Introduction

This submission relates particularly to page 344 of the draft report on the Review of the Disability Discrimination Act 1992 where the Productivity Commission states that it:

'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 to 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.'

This submission is also made in the light of the terms of reference of the Committee, especially 2(d)

- The need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication.

In general, on the grounds of equity and efficiency, consistent protective approaches should be taken to those who are injured at work, or allegedly at the hands of a product or service provider, or as a result of other misfortune or negligence in the community. The appropriate legislative treatment of disability therefore needs to be addressed primarily in the light of previous deliberations by the Productivity Commission and other bodies addressing appropriate occupational health and safety and workers' compensation requirements, and also public liability and professional indemnity insurance. The recent report of the Senate on the Provisions of the Australian Human Rights Commission Legislation Bill 2003 should also be considered in this context.

In general, it is recommended that the Productivity Commission inquiry into the Disability Discrimination Act harmonize its approach and recommendations with the Commonwealth, State and Territory Legislative Initiatives outlined in Appendix 5 of the Senate Economic References Committee Review of Public Liability and Professional Indemnity Insurance (2002).

Supporting Argument based on an understanding of the concept "black letter law":

On page 321 the Productivity Commission report on the Disability Discrimination Act refers to 'legislation or Acts of Parliament' and immediately follows this with the statement '(or 'black letter law'). The statement that 'Explicit government regulation (or 'black letter' law) refers to both primary and subordinate legislation' is repeated on the next page, again without explanation of the reference in brackets. What does 'black letter' mean to the writers and why is it not explained?

I am no lawyer, but my understanding of the term 'black letter law' comes from formerly being employed in the NSW WorkCover Authority, immediately after the introduction of the NSW Occupational Health and Safety Act and related rehabilitation requirements under the NSW Workers Compensation Act. From this NSW perspective, black letter law is prescriptive law, which must be followed to the letter. It is old fashioned and inadequate law, often exemplified, for example, in State acts from the turn of the century such as the Factories Shops and Industries Act, the Construction Safety Act and the Rural Accommodation Act. These acts were all revised with the

passage of State OHS Acts during the 1980s. The new OHS acts have a general duty of care focus, supported by regulation, which calls up standards and codes of practice.

Under State OHS Acts employers are expected to provide a safe place of work. Employees are expected to work safely, and sellers to the workplace are expected to provide safe product. Employers are expected to undertake risk identification and control in consultation with workers who are provided with information and training. The WorkCover Authority is the regulator for both the OHS Act and the Workers Compensation Act, which is administered by 12 insurers who collect premium, administer claims and undertake data gathering and fund investment on behalf of government and industry, which also underwrites the scheme. This structure is based on recognition of the need for effective data driven management, which is essential for the management of all risk.

Ideally, when regulations call up Australian standards (for example regarding electrical safety) these must be followed to the letter. When regulations call up codes of practice these provide guidance on how specific risks may be effectively controlled. However, those at the workplace may deviate from the approved code when it is expertly judged on the evidence that another practice is just as safe or safer in a specific situation. WorkCover inspectors act as advisers who may seek independent expert to resolve workplace safety disputes. Like the health practitioner who applies a scientifically approved treatment for a patient's disease, the workplace practitioner ideally recognises that particular situations may vary, and should act safely, in accordance with the evidence about the specific context. The action should be documented. Study of aggregated documentations and their outcomes should be a common research process, which may lead to change in a code of practice.

In contrast to a duty of care or 'outcomes based' approach to law, black letter law is closely identified with the common law. It may not even contain objectives. For example, the Australian Human Rights Commission Legislation Bill (2003) does not clearly explain its aims or objects except in an accompanying Explanatory Memorandum, which may be forgotten quickly. Black letter law is inadequate because it attempts to be explicit about required practices, in a way which covers all situations. The result of this is that it is often inadequate and incomprehensible, or may become so over time. It may also become increasingly contradictory as a result of court decisions, and extremely outdated as a result of the march of technology.

Because it has no outcome focus black letter law is essentially authoritarian and also deals poorly with individual variation. It retards technological progress because a person who has found a better way of achieving a safe work process may accordingly find themselves in breach of law. Black letter law encourages a stupid, subservient mindset which can never adequately address problems because it does not care about providing the data for doing so. Black letter law has an essentially prescientific and non consultative approach. It is a creature of the common law, in legislative form.

It is hard to understand why the Productivity Commission draft report on the Disability Discrimination Act does not explain the meaning of black letter law and appears to assume that all law is necessarily 'black letter'. Are the writers perhaps lawyers, who, like the recent Human Rights and Equal Opportunity Commission submissions on the Provisions of the Australian Human Rights Commission Legislation Bill (2003) appear to take their primary frame of reference from the courts? Since 19% of the Australian population identify currently themselves as having a disability, and around one third of these difficulties are musculoskeletal, this could become an increasingly expensive perspective for the Australian taxpayer. In contrast, the Commission needs to understand and recommend the benefits of an effectively coordinated and data driven approach to health management in order to gain more effective risk identification and control. (I suggest reading past Productivity Commission reports which are relevant to this.)

In other disability related jurisdictions steps are already in train to deal with the problems black letter law may exacerbate. For example, the Productivity Commission report on its Inquiry into National Workers Compensation and OHS Safety Frameworks has most recently been released. The Senate Review of Public Liability and Professional Indemnity Insurance draft report (2002) noted that concern about increasing public liability and professional indemnity insurance premiums have featured heavily in the news since early 2001. Problems identified include:

- Major claim and premium increases, exacerbating pressures to insurer insolvency
- Extreme uncertainty and variability in premium increases
- No reliable data for the effective setting of premium rates (For example, the absence of a national aggregated database of health care litigation claims has hindered risk management. It has been impossible to identify where the real risks are, whether they are changing and which size claims are increasing most.)
- Withdrawal of many public services and cancellation of community events due to the fear of legal suit.

The Review of Public Liability and Professional Indemnity Insurance (2002) concluded that litigation may be driven by:

- Legal advertising
- No win no fee arrangements
- Lack of penalties for pursuing unmeritorious claims
- Anticipation/expectation that the insurer will setting; and
- Assumption that courts will take a sympathetic attitude towards a victim – this ties in with the shift in definition of negligence.

Insurers submissions to the Committee estimated that legal costs in personal injury cases amount to 40% to 50% of the total costs. However, nobody really had any reliable data about anything.

The committee came to the conclusion that the court system provides people with economic incentives to litigate, without providing supports for effective rehabilitation or future management. For information on the horrific way in which a long drawn out adversarial court system inhibits rehabilitation of the injured one need only consult the reports of the NSW Standing Committee on Law and Justice inquiry into the NSW Motor Accidents Scheme. However, there are many reports providing similar evidence. In general, workers' compensation structures have been established as a no-fault system which includes compulsory conciliation and the potential for prosecution for negligence under OHS acts precisely to avoid such problems.

In Appendix 5 of its report, entitled Commonwealth State and Territory Legislative Initiatives as at 30th September 2002, the report on the review of Public Liability and Professional Indemnity Insurance outlines a range of measures which States have taken to deal with the above problems. **It is recommended that the Productivity Commission inquiry into the Disability Discrimination Act harmonize its approach with this general direction.**

Thank you for the opportunity to make this submission. I can be contacted on 9660 8716 or at 10/11 Rosebank Street, Glebe, NSW 2037.

Yours truly

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