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Ms Helen Owens
Commissioner
Disability Discrimination Act Inquiry
Productivity Commission
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Dear Ms Owens

The Disability Services Commission appreciates the opportunity to comment on the Review of the Disability Discrimination Act 1992 Draft Report.

The Disability Discrimination Act (DDA) has been a powerful tool in addressing discrimination issues for people with disabilities. Any additional powers or processes that can further support the Human Rights and Equal Opportunity Commission in the administration of the DDA are welcomed.

The Commission is supportive of the general findings of the Productivity Commission report. It is particularly supportive of report recommendations: 6.1, 6.2, 10.3, 11.4, 12.3 and 12.4.

At a State level the Disability Services Commission has established links with the justice system through the formation of an interagency working party known as the Access to Justice Working Party, to ensure that people with disabilities who access the justice system are provided with adequate safeguards and supports.

Enclosed are specific comments relating to recommendations in the report.

I hope you find these comments useful.

Yours sincerely

Dr Ruth Shean
DIRECTOR GENERAL
DISABILITY SERVICES COMMISSION

11 March 2004

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Disability Services Commission comments on the Review of the Disability Discrimination Act 1992 Draft Report

CHAPTER 3 – DISABILITY IN AUSTRALIA

3.1 Disability

The Productivity Commission terminology is not compliant with current World Health Organisation practice as defined in the ICF (International Classification of Functioning, Disability and Health) in which:

- **'disability'** is not an attribute of individuals (individuals have 'impairments') but is a product of interaction with the social and physical environment;
- **'limitation'** refers to difficulties an individual might have in executing *activities*; and
- **'restriction'** concerns problems an individual may experience in *participation* in life situations.

The difference is that the ICF definition of 'restriction' refers not to an *activity* (physical, sensory, cognitive and so on) as used to be the case, but to an aspect of social or community *participation*.

The Productivity Commission may want to consider ICF-compliance or at least acknowledge that there are competing terminologies.

Figure 3.1 Relationships among ABS terminology for disability 1998

The diagram does not make clear the implication of footnote (a) which refers to 'specified activities'. As there are many aspects of daily life outside the 'specified activities', an important group of people with disabilities are not represented in this schema.

The difference between the cells headed 'disability...' and 'restriction...' is actually 454,400 and these are Australians *whose disability is only in activity areas other than those specified*. These activity areas include social interaction, making and maintaining relationships, coping with emotions or managing behaviour, thinking through problems or making decisions, and independent living.

These are important aspects of daily life. ABS data indicates that more Australians need help with these activities than with the core activity of self-care.

Table 3.1 Types of disability by restriction 1998

The 454,400 Australians *whose disability is only in activity areas 'other than those specified'* (in Figure 3.1) are mislabeled as having 'no restriction'. In fact, they have a restriction other than those ones specifically listed, which is quite a different thing.

Table 3.1 can be derived from first-release ABS disability data ¹, but it is mislabeled and misleading. It summarises data only for persons who reported an 'intellectual or developmental disorder' as their 'main condition' (n=157,300). A subsequent ABS publication gives data for all persons reporting an 'intellectual restricting impairment' (n=493,000, that is, a three times greater number). When all persons with intellectual impairment are considered, the pattern of restriction is quite different. For example, the proportion with profound core activity restriction is 43% (not 30%, as shown in the Productivity Commission table).

It appears that the Productivity Commission has not complied with the conditions of use attached by the ABS to the reporting of data sourced from its publications (which include that *"the terminology used in referring to the ABS material is the same as that used by the ABS in describing the data"*)².

It is also unnecessarily complex. Note that there are only five original data lines - but there are also five derived lines, (combinations of the original data). The set intersection logic applying to these derived lines is not easily appreciated. There are clearer, simpler, more accessible ways of presenting this data (ABS publications provide a good model) and there are more appropriate, less cryptic data labels. An option would be for the Productivity Commission to use ABS data labels in full. This would aid comprehension, would avoid the need for multiple footnotes, and would be compliant with the ABS conditions of use.

The following table may assist to better understand the above comments.

¹ All the numerical data needed to calculate the percentages in Table 3.1 are in Table 10 of ABS (1999) *Disability, Ageing and Carers, summary of Findings, Australia 1998: product number 4430.0*.

² See 'Terms and Conditions' on the ABS website.

*Persons with intellectual 'restricting impairment' by type of activity restriction, Australia 1998
(Productivity Commission data and ABS 'intellectual impairment' data)*

| <i>Restrictions</i> | <i>Productivity Commission Review, 'Intellectual Disability' %¹</i> | <i>ABS 'Intellectual restricting impairment' %²</i> | <i>ABS 'Intellectual Restricting impairment' numbers³</i> | <i>Set relationship</i> |
|--------------------------|--|--|--|---|
| Core | | | | |
| Profound | 30.4 | 43.2 | 213,200 | <i>Set (a)</i> |
| Severe | 16.9 | 17.0 | 83,700 | <i>Set (b)</i> |
| Moderate | 8.1 | 10.7 | 52,900 | <i>Set (c)</i> |
| Mild | 15.8 | 12.5 | 61,700 | <i>Set (d)</i> |
| <i>Total core</i> | 71.1 | 83.4 | 411,500 | <i>Set (a+b+c+d)</i> |
| <i>Total non-core</i> | 81.2 | 61.5 | 303,500 | <i>Set (e)</i> |
| Core and non-core | 57.4 | 48.7 | 240,100 | <i>Both (e) and (a or b or c or d)</i> |
| One or more restrictions | 94.9 | 96.3 | 474,900 | <i>Either (e) or (a or b or c or d)</i> |
| No restrictions | 5.1 | 3.7 | 18,200 | <i>Neither (e) nor (a or b or c or d)</i> |
| Total | 100 | 100 | 493,100 | <i>Either (e) or (a or b or c or d) and Neither (e) nor (a or b or c or d)</i> |

Notes: 1 From Table 3.1, Productivity Commission (2004) Review of the Disability Discrimination Act 1992 (Draft Report).

2 Calculated from column 3, this table.

3 Data from Australian Bureau of Statistics (2000) Disability and Long-term Health Conditions, Table 5.

The shaded cells in the table above show the data presented in Productivity Commission Review Table 3.1 which relates to the types of activity restriction reported by persons with 'intellectual disability'. Percentages in Table 3.1 can be compared, above, with those which can be calculated from the ABS data on persons with 'intellectual impairment'.

There are differences regarding the percentages with 'profound restriction' as follows:

- The Productivity Commission has used first-release ABS data which reported persons with an 'intellectual or developmental disorder' only as their 'main condition' - a total of 157,300 persons.³
- Later ABS data (the reference is given in note 3 to the table) refers to all persons with 'intellectual impairment' - in all, 493,100 persons, or more than three times the total represented in the Productivity Commission table.

³ The Productivity Commission cites as its source for Table 3.1 'unpublished' data from ABS catalogue item 4430.0 (which is a publication: 'Disability, Ageing and Carers: Summary of Findings, Australia 1998')... All the numerical data needed to calculate the percentages in Table 3.1 are in Table 10 of the ABS publication 4430.0.

The Productivity Commission Review Table 3.1 is also unnecessarily complex. The rightmost column in the table above shows the relationship of data lines in terms of 'set' theory. Note that there are only five original sets of data - for clarity these have been labeled (a) to (e) - but that there are also five derived sets, and the intersection logic is not easily appreciated. This logic is shown in the rightmost column.

Incidence of disability

The Productivity Commission provides its own definition of 'incidence', but this does not accord with conventional usage. The usual distinction is that:

- incidence is the number of new cases of a condition diagnosed or reported during a specified time period; and
- prevalence is the total number of cases within a population at a particular point in time ⁴.

It is in fact 'prevalence' which is being discussed in the review.

3.2 Trends in the incidence of disability

Trends in the 'incidence' of disability

This discussion and trend analysis is not sufficiently informed by ABS work subsequent to publication of 1998 disability data, in particular to ABS Working Paper No. 2001/1 ⁵. ABS disability data is not directly comparable over time, even when it is age-standardised and adjusted for changed criteria (ie wider definition) of disability. This is a consequence of very significant improvements in data capture, which alone, according to the ABS, accounts for three quarters of the observed increase in disability prevalence. ⁶ No account is taken of this advice in the calculations offered.

HILDA (Household, Income and Labour Dynamics in Australia) Survey/ABS comparisons are complicated by their different populations and screening questions (as the review acknowledges), and cannot contribute to the 'trend' debate.

The 'historical growth projection' method, ascribed to OECD ⁷ but described by OECD as the 'dynamic approach', projects past trends (in this case, increases in reported prevalences) into the future. Basic to this method is the comparability of data. But, as noted, ABS disability data is not directly comparable over time due to continued improvements in data capture, and trends should not be determined from it. This precludes application of the OECD methodology, which

⁴ Pol LG and Thomas R K (1992) cited in AIHW (1999) *The definition, incidence and prevalence of acquired brain injury in Australia*, p6.

⁵ ABS (2001) *Working Papers in Social and Labour Statistics: Accounting for Change in Disability and Severe Restriction, 1981-1998*.

⁶ ABS (2001) page iv.

⁷ OECD (1998) *Labour Market and Social Policy - Occasional Papers, no.37: The health of older persons in OECD countries: is it improving fast enough to compensate for population ageing?*

the Productivity Commission admits is likely to be inaccurate, as it forecasts 'implausibly large disability rates for some age groups' (p45). This begs the question: 'why even present such a methodology?'

The alternative OECD method (the 'static' approach) is also presented. It is in fact that used by AIHW (and DSC) and it simply applies recorded prevalences to projected populations. This method assumes constant age/sex-specific disability rates. DSC calculations in 1999 gave an overall Australian disability rate of 22.7% for 2021, but the Productivity Commission figure (23.3%) may be worked from some more recent population projections, which have since been revised downwards following the 2001 Census. This projection will need to be re-worked when ABS 2003 disability data is released.

CHAPTER 5 - ELIMINATING DISCRIMINATION

5.3 Eliminating discrimination in education

Preschool

The Productivity Commission's report comments that this is an unknown area. Equal access to preschool sets in train many positive outcomes, such as family respite, community participation, parent access to the workforce and a way out of poverty. Children with disabilities used to be a priority group for child care. The impression is that with changes in the child care sector such as the increase in for-profit organisations, increasing waiting lists access remains a problem. In Western Australia the Productivity Commission figures suggest that preschool children do not have equal access to child care.

The need for child care is not confined to preschool. After school care and vacation care are essential services for working families and access for children with disabilities needs to be monitored.

Tertiary

The school education sector reports a significant growth in students with high support needs who receive attendant/personal care completing secondary education. These students will continue to require attendant/personal care in addition to educational supports in post secondary education. While the numbers are not large, there are significant resource and planning implications. This is a very positive trend which has highlighted some gaps in arrangements for students' essential support which may be discriminatory.

5.6 Effectiveness of the Disability Discrimination Act for different groups

The Indigenous Disability Action Research Project currently being undertaken in Western Australia by the Disability Services Commission and Edith Cowan University has assisted Indigenous people to inform government of their issues, experiences, ideas and recommendations to improve services.

The views of Indigenous people with disabilities, their families, communities and service providers are being sought through focus groups and individual interviews. Information is being sought from people living in remote, rural and metropolitan areas.

There are a number of issues regarding "lack of sensitivity and understanding of Indigenous culture by service providers" raised so far from the consultation which supports the points raised in the report.

The lack of access to services that are welcoming, comfortable and culturally appropriate was emphasised throughout the consultations. This is a major issue that prevents Indigenous people from receiving support. The factors contributing to a lack of culturally appropriate services included:

- non-Indigenous staff do not generally understand how historical issues influence the willingness of Indigenous people to access current service;
- services do not have the flexibility to cater for family and cultural needs;
- many families provided examples of service providers judging them as not being able to care for their family members with a disability because they were Indigenous. They felt this was due to ignorance and racism and that service providers should receive training to gain an understanding of the issues Indigenous people face;
- many services are developed primarily for non-Indigenous consumers; and
- service providers do not understand that family and cultural business take priority over other business.

Indigenous people have suggested:

- that more Indigenous staff be employed in agencies as they have cultural knowledge and can inform and educate fellow non-Indigenous workers;
- non-Indigenous staff should participate in cross-cultural training which may assist them to establish positive relationship with the Indigenous community; and
- throughout the consultations a number of people in regional centres advised that they experienced racism in the communities in which they lived. This had a great impact on the service they accessed. They were reluctant to approach agencies and felt that when they did they were treated poorly.

Limited influence on decisions affecting them

Indigenous people have expressed the need to establish local disability advocacy groups to have a strong united voice to inform government of their needs. A number of people in rural and remote areas felt they were a lone voice and need to have advocacy support to make changes at an individual and systems level.

A lack of understanding of the services available, and language barriers, impact on people with disabilities, influencing decision-making processes. Strategies to overcome this include service providers informing and empowering families with information, forming links with Indigenous agencies to form "joined up" partnerships and developing appropriate means for disseminating information.

It is evident that Indigenous people, when given the opportunity, will inform service providers of their issues and have a number of strategies to influence change in the services they receive.

Indigenous people with disabilities face a number of disadvantages. The DDA can support them by influencing Government to assist Indigenous people in establishing networks both at local, regional and State levels to provide advocacy support to assist in addressing the disadvantage.

CHAPTER 13 – BROAD OPTIONS FOR REFORM

13.2 Improving Employment Opportunities under the DDA

The Disability Services Commission supports the inclusion of a positive duty for employers within the Disability Discrimination Act 1992 (DDA). The right to work and the remuneration of fair and just wages underpins International treaties to which Australia is party. Additionally, Article 22 of the Draft United Nations Treaty to protect and promote the rights and dignity of people with disabilities currently under development will require nation states to address the right to work within its legislative frameworks, such as the DDA. In anticipation of Australia needing to meet these forthcoming international obligations, the DDA should incorporate a positive duty.

National and international evidence reveals that people with disabilities in common with other marginalised groups do not benefit from economic growth⁸ through experiencing increased employment in either contingent or primary labour markets. These findings imply that employment barriers prevail despite economic growth for the majority of the population. In this area, the role of a positive duty appears to remain as a key avenue for redress.

In terms of the operationalisation of a positive duty within the DDA legislative framework, it is essential that the model focuses on both positive employment strategies and underpins contractual obligations for all suppliers and contractors of public services. This recognises that there is a relationship between economic participation and poverty alleviation strategies for this particular population group⁹, and that both State and private entities have a responsibility to improve this position.

⁸ See Argyrous & Neale (2003); Johnston (2003); Kruse & Schur (2003) for further discussion surrounding the relationship of economic cycles and labour market participation of people with disabilities.

⁹ See the ILO discussion paper on the relationship of employment and poverty reduction for people with disabilities.

In addition to those areas the proposal identifies, other considerations may include:

- a code of conduct that incorporates the principles of inclusion and respect for diversity;
- a strategy that addresses equal opportunities or diversity explicitly targeting people with disabilities;
- targets¹⁰ to increase the recruitment of people with disabilities;
- indicators to demonstrate progression towards targets;
- benchmarks specifying job retention and the career development of current employees with disabilities; and
- social reporting as part of the organisations' annual reporting structure to encourage social inclusion and community development¹¹.

Finally, for a positive duty to be effective in the elimination of labour market discrimination for people with disabilities, a separate monitoring, auditing and reporting structure needs to be embedded within the framework. The Human Rights and Equal Opportunity Commission is the most appropriate body to undertake this role, particularly as responsibility for the DDA lies with the organisation.

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¹⁰ Targets can be aspirational in that organisations implement their own targets and then develop strategies to ensure that they are met, therefore, allowing a high degree of self-regulation.

¹¹ The Employers' Forum on Disability, UK has developed an extensive framework called the Global Inclusion Benchmark outlining 10 key indicators of corporate responsibility within the disability and inclusion area.