which supports the need for a change.

Ai Group is concerned that several of the Productivity Commission's Draft Recommendations appear to be based on the existence of doubts rather than clear evidence (eg. proposed amendments to various key definitions).

Conclusion

Given the relatively short time that the DDA has been in operation, amendments should only be made to the Act where there is very clear evidence that such amendments are warranted.

The Productivity Commission's Draft Report is currently heavily weighted towards imposing further regulation upon employers, rather than focusing on the benefits which would flow if more resources were devoted to educating employers about the issues in a positive manner.