Blind Citizens Australia
Response to the
Draft Productivity Commission
Competition Review of the DDA

1.0 Introduction

Blind Citizens Australia welcomes this opportunity to provide feedback to the Productivity Commission on the draft Report of its **Competition Review of the DDA**. The feedback follows the structure of the Report and includes a response to the appendices.

2.0 Overview

Blind Citizens Australia supports the overall finding of the Report that the **Disability Discrimination Act** (DDA) has achieved its aims in a limited way, with little impact on competition. We agree that Australia has a long way to go before disability discrimination is a thing of the past.

We note and share the Report's concerns about the quality of data available in almost all areas.

3.0 Eliminating Discrimination

3.1 General Findings and Recommendations

Draft Finding 5.6

The **Disability Discrimination Act 1992** appears to have been more effective for people with mobility and sensory impairments than those with a mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation.

Response

We are not in a position to dispute this finding. The finding is of concern considering the fact that discrimination against people who are blind, particularly in the areas of employment and access to information, is rife.

Draft Finding 5.7
People with disabilities from Indigenous or non-English speaking backgrounds, and those living in regional areas face multiple potential sources of disadvantage. However, reasons for this often relate to factors other than disability discrimination, such as race discrimination, language barriers, socioeconomic background and remoteness.

Response
We believe that all of those other factors further compound discrimination on the basis of disability to the extent that it can be difficult to determine the primary cause for discriminatory treatment.

Draft Finding 5.8
Given its relatively short period of operation, the **Disability Discrimination Act 1992** appears to have been reasonably effective in reducing overall levels of discrimination. However, there is still some way to go to achieve its object of eliminating discrimination.

Response
We are not convinced that overall levels of discrimination have decreased. As more people with disabilities have become aware of their rights to non-discriminatory treatment, and discrimination in some areas such as education may have decreased, more people with disabilities are trying to access the built environment, education, employment and independent accommodation and are facing barriers.

3.2 Employment

Draft Finding 5.1
The number of complaints under the **Disability Discrimination Act 1992** and participants' views indicate that disability discrimination in employment remains a significant issue. Overall, the Act appears to have been least effective in reducing discrimination in employment.

Response
The Commission has sought comment on the adequacy of existing support arrangements to assist people with disabilities to find work and to offset the cost of workplace modifications and the viability of introducing a positive duty on employers. This is considered in Section 11.

We agree that it is likely that the least progress in terms of decreasing levels of discrimination has been made in the area of employment.

Attitudinal barriers to employing people with disabilities are very strong. The prospect of employing a worker with disability can seem too strange and too

difficult. Employers invariably have cost concerns as well as concerns about workplace safety and the cost to the employer if the worker has an accident. There is enormous stress on a job applicant to demonstrate that they are as effective and skilled as a worker without disability. And to that the delay in having necessary adjustments installed. This can greatly jeopardise the opportunities for workers with disabilities if they are unable to work productively during the waiting period. It is crucial that a worker with disability can state in an interview that if adjustments are necessary that they can be installed quickly and efficiently with no cost to the employer up to the funding limit. If at interview, an employer discovers that they need to contribute funds from the outset to enable a worker to perform his or her job, it is next to impossible for that person to be considered the best person for the job. Practically, it is extremely difficult to prove discrimination against job applicants. Firstly, due to prior discrimination, it is extremely difficult for a job applicant with a disability to have the same or more experience as other workers and due to a disadvantaged educational background, frequently do not have as good academic record. To then need to disclose disability if it is not immediately apparent and raise the issue of adjustments does not set the applicant up for likely success. Support structures for workers with disabilities which cause the least disruption and cost to an employer's business are essential.

It can generally be guaranteed that a job applicant who discloses is a disability in an application will not get an interview. When to disclose a disability if it is not immediately apparent is one of the most frequent questions asked of Blind Citizens Australia. A number of applicants try to hide their disability and manage without adjustments rather than fail to get a position. Many workers with disability are mortified and concerned about asking for adjustments soon into an employment relationship and feel that they are already at a disadvantage, in that they are already a cost to their employer. This can cause many workers to under perform. Employers can respond negatively to finding out about a new employee’s disability once they have commenced employment or when a job offer has been made. Employers are frequently disinclined to retain the worker with the disability after the trial period has expired and many make the work environment so uncomfortable for the worker that they leave "voluntarily".

3.3 Education

Draft Finding 5.2

Identification of students with disabilities and access to disability programs in mainstream schools have grown substantially since the **Disability Discrimination Act 1992** was enacted. Although it is difficult to distinguish the effects of the Act from the effects of government policies of integration in

education, the Act appears to have had some effect in improving educational opportunities for school students with disabilities.

Response

Blind Citizens Australia agrees with this general statement, however we repeat and affirm our comments in our original submission. We have noticed a change in the way blind and vision impaired students are provided with educational services. Perhaps it is a response to a greater number of students with disabilities going on to tertiary study, but we have noticed a rise in a "one size fits all" approach to students who are blind or vision impaired. For example, it appears more difficult for a student to request course materials in Braille, audio or large print. Students requiring materials in alternate formats including textbooks on disk or CD-ROM, experience considerable delays and most students who are blind or vision impaired still do not receive their course materials at the same time as other students.

Blind Citizens Australia is hopeful that the Education Standards will move things forward considerably with its focus on accessible course structures and delivery models.

3.4 Access to Public Premises

Draft Finding 5.3

The **Disability Discrimination Act 1992** appears to have had some impact on making new public buildings more accessible. However, inconsistencies between the Building Code of Australia and the Act limit the effectiveness of the Act. Formally linking the building code to a DDA standard on access to premises will address these inconsistencies. The **Disability Discrimination Act 1992** has been less effective in improving the accessibility of existing buildings, and the proposed disability standard will not address this.

Response

The DDA has led to only limited improvement in the accessibility of buildings for people who are blind or vision impaired. In particular, the DDA has achieved little in relation to the provision of information in accessible formats or the provision of a safe and accessible path of travel to, from and within buildings. Neither of these issues will be adequately addressed in the draft DDA Access to Premises Standard, so not only existing buildings, but also new buildings, will remain inaccessible to people who are blind or vision impaired.

Draft Finding 5.4

The **Disability Discrimination Act 1992** appears to have been relatively effective in improving the accessibility of public transport in urban areas. However, it has been less effective in relation to taxis and in regional areas.

Response

As the Commission has noted, the effectiveness of standards is linked to their enforceability. The Transport Standards have already been undermined by individual transport operators choosing to apply access measures (such as tactile ground surface indicators) in an idiosyncratic way, rather than according to the agreed Standard. To address this requires extensive use of resources by people who are blind or vision impaired and agencies such as Blind Citizens Australia. Indeed, it is arguable that the leeway allowed to providers in the Standards has left people who are blind and vision impaired in no better position in relation to those difficult operators. This issue is outlined in more detail in our response to Draft Finding 12.3 (section 9).

Blind Citizens Australia's experience supports the comments made by Marrickville Council that "no formal arrangement has been proposed to inform cooperation between the range of players that collectively control and maintain the assets that support transport stock. This includes footpath and road maintenance and improvements along with other pedestrian and traffic facility management" (page 99). Similarly, we support the comments made by HREOC that "local and State government coordination to ensure accessible transport services match with accessible local infrastructure" is needed (page 100).

3.5 Provision of Goods and Services

Draft Finding 5.5

The **Disability Discrimination Act 1992** has played a significant role in reducing discrimination in access to some goods and services, including electronic banking and telecommunications.

Response

It would be true to say that the majority of cases we lodge on behalf of people who are blind or vision impaired relate to access to goods and services. It is an area in which we generally have the greatest likelihood of achieving a successful conciliated outcome and remains a significant area of discrimination. Access to information remains the area in which we have the greatest number of inquiries relating to discriminatory treatment. The barriers people who are blind or vision impaired face in relation to access to information almost overwhelm us. We believe that although access to information can generally fit within the definition of a "service", a new "area" of access to information should be added to the DDA. Blind Citizens Australia is involved in complaints relating to access to billing information, mortgage and other loan agreements, banking information, prospectuses, books, web sites-the list is endless. Although we have made some progress, the task is enormous. It is made difficult partly because people do not consider access to information as necessarily part of the provision of a good, service of facility.

4.0 Equality Before the Law

4.1 General Recommendations and Findings

Draft Finding 6.1
Current arrangements in the Human Rights and Equal Opportunity Act 1986 (s.46) dealing with discriminatory acts under Awards are appropriate.

Response
We agree.

Draft Finding 6.2
People with disabilities living in institutional settings face particular barriers to achieving equality before the law. However, there is limited scope to apply the **Disability Discrimination Act 1992** in this area.

Response
We agree.

Draft Finding 6.3
The process of de-institutionalisation needs to be supported by access to quality disability services. However, there are limitations to the use of the **Disability Discrimination Act 1992** to challenge government decisions about provision of services.

Response
We agree that there are limitations to the use of the DDA to challenge government decisions about provision of services and the quality of services for people with disabilities. We believe that serious consideration should be given by State and Federal governments which have not enacted independent complaints mechanisms to establish such mechanisms. Access to and the quality of disability services are integral to enabling people with disabilities to maximise their opportunities of mainstream participation and access to the areas covered by the DDA.

Request for Information
The Productivity Commission seeks further comment on the desirability of developing an accommodation disability standard, and the forms of accommodation such a standard should cover (for example, private rental accommodation, supported accommodation and/or institutional accommodation).

Response
Blind Citizens Australia has had a number of contacts from people who are blind or vision impaired in relation to access to accommodation. Some had been denied rental accommodation because they use a guide dog. Others

had been rejected for accommodation on the grounds that they receive a Disability Support Pension. We have also had requests for support from people who require alterations in rental and public housing to make them accessible and safe. For example, we were recently contacted by a woman who had a lease ended because she required a hand rail installed on the external stairs. As this example demonstrates, the modifications required for people who are blind or vision impaired are frequently minimal. Despite this, it can often be extremely difficult in a tight rental market where there is more than one application for a rental property, to prove that the disability was the reason why the applicant was unsuccessful. Although an accommodation standard will not solve all of these situations, improved general accessibility and a greater awareness of the law which an accommodation standard would bring, would be highly beneficial.

4.2 Access to the Civil and Criminal Justice Systems

Draft Finding 6.4

There are practical limitations to achieving equality before the law for people with cognitive disabilities. Existing State and Territory arrangements safeguarding the rights of people with cognitive disabilities appear to be working appropriately, but Human Rights and Equal Opportunity Commission research in this area can provide a useful national focus and assist regulatory benchmarking by the States and Territories.

Response

No comment.

Draft Finding 6.5

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are over-represented in the criminal justice system (as both victims of crime and as alleged offenders).

Response

No comment.

Draft Recommendation 6.1

The Attorney General should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system.

Response

We agree and would emphasise that people who are blind or vision impaired are often placed at a disadvantage in the civil justice system, particularly in relation to appearing competent in cases involving children. Parents (and grandparents) who are blind often find it extremely difficult exercising their

rights to access their children because their blindness is used as the reason to deny or limit their access.

4.3 Voting

Draft Finding 6.6

Standards of physical access and independent assistance at polling places are not uniform. Given the importance of voting, it is inappropriate to rely on individual complaints to improve access.

Response

We agree.

Draft Recommendation 6.2

The Australian Government should amend the Electoral Act 1918 to ensure polling places are accessible (both physically and in provision of independent assistance) to ensure the right to vote of people with disabilities.

Response

We support the recommendation and applaud the Commission's recognition that making voting accessible means more than getting rid of steps. We urge the Commission to extend the recommendation to include the provision of accessible information regarding electoral processes, for example, where people can vote and information about postal voting, and to make a recommendation regarding access to information about candidate policies.

The Commission raised the issue of the cost of conducting electronic voting. As the Commission is aware, in 2001 the Australian Capital Territory Electoral Commission successfully trialled electronic voting, using a secure system incorporating bar codes and screen reading software. The Electoral Commission's analysis of the trial was positive.

The trial allowed people who are blind to cast truly independent ballots. Another advantage of the system was that, unlike internet based voting, people who are blind or who have a print disability could cast their vote on election day, allowing them to fully engage in the election process. Other benefits of the system included the provision of voting information in 12 different languages to assist people from non-English speaking backgrounds, the elimination of unintentional voter error and more reliable and speedy counting of ballots (Elections ACT 2002:1).

The Electoral Commission analysis of the trial concluded that the system could be continued with only a minimal impact on the cost of elections; in fact, the Commission suggested that cost offsets could result in a reduction in the cost of an election (2002:3)

4.4 Jury Duty

The Commission does not make a specific recommendation in relation to people who are blind or vision impaired serving on juries. We re-state our position that blindness should not act as a blanket disqualifier for someone serving on a jury.

4.5 Laws with Discriminatory Effects

Draft Finding 6.7

There is uncertainty about the application of the **Disability Discrimination Act 1992** to acts (actions) done in compliance with laws that have not been prescribed under section 47 of the Act.

Response

We agree.

Draft Recommendation 6.3

The **Disability Discrimination Act 1992** should be amended to make it clear that acts (actions) done in compliance with non-prescribed laws are not exempt from challenge under the Act, regardless of the degree of discretion of the decision maker.

Response

We strongly support this recommendation.

Request for Information

The Productivity Commission seeks further information on how the **Disability Discrimination Act 1992** should be amended to clarify the scope to challenge other laws with discriminatory effects, particularly:

• the desirability of specific ‘equality before the law’ provisions (modelled on section 10 of the Racial Discrimination Act 1975)
• their interaction with provisions relating to ‘special measures’ (s.45)
• their interaction with provisions relating to ‘prescribed laws’ (s.47).

Response

Blind Citizens Australia sees specific "equality before law" provisions as highly desirable. There must be a process to ensure that laws are not prescribed which infringe on the right of people with disabilities to equality before the law. The prescription process should not be used to disadvantage people with disabilities. The fact that there is scope for laws to be prescribed makes the presence of such a provision more desirable. Blind Citizens Australia holds the strong belief that there should be no prescription process. People with disabilities should have the right to challenge all legislation which has discriminatory impact. Respondents have the right to the defences available in the legislation. We consider that the same argument applies to the interaction between an "equality before the law" provision and "special

measures". We cannot see how the two principals cannot coexist comfortably.

5.0 Promoting Community Recognition and Acceptance

5.1 General Findings and Recommendations

Draft Finding 7.1
In general, community awareness of disability issues and attitudes towards people with disabilities appear to have improved in the past decade. Scope for further improvement remains, however, both in certain areas of activity, such as employment, and in relation to particular disabilities, such as mental illness.

Response
We agree.

Draft Finding 7.2
The Human Rights and Equal Opportunity Commission's education and research function is an important aspect of promoting community recognition and acceptance.

Response
We agree.

Draft Finding 7.10
The Human Rights and Equal Opportunity Commission has a role in developing a schools' resource specifically addressing disability issues, along the lines of that developed for race discrimination issues.

Response
We agree although we consider the most important resource for schools will be the Education Standards.

Draft Finding 7.11
The Human Rights and Equal Opportunity Commission's website has become an important way for people to access information. Due to limited Internet access among some groups, however, other means of distributing information remain important.

Response
We agree. Due to the funding constraints which HREOC experiences, it can be very difficult for people who are blind or vision impaired to access HREOC resource materials. There was a dramatic decline in the ease with which

people could access alternate format materials in the years immediately following the DDA's enactment.

Draft Finding 7.12
There is potential for the Human Rights and Equal Opportunity Commission to expand cooperation with State and Territory anti-discrimination bodies and other organisations in promoting community recognition and acceptance of the rights of people with disabilities.

Response
We agree.

5.1 Public Inquiries

Draft Finding 7.3
Public inquiries appear to have had positive impacts to date on promoting community recognition and acceptance, due to their extensive consultation processes, and public availability of submissions and other material.

Response
We agree, however, this process should be utilised more frequently.

5.2 Targetted campaigns

Draft Finding 7.8
The **Disability Discrimination Act 1992** appears to have contributed to improvements in community awareness of disability issues and attitudes towards people with disabilities, but there is limited awareness of the Act itself. There is scope to improve awareness of the Act further.

Response
We agree. There is not the same awareness in relation to disability discrimination as there is in relation to race or sex discrimination or sexual harassment. When the DDA was first enacted HREOC seemed to do a lot of promotion of the Act. We would be very surprised if HREOC now had sufficient resources to enable them to raise the profile of the DDA.

Draft Finding 7.9
The Human Rights and Equal Opportunity Commission has a role in raising the awareness of the **Disability Discrimination Act 1992** among professional associations and educators.

Response
The effectiveness of the DDA can be improved by conducting targetted campaigns, eg duties of restaurant and café owners, real estate agents, hotel and motel associations and car hirers in relation to guide dogs.

5.3 Complaint confidentiality

Draft Finding 7.4

Some complaints, particularly high profile cases proceeding beyond conciliation, appear to have helped promote community recognition and acceptance. However, the usefulness of many complaints in this respect is constrained by the confidentiality of conciliated agreements.

Response

It is true that confidentiality agreements do minimise the capacity of a complaint to achieve systemic change. It is also true, that without confidentiality agreements, many complaints would not be conciliated successfully. We try as much as possible to limit confidentiality clauses. We encourage respondents to agree to having the outcome publicised or disclosed, while keeping confidential other aspects of the settlement or the fact that the change in policy resulted from a discrimination complaint.

5.4 Disability Standards and Voluntary Action Plans for

Draft Finding 7.5

The process of developing and implementing disability standards appears to have had a positive impact on promoting recognition and awareness in some sectors, but the overall educative impact of disability standards has been limited because only one has been completed to date.

Response

We agree. Arguably the road to standards has been more difficult than anyone could have predicted. Nonetheless, the process of developing standards in relation to transport, education and building access has probably increased compliance with the DDA in these areas. It was extremely disappointing to us that negotiations in relation to the employment standards stalled as they did. We would be keen to see the Productivity Commission make a recommendation in relation to recommencing discussions regarding the development of employment standards.

Draft Finding 7.6

Voluntary action plans have raised awareness but their overall impact has been limited by the relatively small number that have been lodged.

Response

We believe that the impact of these action plans has been minimal.

Draft Finding 7.7

Guidelines and, to a lesser extent, advisory notes appear to have raised awareness of disability issues and **Disability Discrimination Act 1992** requirements.

Response

We agree, although we are not sure to what extent awareness has been raised.

6.0 Competition and Economic Effects of the Act

6.1 Request for Information

The Productivity Commission seeks information on the costs and benefits to organisations of complying with the provisions of the **Disability Discrimination Act 1992** and disability standards. The Commission would welcome information on the nature of those costs and benefits, and on their magnitude.

Response

Blind Citizens Australia has a staff of seven, five of whom have disabilities requiring adjustments. Necessary adjustments have been made for each worker and we are confident we are DDA compliant. There is no way that this would have been possible without the utilisation of the Workplace Modifications Scheme, a Family and Community Services program. We have used this scheme for four of our staff and have also used the Commonwealth Rehabilitation Service for our other staff member

Draft Finding 8.1

Available evidence suggests that the costs of complying with the **Disability Discrimination Act 1992** and disability standards vary widely across organisations. For many organisations, these costs could be quite small.

Response

We agree.

Draft Finding 8.2

The costs of complying with the **Disability Discrimination Act 1992** can be unpredictable in the case of complaints-based enforcement. Disability Standards can help clarify the costs of complying with the Act.

Response

We agree but they can also mask the true cost of providing an accessible good or service because of the tendency for the Standards to be watered down to the lowest base denominator during their development. This is discussed further in response to Draft Finding 8.5.

Draft Finding 8.3

The progress achieved by the **Disability Discrimination Act 1992** in promoting a more accessible physical environment is likely to have removed some barriers to the employment of people with disabilities.

Response

As most discrimination against people with disabilities results from attitudinal barriers, not physical, we would suggest that a marginally more accessible physical environment has had minimal effect on the barriers people with disabilities face in relation to employment. Changes to the accessibility of the physical environment would have had virtually no impact on the amount of employment discrimination experienced by people who are blind or vision impaired.

Draft Finding 8.4

A reduction in disability discrimination is likely to contribute to 'social capital' (community values and principles that facilitate cooperation within and among groups) and so have broad benefits for Australian society.

Response

We agree.

Draft Finding 8.5

The complaints-based implementation of the **Disability Discrimination Act 1992** has the potential to distort competition by imposing an uneven regulatory burden. By contrast, disability standards tend to promote a uniform playing field and to be more competitively neutral. They might, however, impose larger costs on the economy.

Response

We do not agree that the question of costs can be determined this simply. Costs to the economy might be greater to the extent that there would be overall greater compliance with the DDA. However, the negotiations involved in agreeing on standards might also have the impact of lowering the standard for base level compliance thereby reducing the costs of compliance. Companies might also, through their representatives, decrease the time and resources they spend in reaching individual and idiosyncratic outcomes which might be the subject of future complaints. Standards reduce the likelihood of individual complaints being made which reduces costs for would-be respondents. It could be said that the timeframe for the implementation of the Transport Standards was too generous to providers and the strength of the combined resources of the providers which Standards development enables, works to their advantage.

Draft Finding 8.6

It is generally appropriate for the costs imposed on employers and service providers by the **Disability Discrimination Act 1992** to be shared between organisations, consumers and governments. The extent of government funding would need to vary depending on whether the Act is implemented through complaints or disability standards.

Response

Additional costs should be shared between organisations, governments and Australians. We agree with the DDA which requires that no individual with a disability should have to pay more for an accessible version of a product than would their non-disabled peers. We would repeat that the cost of producing a product or service which is accessible to all Australians is the true cost of production. Just as we would not as a society accept that a cost which had been artificially lowered through the use of slave labour was legitimate, it is not legitimate to artificially lower the cost of a product by making it in a way that prevents a substantial proportion of the population from using it.

7.0 Objects and Definitions

Draft Finding 9.1

The objects of the **Disability Discrimination Act 1992** (s.3) are appropriate and do not require amendment.

Response

We would like to see a subclause 3(d) incorporated into the Objects which states:

(d) to remove barriers to access by people with disabilities of all facets of public life, thereby facilitating equal participation in the community.

Draft Finding 9.2

The **Disability Discrimination Act 1992** is based on a 'social model' of disability discrimination, but it uses a medical definition of disability. This is appropriate. A definition of disability based on the 'social model' is not practical.

Response

No comment.

Draft Finding 9.3

The definition of disability in the **Disability Discrimination Act 1992** (s.4) does not explicitly include medically recognised symptoms (where the underlying cause is unknown), genetic abnormalities or behaviours related to disabilities.

Response

We agree.

Draft Recommendation 9.1

The definition of disability in the **Disability Discrimination Act 1992** (s.4) should be amended to ensure that it includes:

• medically recognised symptoms where a cause has not been medically identified or diagnosed
• genetic abnormalities and conditions
• behaviour that is a symptom or manifestation of a disability.

Response

We fully support this recommendation.

Draft Finding 9.4

The distinction in the **Disability Discrimination Act 1992** between direct and indirect discrimination is appropriate.

Response

We are disappointed the Draft Report does not deal with the very confusing interaction between direct and indirect discrimination. For example, many respondents argue that unjustifiable hardship is made out in cases involving indirect discrimination in which the test is reasonableness. It is not clear in the legislation how the indirect discrimination provisions interact with discrimination in specific areas such as employment and goods and services which are drafted to more easily accommodate allegations regarding direct discrimination.

Draft Finding 9.5

The requirement to make a comparison between the treatment of a person with a disability and the treatment of a person without the disability to determine direct discrimination in the **Disability Discrimination Act 1992** (s.5(1)) is appropriate.

Response

We refer to our comments in our original submission. We also say that the recommendations proposed below relating to direct discrimination go a significant way to alleviating our concerns.

Draft Finding 9.6

The definition of direct discrimination in the **Disability Discrimination Act 1992** (s.5(1)) is unclear about what constitutes circumstances that are 'not materially different' for comparison purposes.

Response

See our response to Draft Recommendation 9.2.

Draft Finding 9.7

The definition of direct discrimination in the **Disability Discrimination Act 1992** (s.5(2)) does not explicitly make failure to provide 'different accommodation or services' required by a person with a disability 'less favourable treatment'. The provision has not been interpreted consistently.

Response

We agree.

Draft Recommendation 9.2

The definition of direct discrimination in the **Disability Discrimination Act 1992** (s.5) should be amended to:

• clarify what constitutes circumstances that are ‘not materially different’ for comparison purposes

• make failure to provide ‘different accommodation or services’ required by a person with a disability ‘less favourable treatment’.

Response

We are fully supportive of this amendment and are pleased that it has been recommended that the definition of direct discrimination be amended to clarify what constitutes circumstances that are "not materially different" and to make failure to provide "different accommodation or services" required by a person with the disability, less favourable treatment. Such an amendment will improve the likelihood that people with disabilities can make out a successful employment discrimination .

Draft Finding 9.8

The proportionality test in the definition of indirect discrimination in the **Disability Discrimination Act 1992** (s.6(a)) imposes an unnecessary evidentiary burden on complainants.

Response

We agree and would like to see a recommendation attached to this finding.

Draft Finding 9.9

The definition of indirect discrimination in the **Disability Discrimination Act 1992** (s.6(b)) does not provide sufficient guidance on how to determine whether a requirement or condition is ‘not reasonable having regard to the circumstances of the case’.

Response

We agree.

Draft Finding 9.10

The burden of proving that a requirement or condition is ‘not reasonable having regard to the circumstances of the case’ in the definition of indirect discrimination in the **Disability Discrimination Act 1992** (s.6(b)) falls on the complainant. This is neither appropriate nor efficient.

Response

We agree.

Draft Finding 9.11
The definition of indirect discrimination in the **Disability Discrimination Act 1992** (s.6) does not include proposed acts of indirect discrimination. This is not appropriate.

Response
We agree. Being able to lodge a complaint regarding proposed discrimination significantly increases the chance of a successful resolution and decreases the likelihood that a respondent can rely on the available defences. It is often too late to remedy a situation once the proposal has been implemented.

Draft Recommendation 9.3
The definition of indirect discrimination in the **Disability Discrimination Act 1992** (s.6) should be amended to:
• remove the proportionality test
• include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances of the case'
• place the burden of proving that a requirement or condition is reasonable 'having regard to the circumstances of the case' on the respondent instead of the complainant
• cover incidences of proposed indirect discrimination.

Response
We fully support all of the above recommendations.

Draft Finding 9.12
The **Disability Discrimination Act 1992** does not make harassment unlawful in all of the areas of activity in which disability discrimination is unlawful.

Response
We agree.

Request for Information
The Productivity Commission requests further information on options for extending the scope of the harassment provisions and addressing the vilification of people with disabilities.

Response
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8.0 Defences and exemptions

Draft Finding 10.1
The inherent requirements provisions in the employment sections of the **Disability Discrimination Act 1992** are appropriate and do not require amendment. Guidelines to explain how inherent requirements should be identified in practice could be useful.

Response
We agree.

Draft Finding 10.2
An unjustifiable hardship defence in the **Disability Discrimination Act 1992** is appropriate. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting any requirements that would impose excessive costs on individual employers, service providers or others in the community.

Response
We agree.

Draft Recommendation 10.1
The **Disability Discrimination Act 1992** should be amended to allow an unjustifiable hardship defence in all substantive provisions of the Act that make discrimination on the ground of disability unlawful, including education and the administration of Commonwealth laws and programs.

Response
We disagree particularly in relation to the administration of Commonwealth laws and programs. We believe that it would be contradictory to include an overarching equality before the law provision and include the defence of unjustifiable hardship to the administration of Commonwealth laws and programs. The Commonwealth developed the Disability Strategy over ten years ago and it is still poorly implemented and often irrelevant to the workings of Commonwealth departments and agencies. Poor planning is the usual reason for discrimination in this area and it should not be the case that the Commonwealth could rely on an unjustifiable hardship defence in these cases. There should be no such defence in this area. The Commonwealth should be demonstrating best practice to other service providers.

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 **Disability Discrimination Act 1992** (s.11) that can be applied flexibly to individual cases.

Response
We agree.

Draft Recommendation 10.2
The criteria for determining unjustifiable hardship in the **Disability Discrimination Act 1992** (s.11) should be amended to clarify that community wide benefits and costs should be taken into account.

Response

We cannot see any need for this change. Community wide benefits and costs appear to us to be incorporated within the section 11 (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned.

Draft Finding 10.4
The absence of the term 'reasonable adjustment' in the **Disability Discrimination Act 1992** is appropriate. It is sufficient for the Act to require adjustments to be made up to the point where they cause an unjustifiable hardship. The term 'reasonable adjustment' causes confusion when used in guidelines and other explanatory materials for the Act.

Response

It needs to be explicit in the legislation that there is an obligation to provide adjustments to the point of unjustifiable hardship. This is not currently the case and we refer back to our original submission. The proposal by the Productivity Commission regarding the positive duty on employers to make adjustments does not cover any other areas of discrimination such as goods, services and facilities and education. The Productivity Commission is in an excellent position to significantly improve the legislation and ensure that the problems that arose in the Humphries case in the Federal Court regarding the lack of positive obligation to provide accommodations does not affect decisions in other areas, thereby compromising the rights of people with disabilities and frustrating the intention of Parliament when the legislation was enacted.

Draft Finding 10.5
A partial exemption for insurance and superannuation in the **Disability Discrimination Act 1992** (s.46) is appropriate, but its current scope is uncertain.

Response

We agree.

Draft Recommendation 10.3
The **Disability Discrimination Act 1992** should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:

• stereotypical assumptions about disability that are not supported by reasonable evidence
• unfounded assumptions about risks related to disability.

Response

We agree.

Draft Finding 10.6

The limited exemptions in the **Disability Discrimination Act 1992** for combat duties and peacekeeping services in the Defence Forces (s.53) and peacekeeping services by the Australian Federal Police (s.54) are appropriate and do not require amendment.

Response

No comment.

Draft Finding 10.7

The scope of the Migration Act 1958 exemption in the **Disability Discrimination Act 1992** (s.52) is uncertain.

Response

We agree.

Draft Recommendation 10.4

The exemption of the Migration Act 1958 in the **Disability Discrimination Act 1992** (s.52) should be amended to ensure it:
• exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision-making for Australian entry and migration visa categories but
• does not exempt more general actions done in the administration of Commonwealth migration laws and programs.

Response

We are disappointed by the extent of the recommendation on this issue. Although we appreciate that the Productivity Commission would be disinclined to make a recommendation which could be seen to impact on decision making for migration and entry categories, we refer back to our comments in our original submission and our verbal evidence to the Commission and state that people with disabilities are discriminated against unreasonably because of the operation of the health rules. The rules should require that the estimated costs of entry or migration be offset against the skills and resources of the applicant. Although unreasonable disability discrimination might be more difficult to assess in this area than racial discrimination, it is not less pernicious carrying a shameful human cost. We are disappointed that the Commission did not even raise these concerns in the draft report and ask for more comment. If the Productivity Commission is

concerned about the benefits and costs of the DDA, it should concern itself with the number of skilled migrants with disabilities who are denied permanent residency purely on the basis of disability.

Draft Finding 10.8
The scope of the 'special measures' exemption in the **Disability Discrimination Act 1992** (s.45) is uncertain.

Response
We agree.

Draft Recommendation 10.5
The 'special measures' exemption in the **Disability Discrimination Act 1992** (s.45) should be clarified to ensure that it:
• exempts the establishment, eligibility and funding arrangements of 'special measures' that are reasonably intended to benefit people with disabilities but
• does not exempt general actions done in the administration of 'special measures' that are reasonably intended to benefit people with disabilities.

Response
We agree.

Draft Finding 10.9
The current provisions of the **Disability Discrimination Act 1992** dealing with productivity-based wages are appropriate. However, there is some uncertainty about the interaction between provisions dealing with productivity-based wages (s.47(1)(c)) and the exemption for 'special measures' (s.45).

Response
We agree.

Draft Recommendation 10.6
The **Disability Discrimination Act 1992** should be amended to clarify that the specific provisions governing productivity-based wages (s.47(1)(c)) take precedence over the general exemption for 'special measures' (s.45).

Response
We agree.

Draft Finding 10.10
On balance, some exemptions from the **Disability Discrimination Act 1992** are appropriate. They must be clearly defined and restricted to only those aspects of legislation or regulation for which an exemption is necessary for other public or social policy reasons.

Response
We agree.

9.0 Complaints

Draft Finding 11.1
The complaints process, together with the threat of complaints, can be powerful tools for addressing discrimination on the ground of disability.

Response
We agree.

Draft Finding 11.2
Fear of victimisation can create a significant barrier to use of the complaints process. However, there have been no prosecutions under the **Disability Discrimination Act 1992** victimisation provisions (s.42).

Response
We agree.

Request for Information
The Productivity Commission is seeking further comment on how fear of victimisation could be addressed, for example, through improved awareness of the victimisation provisions, changes to the offence provisions or changes to the penalty.

Response
It might be of some benefit to make clear in the legislation the consequences of a finding of victimisation against a respondent. We have alleged victimisation in cases which have been conciliated. It can be difficult to prove that the treatment that a person has received because he or she has either lodged a discrimination complaint or the respondent believes they are about to, actually does result from that cause. It is very common for treatment which might be defined as victimisation to simply be added to the complaint as part of the detriment experienced by a person with a disability.

Draft Finding 11.3
People with disabilities can face significant barriers to using the **Disability Discrimination Act 1992** complaints process, which can reduce its effectiveness.
Barriers include:
• the financial and non-financial costs of making a complaint

• the complexity and potential formality of the process (although the introduction of the Federal Magistrates Service as an alternative to the Federal Court has improved access)
• the evidentiary burden on complainants
• the fear of victimisation if a complaint is made (which can be greater in institutions and small communities)
• the inequality of resources and legal assistance between complainants and respondents.

Response

All of the barriers outlined above certainly exist. Nonetheless, we generally find that the process of complaint lodgement is very flexible and that the investigation and conciliation process is user-friendly. We commend HREOC for being prepared to communicate with people with sensory disability in a way which is accessible to them. Most States and Territories are not this flexible. We also find that HREOC is flexible in the way it conducts conferences, including always finding accessible venues and telephone conferencing. Complainants usually lodge a complaint when they find that the barriers they face in not addressing the discriminatory treatment are greater (if only marginally) than their concern about the ramifications of lodging a complaint. In other cases, especially in employment cases, the relationships have so broken down that the barriers are not so significant.

It is certainly true, however, that significant barriers exist which discourage complainants from lodging complaints with the Federal Magistrates Service. It is certainly far less threatening and less costly for complainants to have matters heard by the Commission. Applicants need legal representation and most are not in the position to obtain it. The likelihood that any compensation is likely to be less than the costs of representation is exacerbated by the real risk of the costs order being made against the applicant. A successful applicant also faces the risk that a decision will be appealed. The State and Territory jurisdictions are in this respect more attractive.

Draft Finding 11.4

According to Human Rights and Equal Opportunity Commission surveys, both complainants and respondents appear reasonably satisfied with its complaints handling processes.

Response

We agree.

Draft Finding 11.5

The Human Rights and Equal Opportunity Commission's complaints handling timeliness appears to be comparable to that of the States and Territories. Uncertain case loads and investigation requirements make it inappropriate to

impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

Response

We agree.

Request for Information

The Productivity Commission seeks further comment on whether the enforceability of conciliated agreements should be improved and, if so, what approach should be adopted.

Response

We would be extremely pleased if from the enforceability of conciliated agreements could be improved.

Draft Finding 11.6

The Human Rights and Equal Opportunity Commission's location in Sydney does not appear to be a barrier to **Disability Discrimination Act 1992** complainants outside New South Wales. However, the majority of complainants clearly favour State and Territory based anti-discrimination bodies.

Response

We agree with the first part of this finding. We generally prefer the Federal jurisdiction being a national organisation based in Victoria.

Draft Recommendation 11.1

The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction. This would reduce confusion for people wishing to obtain advice or lodge a complaint. The Human Rights and Equal Opportunity Commission should retain responsibility for accepting or declining complaints and for conducting conciliations.

Response

We agree. We have recently had a case where the failure to refer a complainant to HREOC led to a complainant being extremely disadvantaged under the state system. The complainant was a vision impaired child care worker. We had professional reports to assert that she was fully competent in the performance of her position. The referral officer at the Victorian Equal Opportunity Commission lodged the case under the Equal Opportunity Act 1995 despite the legislation containing a defence dealing with the care of children. This made the case virtually impossible to take to the next level after it failed to settle at conciliation and in fact confirmed the respondent in its discriminatory position. We were advised that the Equal Opportunity

Commission were precluded from referring the complainant to the Federal complaints process. The State and Federal Equal Opportunity bodies should cooperate to ensure that complainants have access to the most appropriate complaints mechanism

Draft Finding 11.7
There are net benefits from allowing parties to conciliation to determine the level of confidentiality, but for the Human Rights and Equal Opportunity Commission to publicise outcomes as widely as possible subject to maintaining that confidentiality.

Response
We agree.

Draft Finding 11.8
Transfer of the determination making power to the Federal Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission.

Response
We agree.

Draft Finding 11.9
Uncertainty about cost orders in the federal courts affects incentives and outcomes at the conciliation stage of complaints handling. It is likely that some cases of unlawful disability discrimination are not being adequately addressed.

Response
We strongly agree with this draft finding.

Draft Recommendation 11.2
Subject to a review of the implications for other federal discrimination laws, the Human Rights and Equal Opportunity Commission Act 1986 should be amended to incorporate grounds for not awarding costs against complainants in the Federal Court and Federal Magistrates Service.

Response
We fully agree with this recommendation.

Request for Information
The Productivity Commission is seeking comment on the criteria to be included in guidelines for the Federal Court and Federal Magistrates Service in awarding costs in cases brought under the **Disability Discrimination Act 1992**. Participants might like to comment on the criteria suggested by the

Disability Discrimination Legal Service or factors considered relevant in previous discrimination cases.

9.1.1 Response

Blind Citizens Australia agrees with the productivity Commission's preference for the introduction of guidelines for the courts to consider in awarding costs. While we generally agree with the criteria suggested in Box 11.3 we believe that there should be a hardship provision applied for cases which are not vexatious or frivolous. In cases in which a complainant is successful, capacity of the respondent to pay should be a consideration given the remedial nature of the legislation. Lastly, it appears that the Federal Magistrates Service has been interpreting "public interest" extremely narrowly and it might also be necessary to define this concept.

Draft Recommendation 11.3

The **Human Rights and Equal Opportunity Commission Act 1986** (s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service.

Response

We fully agree with this recommendation. It can often take a complainant considerable time to arrange legal advice and support. The current arrangement of 28 days is totally inadequate.

Draft Finding 11.10

The Disability Discrimination Legal Services make an important contribution to the effectiveness of the **Disability Discrimination Act 1992** complaints process, and to ensuring equality before the law for people with disabilities.

Response

We agree with this finding and state that demand for these services seems to be so significant that unless a complaint is a test case or has significant public interest a number of services can only offer basic advice rather than actual support and representation. Even in cases that the legal services take up, the support generally only goes up to conciliation.

Draft Finding 11.11

In some circumstances, individual complaints can lead to systemic change. They have been effective in areas involving physical and communication barriers. However, there are limits on the extent to which the individual complaints system can achieve systemic change.

Response

We agree.

Draft Finding 11.12
There appears to be some confusion about the ability of disability organisations and advocacy groups to initiate representative complaints with the Human Rights and Equal Opportunity Commission and with the federal courts. This is likely to have discouraged organisations from making representative complaints.

Response
We agree.

Request for Information
The Productivity Commission requests further comment on the implications of allowing disability organisations with a demonstrated connection to the subject matter of a complaint to initiate a **Disability Discrimination Act 1992** complaint with the Human Rights and Equal Opportunity Commission and to pursue that complaint to the federal courts. In particular:
• What procedural issues would have to be addressed?
• How should disability organisations be defined?
• How should a 'demonstrated connection' be defined?

Response
Blind Citizens Australia would benefit from being able to initiate complaints on its own behalf. We believe that disability organisations should be defined to only include consumer organisations or their peak organisations. Such complaints would typically involve indirect discrimination and we believe that the "demonstrated connection" is already incorporated in the definition of indirect discrimination.

Draft Finding 11.13
The Human Rights and Equal Opportunity Commission's current complaints handling role is appropriate and should not extend to advocacy for individual complainants.

Response
We agree.

Draft Recommendation 11.4
The **Human Rights and Equal Opportunity Commission Act 1986** (s.46P) should be amended to allow the Human Rights and Equal Opportunity Commission to initiate complaints under prescribed circumstances. Administrative separation should be maintained between its complaint initiation and complaints handling functions.

Response
Given the importance of the Commission's complaints handling functions we believe that respondent confidence in the independence of the Commission is

likely to be compromised. Such confidence is crucial to the respondent participating in the complaint investigation process let alone the chances of a successful outcome. We believe it is more appropriate for the Commission to utilise its inquiry function more readily. We believe the costs make the option impractical and also believe that damages, being a personal remedy, ought not be awarded to the Commission.

Request for Information
The Productivity Commission requests comment on the circumstances under which the Human Rights and Equal Opportunity Commission should be able to initiate complaints; and whether it should be entitled to claim damages or costs from respondents.

Response
See previous response.

Draft Recommendation 11.5
The Attorney-General's Department should investigate the implications of this inquiry's recommendations about **Disability Discrimination Act 1992** complaints for other Commonwealth anti-discrimination Acts.

Response
We agree in relation to the recommendations we support.

10.0 Regulation

Draft Finding 12.1
It appears that the draft education standard might have the effect of altering the scope of the **Disability Discrimination Act 1992** provisions concerning discrimination in education.

Response
We agree.

Draft Recommendation 12.1
The scope of the **Disability Discrimination Act 1992** should only be altered via amendment of the Act, not via disability standards.

Response
We agree.

Draft Finding 12.2

A rigorous regulation impact statement process is sufficient to ensure that disability standards reflect the characteristics of good regulation, including flexibility.

Response

We agree.

Draft Finding 12.3

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints.

Response

We agree in principle although whether a standard is complied with is likely to be the issue in dispute. The standards contain the concept of unjustifiable hardship. In relation to transport standards, the timeframe for implementation effectively precludes people with disabilities from lodging complaints regarding access barriers which could be remedied quickly and economically. The standards also do not preclude a service provider coming up with an alternative solution for access which may not be appropriate. Whether this alternative solution complies with the standards will be an issue in dispute. Only after this issue is satisfied can the issue of whether the alternative solution is discriminatory be addressed.

Draft Finding 12.4

There is some uncertainty about the relationship between State and Territory antidiscrimination legislation and disability standards.

Response

We agree.

Draft Recommendation 12.2

The **Disability Discrimination Act 1992** (s.13) should be amended to make it clear that disability standards displace the general provisions of State and Territory anti-discrimination legislation. Any jurisdiction wanting to introduce a higher level of compliance in an area should request that allowance be made for this through a jurisdiction-specific component in the disability standards. The **Disability Discrimination Act 1992** (s.31) should be amended to allow for disability standards to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standard making power should extend to the clarification of the operation of statutory exemptions.

Response

We agree.

Draft Recommendation 12.4
Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes. The Human Rights and Equal Opportunity Commission's role should be to report to the Attorney General on the operation and adequacy of those processes.

Response

We agree.

Draft Finding 12.5
The disability community has sufficient opportunity to consult and comment during the development of disability standards. The **Disability Discrimination Act** Standards Project is a productive way of engaging people with disabilities in this process but it is not their only means for providing input.

Response

We agree.

Draft Finding 12.6
The development of disability standards has been very slow and only one set of standards—the Disability Standards for Accessible Public Transport 2003—has been developed to date. However, imposing deadlines could constrain the consultation process.

Response

We agree.

Request for Information
The Productivity Commission is considering the potential for a co-regulatory approach under the **Disability Discrimination Act 1992**. The Commission is seeking views on how a co-regulatory approach might be implemented, including:
• the status that should be afforded an industry-developed code of conduct
• appropriate deadlines for industry to develop a code of conduct in an area before a disability standard is imposed.

Response

We reiterate our comments made in our original submission but welcome genuine efforts by industry to meet its obligations. This might well be achieved through a co-regulatory approach. In relation to the status to be accorded codes of conduct, it is not evident that the evidentiary recognition of Action Plans has had much impact. It is not likely to be the reason for an industry developing a code of conduct but might be an added benefit. The same might be said for the code of conduct being grounds for granting a temporary exemption. It assumes that the industry involved has particular

concerns about complaints being lodged against it and wants to guard against such a situation until its house is in order. We believe that such a situation is relatively infrequent. Nonetheless, it is a reasonable option to include if an industry has had the initiative to develop a code of conduct. The other option, that the code of conduct has the same status as the disability standard is of course the most attractive option for industry. It is essential for any of these options that the Commission only accept codes of conduct which it believes to be DDA compliant and broad consultation has occurred amongst the disability sector. Codes of conduct can be generally beneficial to complainants in that it is possible to argue that the treatment received is even in breach of the industry's own code of conduct. This can make it easier for complainants to argue that the defences of reasonableness and unjustifiable hardship are not made out. If the codes of conduct do not include issues relevant to the provision of services to people with disabilities this also assists complainants to argue that the respondent's actions are not reasonable.

Draft Recommendation 12.5
The Human Rights and Equal Opportunity Commission should replace the Frequently Asked Questions for employment with guidelines in order to provide more formal recognition under the **Disability Discrimination Act 1992**.

Response
No comment.

Draft Finding 12.7
Voluntary action plans are an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of businesses have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

Response
We agree and whether the plans are implemented is another matter again. We have previously expressed our opinion about the minimal impact of Action Plans.

Draft Finding 12.8
The **Disability Discrimination Act 1992** (s.59) does not provide for registration of voluntary action plans by employers.

Response
We agree.

Draft Recommendation 12.6

The **Disability Discrimination Act 1992** (s.59) should be amended to clarify that voluntary action plans can be developed and registered by employers.

Response

We agree.

Draft Finding 12.9

Some State laws are currently exempted from the **Disability Discrimination Act 1992** by prescription under section 47, while similar laws in other States and Territories are not. There is no consistency in the prescription of laws under section 47.

Response

We agree.

Draft Recommendation 12.7

The laws currently prescribed under section 47 of the **Disability Discrimination Act 1992** should be delisted unless relevant the States request their retention.

Response

We agree. We also reaffirm that we disagree with the prescription process as contrary to the objects of the DDA and the rights of people with disabilities.

11.0 Broad Options for Reform

11.1 Implementation Issues

Draft Finding 13.1

There are advantages in retaining both the **Disability Discrimination Act 1992** and State and Territory anti-discrimination legislation. However, this places an obligation on all jurisdictions to work cooperatively to meet the needs of people with disabilities and minimise confusion about the two systems.

Response

We agree.

Draft Finding 13.2

The advantages of a stand-alone **Disability Discrimination Act 1992** outweigh the advantages of a federal omnibus anti-discrimination Act.

Response

We agree.

Request for Information
The Productivity Commission seeks views on how the costs of adjustments should be shared between governments, organisations and consumers. The Commission would welcome comment on the adequacy of existing government funding schemes for such adjustments, and the advantages and disadvantages of extending particular arrangements (such as portable grants).

Response
We have addressed the issue of how costs should be shared in our response to Draft Finding 8.6. In our experience the efficacy of the Workplace Modifications Program, run by the Department of Family and Community Services, is hampered by the length of time it takes for a grant to be made (several months in some cases) and by the lack of awareness of the program among employers and employment agencies. The former problem makes the Program particularly unsatisfactory for people engaged in short term projects or contracts. The fact that people must gain employment before they can access equipment also makes it almost impossible for a person to practically demonstrate to an employer that they can do the job.

Blind Citizens Australia supports the introduction of an equipment scheme whereby people who are blind or vision impaired gain access to equipment which they can take with them from school to employment and which they can utilise in their daily life. Such a scheme would greatly promote the social inclusion of people who are blind.

In relation to the costs of adjustments in other areas, we would restate that a genuine commitment by society to implement the principles of universal design would dramatically diminish costs across the board.

11.2 Improving Employment Opportunities

The Commission considers ways that employment opportunities for people with disabilities can be improved that go beyond the **Disability Discrimination Act**. In particular, the Commission draws on OECD proposals for mutual obligation which are included in the paper **Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People**.

Blind Citizens Australia has responded to this report and its recommendations that OECD member nations adopt mutual obligation for people with disabilities. An extract from our response is given below:

> Overall, Blind Citizens Australia considers the Report and its conclusions flawed because the impact of systemic discrimination on the capacity of people with disabilities to engage in the labour

> market is not recognised….. The Report does not adequately account for the impact of structural barriers and systemic discrimination on the capacity of people who are blind or vision impaired to actively participate in the community, whether through paid employment or voluntary activity. Although the Report attempts to quantify the impact of measures designed to redress the impact of disability on an individual basis, such as anti-discrimination legislation and the provision of rehabilitation and training services, it overlooks the most important determinants of the participation capacity of a person who is blind or vision impaired: the cumulative impact of individual and systemic discrimination, particularly the inaccessibility of community services and resources, such as education, public transport and infrastructure.
>
> In addition, the Report does not acknowledge broader trends in the labour market which are impacting on the employment of people with disabilities. There has been a substantial growth in the number of long term unemployed in OECD nations caused in part by an increasingly inequitable distribution of employment across regions and a lack of fit between employment opportunities and the skills of the labour market, and people with disabilities are not immune from these trends.
>
> The Report recasts the exclusion of people who are blind or vision impaired from the workforce and the increase in long term unemployment as individual failings. In effect, people who are blind or vision impaired are told that if they cannot gain employment it is because of their lack of initiative.
>
> (Blind Citizens Australia 2003, unpublished)

We would urge the Commission to reconsider the OECD's recommendations in light of the above comments.

11.3 A Positive Duty on Employers

Request for Information

The Productivity Commission seeks information on the potential impact on businesses and people with disabilities of introducing a limited positive duty on employers to take 'reasonable steps' to identify and work towards removing barriers to employment of people with disabilities, including:

- the nature of the duty
- how it should be implemented and enforced
- the costs and benefits for business, including small business
- the costs and benefits for people with disabilities

• the role of government in sharing costs and maximising benefits.

Response

We totally support a positive duty on employers but are concerned that its description as a "positive duty" has led to the Productivity Commission to put it in the category of positive discrimination and thereby describe the proposed duty as "limited". We believe this is incorrect as it is already explicit in the DDA that different services might be required by people with disabilities in the definition for the purposes of the comparator test. It is also present in the defence of unjustifiable hardship. An amendment should simply expressly state that all adjustments required up to the point of unjustifiable hardship should be made to achieve compliance with the DDA. We believe that such an amendment reflects Parliament's intention when the DDA was passed We believe it is an error in the legislative drafting of the DDA and an amendment is consistent with the objects of the DDA. The duty is integral to decreasing discrimination in employment.

12.0 Other Issues

12.1 Funding Issues

Draft Finding 14.1

Inadequate funding of Disability Discrimination Legal Services could undermine the effectiveness of the **Disability Discrimination Act 1992**.

Response

We agree and refer to our previous comments regarding the limited services the legal services can provide due to the massive need and the amount of funding provided.

Draft Finding 14.2

Some inquiry participants expressed concern that current funding arrangements restrict education choice for school students with disabilities to a greater extent than students without disabilities. This could contribute to discrimination by increasing the likelihood that some schools would be able to claim unjustifiable hardship under the **Disability Discrimination Act 1992**.

Response

We agree.

Draft Finding 14.3

It is the role of governments, not the **Disability Discrimination Act 1992**, to determine the level of funding and eligibility criteria for disability services. It is, however, appropriate for the Act to apply to the administration of disability services.

Response

We agree with this draft finding except that it should be open to the Courts to find the current level of funding is a cause of the discriminatory treatment. Levels of funding could be extremely relevant to education discrimination in particular and an indirect factor in discrimination in employment.

12.2 The Need for an Electronic Book Repository

Draft Finding 14.4

There appears to be merit in investigating further an Australian electronic book repository for educational (and other) publications.

Response

Blind Citizens Australia strongly supports the finding. The introduction of an electronic book repository would significantly improve the access of people with print disabilities to published information through reduced transcription costs and timeframes, provided that the electronic file format was consistent and appropriate.

13.0 Appendices

13.1 General

The Appendices reference Australian Bureau of Statistics (ABS) data extensively and use the terms used by the ABS such as profound, severe and core activity restriction without providing any guidance on their meaning. For example it is unclear whether the use of the term profound in relation to disability refers to the severity of the person's medical condition or the severity of its impact on their capacity to participate in society. These terms should be explained in simple, plain English. It would be helpful if examples were given to illustrate the terms for example, the difference between a core activity restriction and a non-core activity restriction.

13.2 Appendix A: Eliminating Discrimination in Work

It is notable that the appendix does not directly address the option of self-employment for people with disabilities. This employment option has proven to be an important one for people who are blind or vision impaired. It is also notable that access to opportunities for career advancement is not explicitly considered. Research undertaken by Blind Citizens Australia identified under-employment as a key issue for our members. Research participants noted that they had reduced, or non-existent, access to information about training, higher duty and promotional opportunities. The difficulty people with disabilities experience gaining promotions is reflected in data that shows that people who have a disability remain with the same employer for longer periods than people without a disability. This does not reflect, as is often

insultingly intimated, greater loyalty or gratitude to employers, rather, it simply reflects the reduced access to job opportunities, including promotion, that all people with disabilities experience. Our research found:

> Access to promotion and training opportunities was limited by the information being inaccessible, and by the respondent's sense that it was better the devil you know (and who knows you). Only one respondent reported regularly receiving organisation updates/job opportunities in an accessible format. Other respondents were frustrated at the difficulties applying for secondment opportunities:
>
> "the extra effort that is required can wear you out sometimes"
>
> "I tend to be more reluctant to consider applying for more advanced jobs within (my workplace) let alone other organisations. I find it daunting to think that I would have to go through the same advocacy procedures with a new employer or with another department within the (agency)".
>
> (Blind Citizens Australia 2002)

Appendix A is unique among the appendices in taking a dismissive approach to the value of anecdotal evidence and appearing to rely too heavily on economic modelling. As a result, the Appendix concludes that disability discrimination is not occurring on a large scale. Blind Citizens Australia disputes this conclusion. As the Report acknowledges, discrimination does not have to be either conscious or deliberate. Neither does the person faced with discrimination have to acknowledge that they have been discriminated against. In our experience, many people who are blind internalise the still pervasive societal attitude that if you are blind, you are useless. As a result, many people end up accepting a "voluntary" redundancy in the face of an inadequate employer response to their disability does not negate the fact that discrimination has occurred. The overwhelming weight of evidence available to Blind Citizens Australia is that discrimination is both wide-spread and devastating to those who experience it.

There is a suggestion in the Appendix that people with disabilities attempting to (re)enter the work force should accept lower wages to "compensate" employers for the additional cost of employing them. Blind Citizens Australia disputes this suggestion and finds both its tone and implications highly insulting. It is our experience that the ongoing cost of employing a person who is blind or vision impaired are minimal and could be made negligible by employers adopting the principles of universal design. With appropriate workplace adjustments and adaptive technology and software, people who are blind or vision impaired are as productive as their sighted colleagues.

Moreover, it is not just for people with disabilities to be punished through lower wages because they have a disability if their productivity level is the same as their colleagues.

13.3 Appendix B: Education

Appendix B provides a useful overview of the situation for students with disabilities. Blind Citizens Australia would comment that the low participation rate of students who are blind or vision impaired in the tertiary education sector reflects in some cases discrimination experienced by students at the pre-enrolment phase. We are aware of cases of potential students not pursuing tertiary education because they have been told by the institution that they will not be provided with their educational materials in their preferred format. As we stated in our original submission and in our response to Draft Finding 5.2, student access to educational materials in an appropriate format appears to have worsened in recent years. This is particularly the case at universities. In our experience, the existence of a university equal opportunity policy is not synonymous with a genuine, systemic commitment to equity for students who are blind or vision impaired. Very often these plans, although excellent, are not considered or adopted outside of the university equity office. In rare cases, the plans themselves are not equitable.

13.4 Appendix C: Public Premises and Transport

Blind Citizens Australia notes the benefits of the introduction of Standards under the DDA in the areas of transport and access to premises, as outlined by the Commission. We also note the Commission's recognition that the effectiveness of the Standards is undermined by the continuing inaccessibility of the physical environment, such as streetscapes. We have addressed this issue in our response to Draft Finding 5.4 (s 3.4).

We would emphasise the importance of people with disabilities continuing to have access to the DDA after the formulation and adoption of Standards. For instance, many issues of vital importance to people who are blind or vision impaired will not be addressed in the draft DDA Access to Premises Standard, due to be released in December 2003. Clearly it is essential that blind people retain their access to the DDA in these circumstances.

13.5 Appendix D: Goods, Service and Facilities and Social Participation

The Appendix provides a good overview of the current situation in relation to the provision of goods and services to people with disabilities. Blind Citizens Australia agrees that there is a need for action in the area of private accommodation.

13.6 Appendix E: Commonwealth Laws and Programs

The Appendix attempts to assess the success of the Commonwealth Disability Strategy (CDS). We note that the Office of Disability did not prepare a submission to the Review. In our experience Commonwealth Departments and Agencies are not meeting the requirements of the CDS. We have already addressed the issue of employment in our original submission to the Commission. Another area in which the Commonwealth is clearly failing the CDS is access to materials in alternative formats. In recent years the responsibility for publishing and printing government documents in all formats has been decentralised to individual agencies. This is an inefficient way for documents to be produced in accessible formats because:

- public service staff in all agencies must have detailed knowledge of alternative format material publishing, when few will ever have to apply it;
- minimum standards for formatting are not applied, making the transcription of documents more difficult;
- most agencies will only require small amounts of material to be transcribed (except such agencies as the Department of Family and Community Services and Centrelink) and will be unable to negotiate discounts for volume;
- public servants' ignorance of the alternative formatting market means that competition is not vigorous, leading to inflated costs; and,
- demand cannot be managed across a range of suppliers to take production peaks and troughs into account.

These factors combine to mean that people who are blind or vision impaired experience significant time delays in receiving documents.

We have stated our strong support for the proposal to amend the DDA so that complaints about the content of legislation can be made in response to Draft Recommendation 6.3.

13.7 Appendix F: Discrimination Legislation in Other Jurisdictions

No comment.

13.8 Appendix G: Quantitative Analysis of Discrimination in the Labour Market

No comment.

13.9 Appendix H: Changing Community Attitudes

No comment.

References

Elections ACT (2002), **The 2001 ACT Legislative Assembly Election: Electronic Voting and Counting System Review**, ACT Publishing Services: Canberra.

Blind Citizens Australia (2002), **Non-Optional Costs of Blindness Employment Survey**, unpublished paper.