

29 January 2004

Disability Discrimination Act Inquiry  
Productivity Commission  
Melbourne VIC 8003

Dear Sir/Madam

**Re: Submission to the Productivity Commission Inquiry into the *Disability Discrimination Act 1992* (Cth)**

We have had an opportunity to read the Commission's draft report prepared for its review of the *Disability Discrimination Act 1992* (Cth). We would like to now take this opportunity to make a submission to the Commission relating to some of the matters discussed in the draft report.

It is our submission that the operation of the *Disability Discrimination Act 1992* (Cth) would be enhanced by the inclusion of a section that exempts discrimination which is reasonable in order to protect the health or safety of any person or of the public generally, from the operation of the Act, or a similarly worded section.

The issue has arisen for us in the context of debates about the prohibition of smoking in workplaces and public venues on the ground of the harms caused by exposure to environmental tobacco smoke (ETS). The harms caused by exposure to ETS are well established. A 1999 summary of the medical and scientific literature on exposure to ETS concluded that it causes heart disease, lung cancer, nasal sinus cancer, and irritation of the eyes and nose in adults, and sudden infant death syndrome, lower birth weight (where the pregnant mother has been exposed), bronchitis, pneumonia and other lung/airways infections, asthma and exacerbation of existing asthmatic conditions, middle ear disease (otitis media or glue ear.) and respiratory symptoms (coughing and wheezing) in children.<sup>1</sup> Exposure to ETS has also been linked to other diseases and conditions, including cervical cancer<sup>2</sup>, miscarriages<sup>3</sup>, stroke<sup>4</sup> and breast cancer<sup>5</sup> in adults, and adverse effects on cognition and behaviour (affecting learning and awareness)<sup>6</sup>, decreased lung function<sup>7</sup>, worsening of cystic

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<sup>1</sup> National Cancer Institute. Health effects of exposure to environmental tobacco smoke: a report of the California Environmental Protection Agency. Smoking and Tobacco Control Monograph No. 10. Bethesda, MD: U.S. Department of Health and Human Service, National Institutes of Health, National Cancer Institute, NIH Pub No 99-4645, 1999.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Bonita R, Duncan J, Truelson T, Jackson RT, Beaglehole R. Passive smoking as well as active smoking increases the risk of acute stroke. *Tobacco Control* 1999; 8: 156-160.

<sup>5</sup> Lash TL, Aschengrau A. Active and passive smoking and the occurrence of breast cancer. *Am J Epidemiology* 1999; 149(1): 5-12. Burton RC, Sulaiman N. Active and passive smoking and breast cancer: is a real risk emerging? *MJA* 2000; 172: 550-552.

<sup>6</sup> National Cancer Institute. Health effects of exposure to environmental tobacco smoke: a report of the California Environmental Protection Agency. Smoking and Tobacco Control Monograph No. 10. Bethesda, MD:

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fibrosis<sup>8</sup>, meningococcal disease<sup>9</sup> and lung complications during and after surgery<sup>10</sup> in children. Prohibitions on smoking in enclosed workplaces and public places are thus well justified. They operate to protect employees and members of the public from exposure to the risk of serious harm.

Since the decision of the Federal Court in *Marsden v HREOC* [2000] FCA 1619, to the effect that opioid addiction may constitute a .disability. under the Act, the argument has been made that addiction to nicotine, such as is experienced by many people who smoke, may also be a .disability., and that, therefore, people with such a disability are entitled to the protection afforded by the Act. While we are not arguing against this position *per se*, in our view, it is important to ensure that the Act cannot be used to prevent, or make it more difficult, for employers or occupiers of public venues to prohibit smoking on their premises.

Indeed, such measures are required to be undertaken by employers and occupiers of public venues to discharge their duties under occupational health and safety legislation and at common law to employees and patrons, and under anti-discrimination legislation itself to employees and patrons suffering conditions such as asthma, and heart, lung and respiratory conditions. On the latter point, see *Francey & Ors v Hilton Hotels* [1997] HREOCA 56 (25 September 1997), in which the defendant was found to have discriminated in relation to the provision of access to premises and the provision of goods, services and facilities, in breach of the Act, against a woman who suffered from a lung condition and her partner, by exposing her to ETS on the premises.

Our concern is that, in the absence of a provision such as we have suggested, it may be possible to seek to use the Act, or to argue that it can be used, to prevent the prohibition of smoking in enclosed workplaces and public places. Certainly, anecdotal evidence indicates that some employers and occupiers of public venues are concerned about the possibility of action being taken against them under the Act by a person who smokes in the event that they do introduce a prohibition, and that this concern may play a role in dissuading them from doing so. In our submission, this is an unfortunate situation and one that is not intended by the Act. Indeed, it operates against the objects of the Act. While all regulation requires the balancing of various rights and interests, one cannot compare the situation of an asthmatic, for example, who cannot work in or attend premises or enjoy goods, services and facilities because of the presence of ETS, with a smoker who can do all of these things but is prohibited from smoking while he or she is on the premises or in the venue, i.e. he or she can work in or attend premises, and enjoy goods, services and facilities, but is required to leave the venue or premises for a short period if he or she chooses to smoke.

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U.S. Department of Health and Human Service, National Institutes of Health, National Cancer Institute, NIH  
Pub No 99-4645, 1999.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Rosenstein NE, Perkins BA, Stephens DS, Popovic T, Hughes JM. Meningococcal disease. N Engl J Med. 2001 May 3;344(18):1378-88. Review.

<sup>10</sup> Australian and New Zealand College of Anaesthetists. Statement on smoking as related to the perioperative period. ANZCA Professional Document (Review) PS12 (2001). [http://www.anzca.edu.au/publications/profdocs/profstandards/ps12\\_2001.htm](http://www.anzca.edu.au/publications/profdocs/profstandards/ps12_2001.htm), accessed 18 February, 2003. Rodrigo C. The effects of cigarette smoking on anesthesia. Anesth Prog. 2000 Winter;47(4):143-50. Review.

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We note that section 48 of the Act contains an exemption such as we are suggesting where the relevant disability is an infectious disease and "the discrimination is reasonably necessary to protect public health". Of course, it is not only infectious diseases, but also behaviours that may damage or threaten public health, and, though we are addressing the issue in the context of exposure to ETS, there are likely to be other threats to public health that such a provision could protect against. Arguably, a provision such as we are suggesting may become even more important in the context of moves, such as recommended by the Commission in its draft report, to amend the definition of disability to include "behaviour that is a symptom or manifestation of a disability": draft recommendation 9.1.

It is important to observe that the issues that arise in this area, i.e. the effects of behaviour on public health, are not adequately addressed - though some of them may be - by the "reasonableness" requirement in section 6 of the Act, because this applies only to indirect discrimination. Nor are the issues that arise adequately addressed by any of the Act's current exemptions. In respect of those issues which are matters of indirect discrimination, inclusion of criteria for determining whether a requirement or condition is not reasonable having regard to the circumstances of the case, as recommended by the Commission (draft recommendation 9.3), would be beneficial, and, in our submission, should specifically refer to the protection of the health or safety of any person or of the public generally.

It is arguable that the lack of a provision such as the one we are suggesting leaves open the possibility of a conflict between duties under the Act to people with a disability, or a behaviour that is a symptom or manifestation of a disability, and ordinary common law duties to take reasonable care for the health and safety of others, such as employees, patrons and other members of the public. In the event of such a conflict, the Act would prevail. In our submission, it cannot be intended that the Act operate to override ordinary common law duties to take reasonable care for the health and safety of others.

Finally, we note that the *Equal Opportunity Act 1995* (Vic) contains an exception along the lines of the one we are suggesting: section 80(1)(a). It provides that a person may discriminate against another person on the

basis of impairment or physical features if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against) or of the public generally.. The exception applies to both direct and indirect discrimination.

Yours sincerely

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