



Australian Government

**Department of Employment and
Workplace Relations**

**Submission to the Productivity Commission
Inquiry into the
*Disability Discrimination Act 1992***

Department of Employment and Workplace Relations

January 2004

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Executive summary

Introduction

This submission deals with both employment and workplace relations issues of relevance. The submission covers an overview of Job Network services, the *Active Participation Model* and evaluation findings (Section 1); Workplace flexibilities (Section 2); and, DEWR's response to the Commission's draft recommendations (Section 3).

Job Network

- Job Network provides employment services to job seekers including those with a low to moderate disability through over 2,500 sites, which include Job Network members, Job Placement Organisations and other employment services. Of the Job Network member sites, most are generalist providers, however 37 are disability specialist sites which primarily assist job seekers with disabilities.

The *Active Participation Model* (APM) of employment services commenced on 1 July 2003 and simplifies access and streamlines services provided by Centrelink, Job Placement Organisations, Job Network members and complementary employment and training programmes.

- A job seeker selects a single Job Network member who provides continuous assistance until the job seeker finds employment. The level of this assistance is based on the job seeker's needs, level of disadvantage in the labour market and duration of unemployment - the two main forms of assistance delivered by all Job Network members are Job Search Support and Intensive Support.
 - : Job Search Support is aimed at placing job seekers directly and quickly into jobs and every eligible job seeker receives this service.
 - : Intensive Support provides additional assistance tailored to the needs of the individual job seeker. Intensive Support customised assistance provides expanded one-on-one services to address job seekers' barriers to employment. Both Intensive Support and Intensive Support customised assistance aim at supporting job seekers who have multiple barriers to employment.
- Job Network members have, on average, access to about \$180m per year through the Job Seeker Account to purchase tailored assistance for eligible job seekers to improve their employment prospects. A variety of services and products can be obtained for job seekers through the Job Seeker Account, from training and work clothing or equipment to wage subsidies and assistance with workplace modifications.
- A range of service and/or outcome fees are available to Job Network members for providing the required services, and achieving positive outcomes for job seekers.
- A new Job Placement service was introduced and provides a dedicated recruitment service to employers to help them find suitable employees. Job Placement Organisations canvass employers for vacancies, then screen and refer suitable job seekers to those vacancies.

- There are currently over 50 complementary programmes which job seekers can access through their Job Network member including those targeting people with disabilities.
- Job seekers with disabilities participating in Intensive Support customised assistance may be eligible to access the Department of Family and Community Services (FaCS) Workplace Modifications Scheme (WMS), with the aim of assisting with the cost of workplace modifications, or special or adaptive equipment for new workers.
- During 2002-03 there was a total of 592,900 job seekers in Job Network, 48,455 of whom had disclosed disabilities. Currently, 63,000 job seekers in Job Network have disclosed a disability that impacts on their ability to look for or maintain employment. More than 30 per cent of these job seekers are identified as highly disadvantaged.
- Almost half of job seekers with disabilities had positive outcomes. The outcomes for job seekers with disabilities are similar to, or higher than, outcomes for other equity groups in Job Network.
- New developments in assisting people with disabilities gain employment include:
 - the development of a web-based Disability Toolkit to improve services for job seekers with a disability;
 - implementation of a pilot scheme to better enable Disability Specialist Job Network members to attract and find employment for people with disabilities : it is expected that the pilot will increase participation of Disability Support Pension recipients, and identify best practice and appropriate servicing options that will be transferable to all Job Network members; and
 - working closely with a range of disability community stakeholders and other government departments to encourage projects aimed at improving awareness and information flows for both Job Network members and people with disabilities regarding employment assistance for job seekers with disabilities.

Workplace flexibilities

- Flexible working time arrangements – particularly part-time work and flexibility in how hours are arranged – can greatly assist employees. Opportunities to explore these arrangements are readily available under the agreement-making provisions of the *Workplace Relations Act 1996*. These allow employers and an employee or employees to tailor mutually beneficial employment conditions at the workplace.

Response to draft report

- The Department does not oppose draft recommendation 6.3, to amend the *Disability Discrimination Act 1992* (DDA) to clarify that acts done in compliance with non-prescribed laws are not exempt from challenge under the DDA regardless of the degree of discretion of the decision maker. This would clarify the current legal position but not alter it.
- Part 1 of draft recommendation 9.2, to clarify what constitutes circumstances that are ‘not materially different’ for comparison purposes, may have some benefits, although the Department notes that guidelines may be difficult to formulate.
- Part 2 of draft recommendation 9.2, to make failure to provide ‘different accommodation or services’ required by a person with a disability ‘less favourable treatment’, is not

supported. The Department's view is that such a change would be premature and that the matter should first be considered by the courts.

- Draft recommendation 9.3 would: 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; and, cover instances of proposed indirect discrimination. These changes are not opposed, as they may improve the effectiveness of the DDA and do not appear problematic.
- Draft recommendation 12.7 to delist laws currently prescribed under section 47 of the DDA unless the relevant States request their retention, is not opposed.
- The Productivity Commission seeks further information in chapter 6 of the draft report, regarding the desirability of specific 'equality before the law' provisions. Such provisions are opposed, as they would radically extend the operation of the DDA and could invalidate Commonwealth legislation.
- The Productivity Commission seeks further information in chapter 13 of the draft report, regarding a duty on employers to take 'reasonable steps' to identify and eliminate barriers to the employment of people with disabilities. Such a duty is opposed as it would potentially:
 - be difficult and costly for employers to comply;
 - require extensive guidelines and monitoring which could create a disincentive for employers to employ people with disabilities;
 - impose greater burdens on small and medium businesses which do not have resources to comply; and
 - undermine the many positive measures being taken to encourage employment for people with disabilities.

Introduction

The role of the Department of Employment and Workplace Relations (DEWR) is to develop policies and implement programmes that contribute to the achievement of two interrelated government outcomes that are relevant to all Australians:

- an effectively functioning labour market; and
- higher productivity, higher pay workplaces.

The aim is to maximise the ability of unemployed Australians to find work, particularly those who face the most severe barriers to work, and to support strong employment growth and the improved productive performance of enterprises in Australia.

This submission deals with both employment and workplace relations issues of relevance. The Department has prepared this submission in response to the Productivity Commission's inquiry into the *Disability Discrimination Act 1992*. Where appropriate, reference is made to the Draft Report and appendices released in October 2003, containing the Commission's interim findings. The submission covers an overview of Job Network services, the *Active Participation Model* and evaluation findings (Section 1); Workplace flexibilities (Section 2); and, DEWR's response to the Commission's draft recommendations (Section 3). Comments on some technical aspects and findings of the Draft Report are at Attachment A.

1. Job Network Services

Job Network is a national network of private and community organisations dedicated to finding jobs for unemployed people, particularly the long-term unemployed. Job Network is designed to provide flexible assistance tailored to the individual job seeker. Under the *Active Participation Model* there are now over 2,500 sites which deliver Job Network, Job Placement and other related employment services to job seekers.

Job Network provides varying levels of service to job seekers, depending on the barriers to employment that they face and the length of time they have been unemployed. Job seekers typically register with Centrelink for income support and are then referred to Job Network members for assistance. For the majority of job seekers Centrelink is the 'gateway' to Job Network services.

Job Network provides employment services to job seekers with a low to moderate disability, to overcome vocational barriers to employment. FaCS funded disability employment services assist job seekers with a moderate to severe disability and job seekers who have difficulty in gaining and retaining employment without rehabilitation or ongoing support.

1.1 Active Participation Model

The *Active Participation Model* of employment services (the third Employment Services Contract (ESC3 - 2003-2006)) commenced on 1 July 2003. The *Active Participation Model* simplifies access to services for job seekers and streamlines services provided by Centrelink, Job Placement Organisations, Job Network members and complementary employment and training programmes.

Key features of this model include a single Job Network member providing continuous assistance and working with job seekers until they find employment. Job seekers can choose

their preferred Job Network member. Job Network members focus on the needs of job seekers by providing services appropriate to the individual job seeker.

The level of assistance provided by the Job Network member to job seekers is based on the job seekers' employment needs and level of disadvantage in the labour market, as well as on the duration of their unemployment. The Job Network member will continue to provide services and maintain regular contact with the job seeker throughout the unemployment period, ensuring ongoing employment-focused activity. Job Network services must be based on strategies to achieve sustainable employment outcomes for different groups of job seekers.

The *Active Participation Model* offers a continuum of employment assistance including Job Search Support services and Intensive Support services. Eligibility for these services is determined by a range of factors, such as the job seeker's age, duration of unemployment and level of disadvantage. Centrelink makes the assessment of eligibility and refers job seekers for the appropriate level of assistance.

- Job Search Support is aimed at placing job seekers directly and quickly into jobs. Every eligible job seeker will receive Job Search Support services. Under Job Search Support, Job Network members assist their clients to lodge their résumé or 'vocational profile' on JobSearch so that they can be auto-matched against available vacancies. Job seekers will be notified of matches to suitable jobs placed on the site in the preceding 24 hours through JobSearch kiosks or a phone service for the cost of a local call. Eligible job seekers with mobiles can also choose to be notified of matches via SMS messages.
- Intensive Support, generally available after three months of Job Search Support, provides additional assistance including job search training and advice on job search approaches, which is specifically tailored to meet the needs of the individual job seeker. Assistance may include, but is not limited to, expanding the job seeker's employment-related networks, motivating job seekers to look for work, formal and informal training in job search skills and techniques as well as practical job search activities.
 - Job seekers who have been unemployed for 12 months or identified as highly disadvantaged and requiring early intervention will receive Intensive Support customised assistance. Intensive Support customised assistance provides job seekers with expanded, flexible one-on-one services to individually address job seekers' barriers to employment, and tailor job seekers' efforts in looking for work. The activities, and the method of their delivery, are negotiated between the job seeker and the Job Network member.
 - Both Intensive Support and Intensive Support customised assistance are aimed at supporting job seekers who have multiple barriers to employment that particularly disadvantage them from finding work including those with a disability.

1.1.1 Job Seeker Assessment

The Job Seeker Classification Instrument (JSCI) is an objective measure of a job seeker's relative labour market disadvantage. The JSCI is designed to immediately identify job seekers who, because of their individual circumstances, are likely to become long-term unemployed. These job seekers are classified as 'highly disadvantaged' in the labour market and are eligible for early referral to Intensive Support customised assistance. Within Job Network, job seekers with disabilities are identified or defined primarily by their responses to the JSCI.

Initially, the JSCI is applied by Centrelink on behalf of DEWR to job seekers who register with Centrelink as *Looking for work*. The JSCI score is a derived score depending on the disclosure by job seekers to a standard set of questions asked by Centrelink at the job seeker's *Looking for work* interview and identifies those 'highly disadvantaged' job seekers for early access to Intensive Support customised assistance, job seekers for referral to Language, Literacy and Numeracy training and the Adult Migrant English Programme (AMEP) and job seekers who require a JSCI Supplementary Assessment.

The purpose of conducting a JSCI Supplementary Assessment (JSA) is to identify and assess job seekers who have potentially severe, multiple or non-vocational barriers to employment. It is used to determine the most appropriate employment assistance to meet the job seeker's needs and results in a referral to Job Network, Disability Employment Assistance, Vocational Rehabilitation or the Personal Support Program.

The JSA involves an interview between the job seeker and a Centrelink specialist - either a Disability Officer, Psychologist or Social Worker. The three types of JSAs that can be identified as required following a job seeker's responses to the JSCI are a JSA – Disability, JSA - Personal Factors and JSA - Special Needs.

- The JSA – Disability is identified as required when a job seeker discloses during the JSCI interview that they have a psychological condition, psychiatric illness, acquired brain injury or a learning disability; any two or more disabilities; or an inability to work 15 hours per week over 5 consecutive days.
 - A JSA - Disability uses the Disability Employment Indicators (DEI) to identify a job seeker's need for ongoing support in employment and/or need for vocational rehabilitation. The DEI uses two Centrelink forms to collect relevant information, one form is completed by the job seeker and the other form is completed by a professional who has contact with the job seeker. A Centrelink Disability Officer reviews both of these forms in an interview with the job seeker and makes a determination about the appropriate type of employment assistance to meet the job seeker's needs. Following the completion of the JSA – Disability a job seeker may be referred to either Job Network or the FaCS funded Disability Employment Assistance or Vocational Rehabilitation.
- The JSA - Personal Factors aims to identify a range of issues which may potentially impact upon a job seeker's ability to gain employment such as poor motivation, poor self esteem and poor presentation which may require professional or specialist advice.
- The JSA – Special Needs aims to identify job seekers with potential special needs who have severe and/or multiple non-vocational barriers to employment. The JSA – Special Needs also determines whether the job seeker has the capacity to benefit from Job Network or whether a referral to the Personal Support Programme may be more appropriate.

The *Job Network Evaluation Stage Three: Effectiveness Report (2002)* noted that the performance of the JSCI depends on Centrelink's capacity to classify job seekers at registration and to reclassify them at appropriate intervals if their circumstances change. The assessment arrangements under the *Active Participation Model* have been improved by allowing the Job Network member to update a job seeker's circumstances. This will assist with the disclosure of the information and the accuracy of the job seeker's JSCI. Since September 2003, if a job seeker discloses to their Job Network member a change in circumstances, the Job Network member is able to update the job seeker's personal details. The job seeker's JSCI score will be

recalculated, and, if eligible, the job seeker can access Intensive Support customised assistance immediately or be referred back to Centrelink for further assessment.

1.1.2 Specialist and generalist providers

Job Network provides employment services to all job seekers including those with a disability, to overcome vocational barriers to employment. On registration with Centrelink, each eligible job seeker is referred to a single Job Network member, who will provide services to them while they remain eligible for assistance.

Job Network providers have been selected on the basis of their capacity to provide employment services to cater for the needs of particular client groups in the community. While some Job Network members are solely employment service providers, others may offer a range of services to job seekers.

Job seekers can choose from a range of specialist providers who have expertise in services to particular groups of disadvantaged job seekers such as people with a disability, job seekers from other than English speaking countries and mature aged job seekers. There are 37 specialist Job Network member sites providing specialist support to job seekers with disabilities, including those with a hearing or vision impairment, mental health issues and HIV/AIDS/Hepatitis.

1.1.3 Job Placement service

Under the *Active Participation Model*, a new Job Placement service was introduced and provides a dedicated recruitment service to employers to help them find suitable employees. Job Placement Organisations canvass employers for vacancies, then screen and refer suitable job seekers to those vacancies. These firms include specialist personnel recruitment organisations with expertise in particular fields. All their non-executive vacancies are listed on Australian JobSearch, the national vacancy database. By harnessing the expertise of the private recruitment industry, the Government expects that the new Job Placement system will make over 600,000 additional jobs available on the Australian JobSearch database over the coming three years. All job seekers are free to approach Job Placement Organisations for referral to positions on Australian JobSearch. Job Placement Organisations are paid a placement fee by the Government each time they place a Job Network eligible job seeker into work.

1.1.4 Job Seeker Account and Training Account

Job Network members have, on average, access to about \$180 million per year through the Job Seeker Account to purchase a wide range of assistance to help eligible job seekers secure work. All job seekers in Intensive Support, including job seekers with a disability, are eligible for assistance from the Job Seeker Account. Assistance provided through the Job Seeker Account is tailored to the needs of individual job seekers and aimed at reducing their employment barriers. Job Network members determine what is an appropriate type and level of assistance for each eligible job seeker according to their individual needs and available employment opportunities.

Types of assistance could include, but are not limited to: skills training; help with transport costs; assistance for job search or employment related activities; professional services, including interpreter services for participation and work related activities; employer incentives including wage subsidies or help with workplace modification; and, purchasing work related clothing or equipment.

Mature aged and Indigenous Australian job seekers in Intensive Support also have access to additional funds for work related training and associated costs through the Training Account. The Training Account can be used by Job Network members to purchase vocational or skills-based training to improve the employment prospects of eligible job seekers.

Job Network member services to job seekers are underwritten by a Service Guarantee which defines the nature and frequency of services to be provided by Job Network members. Sanctions are applied to Job Network members who do not deliver the services and standards set out in the Guarantee.

1.1.5 Service/outcome fees

Job Network members are paid a range of service fees that include additional amounts available for job seekers identified as highly disadvantaged.

In Job Search Support, Job Network members receive a variable service fee for providing a range of services to assist the job seeker to find employment including: completing their Vocational Profile; providing advice on job search techniques, career options and employment programmes; and, giving feedback on interviews. Job Network members also receive a placement fee when the job seeker is placed in employment, with the amount varying depending on the job seeker's length of unemployment, eligibility and level of disadvantage.

Job Network members are paid Intensive Support outcome fees when the job seekers they assist gain employment that extends for a minimum of 13 consecutive weeks or complete a qualifying education and training course. The highest fees are paid when positive outcomes are achieved for long term unemployed and other highly disadvantaged job seekers.

1.1.6 Complementary Programmes

Under the *Active Participation Model*, Job Network members are encouraged to strengthen linkages with other service providers including programmes helping people with disabilities. Job Network members are able to refer job seekers to complementary employment and training programmes provided by other Commonwealth and State governments, which give a job seeker specialised help to overcome barriers to getting a job. Job Network members can work with complementary programme providers to help meet the needs of job seekers and help job seekers to participate in programmes which most closely meet their needs.

There are currently over 50 complementary programmes which job seekers can access through their Job Network member including several programmes which specifically target people with disabilities as well as programmes which include people with disabilities in their target group. In most cases, job seekers can continue to receive assistance from their Job Network member while participating in the complementary programme. Job seekers can continue to get additional support particularly with their job search activity and keeping their resume available for matching against jobs.

1.1.7 Workplace Modifications Scheme

Job seekers who are eligible for Intensive Support customised assistance may be able to access funding through the Department of Family and Community Services (FaCS) Workplace Modifications Scheme (WMS), when they are placed in a job through a Job Network member.

Assistance under the WMS is also available to Supported Wage System (SWS) and job in jeopardy (J-in-J) workers who meet the eligibility requirements, where that assistance falls within the guidelines of the Scheme, and funds are available. Assistance under the Scheme may be extended to some eligible self-employed persons with disabilities who are participants of the New Enterprise Incentive Scheme (NEIS). The objective is to encourage employers to provide employment opportunities for new workers with disabilities or existing workers with disabilities whose job may be in jeopardy.

1.2 Job Network participation and outcomes

1.2.1 Participation

During 2002-03 there were 592,900 job seekers in Job Network. In the same period, 48,455 people with disabilities are recorded as participating in Job Network (Table 1). However both these figures have been affected by the transition from ESC 2 to ESC 3 from April to June 2003, when referrals were significantly reduced.

Job Network is currently assisting around 63,000 job seekers with a disability, with more than 30 per cent of these job seekers identified as highly disadvantaged.

Table 1: Job Network Programme participation in 2002-03

	Job Matching	JobSearch Training	Intensive Assistance	NEIS	TOTAL
Job seekers with disabilities	20 182	2 537	25 736	Not available	48 455
All job seekers	284 800	72 500	228 600	7 000	592 900

Note: participation rates for all disadvantaged groups were less in 2002-03 than in 2001-02 due to the transition from the Employment Services Contract 2 to the ESC3. Referrals into employment services were significantly reduced during the period April to June 2003 as part of the transition process to ESC3.

Table 2: Breakdown by disability group for 2002-03 job seekers in intensive assistance

Disability Group	Total Intensive Assistance Commencements	% of all Intensive Assistance Commencements
Acquired brain injury	175	0.1
Autistic conditions	18	0.0
Hearing	808	0.4
Intellectual and learning	861	0.4
Neurological	1 572	0.7
Other	7 754	3.4
Physical	14 279	6.2
Psychiatric and psychological	3 577	1.6
Speech	116	0.1
Substance abuse	912	0.4
Vision	898	0.4
Disabled job seekers total	25 736	11.3
Non disabled job seekers total	203 106	85.3
All job seekers	228 600	100.0

Note: the disabled job seekers total is less than the sum of the disability groups because job seekers can have multiple disabilities.

1.2.2 Outcomes

The positive outcomes shown in Table 3 relate to the proportion of job seekers in employment or education/training three months following participation in Job Network. These outcomes are not directly comparable with FaCS disability employment services outcomes.

As Table 3 indicates, positive outcome estimates are around 10 - 12 percentage points lower for job seekers with disabilities than all job seekers. However it is encouraging that estimates show almost half of job seekers with disabilities were in employment or education/training three months following participation in employment services. The positive outcomes for job seekers with disabilities are similar to or higher than outcomes for other equity groups, although the equity groups are not mutually exclusive, so some job seekers will be included in more than one group.

Table 3: Positive outcomes¹ for people in Job Network 2002-03

	Job Matching	JobSearch Training	Intensive Assistance	NEIS	TOTAL
Job seekers with disabilities	58.2%	42.4%	44.3%	72.9%	47.8%
All job seekers	70.4%	51.5%	54.2%	82.3%	60.4%

1. Proportion of job seekers in employment or education/training (positive outcomes) three months following participation in Employment Services. The data relate to those job seekers who left assistance in the period 1 April 2002 to 31 March 2003 and achieved outcomes in the 2002-03 financial year. DEWR's Post Programme Monitoring survey is the source of the positive outcomes data and the estimates are based on a 25% sample of job seekers.

1.3 New Developments

1.3.1 Disability toolkit

The development of a web-based Disability Toolkit is one of the initiatives being developed by DEWR to improve services for job seekers with a disability. The Disability Toolkit will provide a reference point to help Job Network members increase their knowledge about disabilities, increase their understanding of the impact a disability may have on a job seeker's capacity to gain and maintain suitable employment and to provide assistance to job seekers with a disability.

1.3.2 Disability specialist pilot

DEWR is funding a pilot that will provide eligible Disability Support Pension (DSP) recipients with access to a range of employment services under Job Network. This pilot is targeted at DSP recipients who are able to be assisted by Job Network – primarily those who do not have significant ongoing support needs – who are not already participating in a form of Commonwealth assistance. The objectives of the pilot align with the Government's policy of improving labour market participation for people with a disability. The expected outcomes of this pilot include:

- increased participation in Job Network by DSP recipients;
- increased awareness by DSP recipients, disability and community groups of the benefits of labour market participation and Job Network services;
- identification of best practice and appropriate servicing options to assist people with a disability; and
- identification of best practice to connect non activity tested job seekers to Job Network.

To produce these outcomes and achieve the objectives, the Pilot will involve:

- specialist disability Job Network members developing tailored marketing, promotion, networking, outreach and engagement strategies to attract eligible DSP recipients;
- eligible DSP recipients being actively engaged and supported by specialist disability Job Network members at a local level and provided with access to a range of specialist and employment services; and
- job seekers being assisted in line with the *Active Participation Model*, including identifying servicing strategies to ensure ongoing connection to Job Network for their unemployment period or referral to more appropriate services where necessary. The pilot will further test the flexibilities available to service voluntary job seekers.

The pilot commenced in December 2003 and will conclude in June 2004, with ongoing monitoring being conducted during and the after completion of the pilot to evaluate its success.

1.3.3 Stakeholder involvement

Community stakeholders have a valuable contribution to make in information sharing, communication, attitudinal change and practical initiatives that will improve employment opportunities for people with disabilities. DEWR is liaising with community stakeholders to encourage these activities (for example Employers Making a Difference, Blind Citizens Australia, Mental Health Council of Australia, Ability Australia)

DEWR is also working closely with other government departments to streamline processes and coordinate efforts at encouraging employment for people with disabilities.

2. Workplace flexibilities

Flexible working time arrangements – particularly part-time work and flexibility in how hours are arranged – can greatly assist all workers to balance their work and life commitments. Opportunities to explore these arrangements are readily available under the agreement-making provisions of the Workplace Relations Act 1996 (The Act). The Act provides employers and employees with the opportunity to develop formal workplace agreements which best suit the needs of the business and its employees. The Act provides opportunities and choices for collective certified agreements – with or without union involvement - and individual Australian Workplace Agreements (AWAs).

Part-time work can provide increased flexibility to employees for a variety of reasons, from allowing parents to balance their work and family commitments to enabling mature workers to

gradually retire. Of all federal certified agreements current at 30 September 2003, 33 per cent (covering 75 per cent of agreement-covered employees) contain part-time work provisions.

A range of working time flexibilities can be utilised, depending on the requirements of a workplace, and many of these can be seen in formalised agreements between employers and employees. Options include averaging of hours, a wider span of hours when work can be performed at ordinary rates of pay, flex-time, make up time, flexible start and finishing times and provisions that allow hours of work to be negotiated (eg by the individual or work team). Some 64 per cent of federal certified agreements current at 30 September 2003 – covering 70 per cent of agreement-covered employees – have one or more flexible hours provisions.

3. Responses to draft report

3.1 Response to draft recommendations

As an overarching comment, it seems that the draft report approach to this legislation favours comprehensive prescription of standards rather than broad general provisions which are intended to be interpreted by the courts in individual cases.

There is an emphasis on consistency with other anti-discrimination laws, and several of the draft report recommendations encourage the adoption of provisions contained in other legislation. While this sentiment is laudable, legislative consistency is not possible for at least two reasons:

- other legislation, even within the federal jurisdiction, does not follow a single template but differs markedly in its terms, and
- there is not a mandate for the Commission to review all anti-discrimination laws with a view to ensuring consistency of coverage.

Draft recommendation 6.3 The DDA should be amended to make it clear that acts 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.

Subsection 47(2) of the DDA exempts acts done in ‘direct compliance’ with a ‘prescribed law’ of the Commonwealth, a State or Territory from being considered unlawful discrimination.

The only laws currently prescribed are:

- in the Commonwealth jurisdiction, regulation 2A and Schedule 1 of the *Disability Discrimination Regulations 1996*;
- in New South Wales, the *Mental Health Act 1990*, *Mental Health Regulations 1995*, *Motor Traffic Regulations 1935*, clauses 10(1)(c) and 11; and
- in South Australia, the *Firearms Act 1977*, sections 20 and 20A; *Motor Vehicles Act 1959*, sections 88 and 148; *Education Act 1972*, sections 75(3) and 75A; *Industrial and Employee Relations (General) Regulations 1994*, regulation 11 and *Workers Rehabilitation and Compensation Act 1986*, section 30A and Schedule 3.

The Productivity Commission has also recommended amending the DDA to clarify that actions done in compliance with all other laws except prescribed laws are not exempt from challenge under the DDA.

This recommendation is considered necessary because HREOC has apparently taken the position that the DDA can only be used to challenge actions taken under a law where there is a discretion in how to exercise the power under a law.

It is already clearly the case that under the DDA it is no defence to a complaint of disability discrimination if a person were to say that his or her allegedly discriminatory action was taken in compliance with a law. If a legislative amendment is deemed necessary to clarify this, it is unexceptionable as it does not have any impact on the current legal position.

Summary: Recommendation 6.3 is not opposed, it merely clarifies the current legal position.

Draft recommendation 9.2 The definition of direct discrimination in the DDA (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’.

The Productivity Commission suggested clarification of what constitutes circumstances that are ‘not materially different’ either through a list of criteria in the DDA, or the use of examples in the legislation, or in guidelines or disability standards.

HREOC’s approach was to use as a comparator a person in the same circumstances but without the general characteristics of that disability. This approach has been used in some, but not all, Federal Court and Federal Magistrates’ Court decisions.

There could be some usefulness in clarifying what general phrases such as ‘not materially different’ mean. A list of criteria or guidelines would probably not change the extent of the obligation not to discriminate. However, it could be valuable to employers in providing more concrete guidance as to their rights and obligations in employing a person with a disability. More specific criteria may also reduce the need for resort to HREOC or the courts to arbitrate cases where disputes arise as to whether a person was discriminated against or not.

Summary: Part 1 of recommendation 9.2 is not opposed, as it may have some benefits in clarifying obligations, although the guidelines would be difficult to formulate.

The Department does not however, support the second part of the recommendation to make failure to provide ‘different accommodation or services’ required by a person with a disability ‘less favourable treatment’. Doing so would, in effect, create a duty to provide a person with a disability with the accommodation or services he or she requires to ensure that he or she is treated in the same manner as a person without that disability. It is not currently clear whether the DDA requires the provision of ‘different accommodation or services’ or not.

The suggested amendment may do nothing more than clarify the meaning of the existing provisions of the DDA. However, if a court were to take a narrow interpretation of the definition of direct discrimination, then making a legislative amendment enshrining a broad interpretation has the obvious effect of extending the liabilities of employers, partners in partnerships, employment agencies and others in relation to people with disabilities.

To amend the definition of direct discrimination in this manner is pre-empting the courts. In the first instance, it should be the role of the courts to interpret the DDA and apply it in particular situations to determine whether or not section 5(2) imposes a duty to provide different accommodation and services to people with a disability. Making a legislative amendment before the issue has been considered by the Federal Court would be premature.

Summary: Do not support part 2 of recommendation 9.2, as it may increase the obligations of employers and others, and the proper course is for the matter first to be considered by the courts.

Draft Recommendation 9.3 The definition of indirect discrimination in the DDA (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**

Currently, section 6 of the DDA requires a person complaining of discrimination to prove that a ‘substantially higher proportion’ of people with a certain disability are disadvantaged by an action than people without the disability. The Productivity Commission recommends removing this and replacing it with a simpler obligation to prove that a person with a disability has suffered less favourable treatment or been subjected to a disadvantage. This would be similar to the test of indirect discrimination in the *Sex Discrimination Act 1984* (Cth), and some other laws, such as the ACT’s anti-discrimination legislation.

This amendment may make it easier for people complaining of discrimination to make out their case against employers and others, but would probably not have a substantial impact on the number of successful complainants, as the majority of complainants do not founder at the hurdle of proportionality. It is unlikely that the suggested amendment will significantly alter employers’ obligations or subject them to additional liability.

Summary: Removing the proportionality test is not opposed, as it may simplify the DDA a little but is unlikely to impose a significant additional burden on employers.

Currently, the DDA has no criteria for determining whether or not a requirement is ‘reasonable in the circumstances’. What is ‘reasonable’ has developed through case law.

Section 9 of the *Racial Discrimination Act 1975* (Cth) also contains no criteria for assessing ‘reasonableness’. The Age Discrimination Bill 2003 (Cth), which is currently before Parliament, does not include criteria for determining what conditions are ‘reasonable’ in clause 15.

In contrast, the *Sex Discrimination Act 1984* (Cth) states that the matters to be taken into account in determining whether a requirement is ‘reasonable’ include (subsection 7B(2)):

- the nature and extent of the disadvantage resulting from the requirement; and
- the feasibility of overcoming or mitigating the disadvantage; and
- whether the disadvantage is proportionate to the result sought by the person who imposes the requirement.

The Productivity Commission recommends the addition of similar criteria into the DDA to clarify when a requirement is ‘reasonable’.

It is unclear why it is necessary to amend the DDA when criteria for establishing ‘reasonableness’ can be found in case law, and no criteria are specified in the *Racial Discrimination Act 1975* (Cth) or the Age Discrimination Bill 2003 (Cth). However, it does not seem as though the addition of criteria of ‘reasonableness’, provided they are of a general nature similar to those contained in the *Sex Discrimination Act 1984* (Cth), would have a detrimental effect on employers, partnerships and others.

Summary: the introduction of legislative criteria for determining ‘reasonableness’ is probably unnecessary, given they already exist in case law. However, the proposal does not appear to be problematic, and may provide small improvements in terms of consistency and legislative certainty.

The Productivity Commission also recommends that the burden of proving that a requirement is ‘reasonable’ be placed on respondents (for example, employers).

This accords with the approach taken in federal sex and proposed age discrimination legislation. Section 7C of the *Sex Discrimination Act 1984* (Cth) puts the burden of proving that an act was done reasonably and hence was not discriminatory on the person who did the act. Similarly, clause 15 of the *Age Discrimination Bill 2003* (Cth) places the burden of proving that a requirement has been ‘reasonably’ imposed on the alleged discriminator.

The reason for this recommendation is that those accused of discrimination (such as employers) have access to the necessary information relating to their business requirements and reasons for imposing the condition, whereas this information is often inaccessible to people complaining of discrimination.

Although shifting the burden of proof may be logical having regard to the inequities of access to the necessary information, it is likely to be opposed by employers, as it will be seen as making it easier for those complaining of discrimination to succeed in their complaints.

Summary: Not opposed to placing the burden of proving reasonableness on the alleged discriminator, as complainants are unlikely to have access to the necessary information.

The definition of ‘direct discrimination’ in section 5 of the DDA applies to discriminatory acts and proposed discriminatory acts. By contrast, the definition of ‘indirect discrimination’ applies only to discriminatory requirements or conditions that have been imposed, not those which are proposed to be introduced.

This situation is inefficient, because it is not possible to challenge a requirement or condition before it has been introduced. It is also out of step with other federal discrimination laws (for example, section 7B of the *Sex Discrimination Act 1984* (Cth), clauses 14 and 15 of the *Age Discrimination Bill 2003* (Cth)), which cover both actual and proposed incidents of indirect discrimination.

It is worth noting, however, that federal anti-discrimination laws are not uniform or consistent. For example, section 5 of the *Sex Discrimination Act 1984* (Cth) prohibits only acts of direct sex discrimination, not proposed acts. Similarly, section 9 of the *Racial Discrimination Act 1975* (Cth) covers acts or omissions of direct or indirect racial discrimination, but not proposed acts or omissions.

The Productivity Commission recommends including proposed acts of indirect discrimination in the definition in section 6 of the DDA.

Although this will allow more challenges to alleged discriminatory behaviour, it seems efficient and sensible to be able to challenge a decision once the intention to implement the decision becomes known, rather than wait until it has been implemented and then potentially force a retrospective change of both policy and practice.

Summary: Not opposed to amending the DDA to cover incidences of proposed indirect discrimination, which may have been omitted by legislative oversight.

Draft recommendation 10.6 The Disability Discrimination Act 1992 (DDA) 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)

Recommendation 10.6 is essentially a technical amendment and concerns the application of the DDA to business services that are funded by the Department of Family and Community Services (FACS). This recommendation is, therefore, primarily a matter for FACS. However, any approach taken on this issue needs to recognise that many business services currently cannot afford to pay pro-rata award based wages.

Summary: the issues covered by this recommendation are primarily the responsibility of FaCS.

Draft Recommendation 12.7 The laws currently prescribed under s 47 of the DDA should be delisted unless the relevant States request their retention.

Subsection 47(2) of the DDA exempts acts done in ‘direct compliance’ with a ‘prescribed law’ of the Commonwealth, a State or Territory from being considered unlawful discrimination.

The only laws currently prescribed are (regulation 2A and Schedule 1 of the *Disability Discrimination Regulations 1996* (Cth)):

- in New South Wales, the *Mental Health Act 1990*, *Mental Health Regulations 1995*, *Motor Traffic Regulations 1935*, clauses 10(1)(c) and 11; and
- in South Australia, the *Firearms Act 1977*, sections 20 and 20A; *Motor Vehicles Act 1959*, sections 88 and 148; *Education Act 1972*, sections 75(3) and 75A; *Industrial and Employee Relations (General) Regulations 1994*, regulation 11 and *Workers Rehabilitation and Compensation Act 1986*, section 30A and Schedule 3.

The Productivity Commission has recommended delisting these exempt State laws unless the relevant State requests their retention.

This recommendation does not cause any problems from the Commonwealth’s perspective.

Only the *Workers Rehabilitation and Compensation Act 1986* (SA) has any relevance to employment. Section 30A sets out a more restrictive test for compensability of psychiatric disabilities than that applicable for other workplace injuries or disabilities. A psychiatric disability is compensable only if the employment was a substantial cause of the disability, and the disability was not mainly caused by disciplinary action, failure to obtain a promotion or transfer or other similar matters. Schedule 3 provides the table of lump sum compensation payable.

Other States have similar laws which are not exempt from the DDA. In any case, these laws are State laws and if States have concerns, they can always request that the laws retain their exempt status.

Summary: Not opposed to recommendation 12.7 as it affects the States not the Commonwealth.

3.2 Response to requests for information

Chapter 6 - Request for information – 1 The Productivity Commission seeks further information on how the DDA 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 s 10 of the RDA)
- their interaction with provisions relating to ‘special measures’
- their interaction with provisions relating to ‘prescribed laws’

The Productivity Commission suggested that one possible way of clarifying that actions done in compliance with laws are not exempt from challenge under the DDA may be to amend the DDA to include an ‘equality before the law’ provision such as that in the *Racial Discrimination Act 1975* (RDA) (see p. 141 of the Draft Report).

The RDA contains two general provisions making discrimination unlawful. Section 9 makes any ‘act’ of racial discrimination unlawful. Section 10 deems any ‘law’ that racially discriminates on the basis of race to give equal rights to those groups discriminated against.

In contrast, there is no express right to challenge laws directly under the DDA. The DDA applies to acts of disability discrimination in specific areas. This includes actions taken in compliance with laws, but the DDA does not create a right to directly challenge legislation. For example, it is unlawful to discriminate on the ground of disability in deciding to whom a job is offered, or in firing someone from a job. But there is no provision permitting a general challenge to a law which is said to be discriminatory on the basis of disability.

Amending the DDA to insert a specific ‘equality before the law’ provision modelled on section 10 of the RDA, as suggested by the Productivity Commission, would fundamentally alter the scope of the DDA. It would open up the potential for aggrieved persons to challenge Commonwealth legislation which is said to have a discriminatory impact or effect upon people with disabilities, independently of any actions taken under such laws. This would be an extremely far-reaching new power and not one to be recommended lightly.

Summary: Do not support the insertion of an ‘equality before the law’ provision modelled on section 10 of the RDA, as this would radically extend the operation of the DDA and has the potential to invalidate Commonwealth legislation.

Chapter 13 – Request for information – 2 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

The Commission suggests that the DDA include a duty on employers to take ‘reasonable steps’ to identify, and be prepared to eliminate, barriers to the employment of people with

disabilities. Failure to meet the obligation would constitute unlawful discrimination, unless the employer could show unjustifiable hardship in meeting it.

While the Department demonstrably supports efforts to increase the labour market participation of people with disabilities, imposing a proposed positive duty on employers will not increase the participation of disabled people in the labour market, and may in fact be counter productive.

Current changes in population demographics – Australia’s ageing population – and an overall low unemployment rate, are beginning to lead employers toward recruiting from groups whose participation rates have not been high, such as people with disabilities. Imposing a positive duty on employers could seriously undermine the effects of these broader influences.

The Department does not believe that imposing such a duty on employers will encourage them to employ people with disabilities. There is a great range of disabilities (physical and intellectual, as well as mental health conditions) which result in varying degrees of workplace productivity. Different disabilities require different responses from employers. Some disabilities require significant workplace modifications, others may require none. Some disabilities may require the employer to modify the interview process, others may not. Given the range of disabilities, it would be very difficult and costly for an employer to be prepared to eliminate the barriers to employment proposed by every form of disability.

It is not clear how employers would be expected to meet the proposed obligation. Taking ‘reasonable steps’ to identify and eliminate barriers to the employment of people with disabilities is a very broad concept. Has an employer met the obligation if they have provided wheelchair access to the workplace, but they do not have appropriate interview procedures for hearing impaired people? The Department is of the view that if this recommendation is adopted, it will inevitably require the development of guidelines and monitoring and that this will be a major burden on employers and a disincentive for them to employ people with disabilities.

The proposed duty imposes compliance on employers without clearly defining how employers can comply. An example provided of meeting the obligation is the ‘adoption of affirmative action such as targets or quotas.’ Does this mean that a complaint could be made against an employer who has not adopted targets or quotas? If so, it imposes a duty on all employers to adopt targets, which would appear to conflict with the Commission’s view that mandatory quotas are not appropriate.

The proposed ‘positive duty’ would impose an even greater burden on small and medium businesses which do not have the resources that larger businesses have available to develop action plans or make workplace modifications. Given that a large number of people with disabilities are employed in small and medium businesses, the recommendation creates a real risk that the imposition of a positive duty will stifle the existing capacity of these businesses to employ people with disabilities. This is despite the inclusion of an unjustifiable hardship exemption from the proposed duty.

The Department considers that increased employment of people with disabilities is best achieved by educating employers about the benefits of employing disabled workers, and recognising and rewarding them for employing people with disabilities, through existing financial incentive schemes and awards processes. It is also important to ensure that employees with disabilities have the skills and training needed to participate to the best of their abilities in the workplace.

Financial incentives exist for employers to employ people with disabilities. These include the Supported Wage System whereby wages are paid to an employee with a disability on a pro rata based on his or her productivity; the Wage Subsidy Scheme which provides an employer with a

financial incentive to employ a person with a disability; and the Workplace Modifications Scheme which assists an employer with the costs of obtaining or modifying equipment for an employee with a disability. The Disabled Apprenticeship Wage Support Program provides financial support to employers who take on apprentices with disabilities. These are all effective methods of encouraging employers to consider employing people with disabilities and to support them during the employment period.

Promoting the benefits of employing people with disabilities among employers is an important method of encouraging the acceptance of people with disabilities as productive workers in the open labour market. For example, the Prime Minister's Employer of the Year Awards, administered by the Department of Family and Community Services, recognise Australian businesses that employ people with disabilities. The awards serve to both demonstrate that people with disabilities can have successful working lives, as well as advance the business profile of companies nominated for the awards. Positive messages such as these will not only encourage other employers, but improve general community acceptance of the social and employment participation of people with disabilities.

These positive initiatives, along with existing voluntary measures such as the lodgement of action plans with HREOC, are an effective means for encouraging progress in this area. A negative approach such as the proposed 'positive duty' on employers could well be counterproductive.

Summary: the Department does not support this recommendation.

ATTACHMENT A : Data analysis

Appendix A of the Productivity Commission Draft Report, provides a comparative labour market profile of people with and without disabilities and uses statistical and economic analysis to explore the source of any discrimination that may be present. The analysis indicates that while there is evidence of the presence of discrimination, it is mainly in the form of barriers to securing employment rather than in the form of wage differences. Although the employment effects of the *Disability Discrimination Act 1992* (DDA) could not be empirically ascertained because of lack of suitable data the Commission has concluded that the DDA has been relatively ineffective in improving the employment situation of people with disabilities.

In our view, the interpretation of the unemployment and participation data in the Draft Report is unduly negative. By concentrating on the comparison of employment indicators between people with a disability and others, the Report fails to adequately acknowledge the very substantial absolute improvement in the employment situation of people with a disability from 1993. Table A1 shows that this improvement has continued to 2001, while more detailed data (only available to 1998) show particularly positive improvements for some subgroups. For instance, Table A3 shows that the unemployment rate for those with a profound disability fell from 20.9% in 1993 to 7.4% in 1998. This improvement is not negated by a very slight reduction in the participation rate over the period (19.9% to 18.9%). This shows that people with a disability substantially participated in the economic and employment improvements over recent years. This is a major achievement, given the structural changes which occurred over this period as the economy has become more efficient and internationally competitive.

With regard to the economic modelling, it is important to realise that it is subject to significant caveats. For instance, as acknowledged in the report, there are problems with definitions of disability and the inclusion of the actual impacts of these disabilities on productivity in the modelling. Furthermore some anomalous results were reported (contrary results in regard to the relationship between the impacts on males and females of “offer wages” and “observed wages”). As such, the analysis is informative, but is not sufficient to indicate the need for substantive additional legislative and programme efforts to address possible wage discrimination. This is very important, as actions which artificially raise the wages of certain groups of persons with a disability, above their marginal productivity, will have a detrimental effect on their attractiveness to employers, with consequent negative employment effects.

HREOC complaints data presented in the Draft Report, indicate that while employment issues have continued to generate the highest proportion of complaints, the number of complaints has fallen. While the Draft Report states that “only small numbers of complaints are made each year, and they might not reflect the experiences of people who do not formally complain” and that “accessibility of the complaints process, might also affect the number of complaints”, no evidence is provided to suggest that these factors would have changed over time. Therefore, they would similarly affect the data for each year, and do not compromise the conclusion that the decline in the number of complaints regarding employment, and other issues, indicates improvement.