

Disability Services Queensland

15 APR 2004

Ms Helen Owens
Commissioner
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003

Dear Ms Owens

Re: The Productivity Commission's Review of the *Disability Discrimination Act 1992 (Cth)*

Please find attached Disability Services Queensland's (DSQ) submission to the Review of the *Disability Discrimination Act 1992 (Cth)* (the Review). DSQ has a leadership role across the Queensland Government on disability issues.

In formulating the submission DSQ consulted with other relevant Queensland Government departments in respect of the draft recommendations, draft findings and requests for information contained in the *Review of the Disability Discrimination Act 1992 Draft Report*. However, the submission reflects the views of DSQ rather than all Queensland Government departments.

I apologise for the delay in forwarding the submission, however, the caretaker period and consequential machinery of government changes as a result of the recent Queensland Government election have resulted in unavoidable delays.

If you require any further information or assistance in relation to this matter, please contact Ms Clare O'Connor, Executive Director, Policy Directorate, DSQ on 322 44970.

Yours sincerely

Linda A Apelt
Director-General

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Productivity Commission Review of the *Disability Discrimination Act 1992*
Disability Services Queensland

March 2004

Contents

Executive Summary

1. Effectiveness in Elimination of Discrimination
2. Equality before the law
3. Promoting Community Recognition and Acceptance
4. Competition and Economic Effects of the DDA
5. Defining Discrimination
6. Defences and Exemptions
7. Complaints
8. Regulation
9. Broad Options for Reform
10. Other Issues

Appendix A

Executive Summary

Disability Services Queensland (DSQ) is committed to fulfilling its responsibilities to people with disability and their families and overcoming existing and potential barriers to access and participation by people with a disability. The Commonwealth *Disability Discrimination Act 1992* (DDA) recognises that people with a disability have the same fundamental rights as other people and should have equal opportunities to participate in community life. The DDA works along side the Queensland *Anti-Discrimination Act 1991* (ADA) which also seeks to promote equality of opportunity for everyone by protecting people from unfair discrimination in certain areas of activity, including work, education and accommodation. The rights of people with a disability are also articulated in other Queensland legislation such as the *Disability Services Act 1992* and the *Guardianship and Administration Act 2000*. DSQ regards all of these pieces of legislation as vital and significant in supporting the rights of people with a disability.

Disability Services Queensland supports:

- the development of disability accommodation standards and offers some matters for consideration in the development of such standards;
- the extension of the unjustifiable hardship defence in all substantive provisions of the Act;
- that the criteria for determining unjustifiable hardship should include community wide benefits and costs; and
- that the scope of the DDA should only be altered by amendment of the Act.

Disability Services Queensland has the following reservations regarding some of the draft recommendations:

- the relationship between disability standards and State and Territory legislation requires clarification but how this should be achieved must be the subject of consultation with State and Territory Governments.
- there is uncertainty around making failure to provide "different accommodation or services" by a person with a disability "less favourable treatment". Such a requirement would appear to have significant financial implications.
- providing clarification in the Act that voluntary action plans can be developed and registered will not necessarily increase the number of plans developed. The benefits that can be derived from their development must be made clear in order to encourage more employers to develop action plans.

1. Effectiveness in Elimination of Discrimination

Access to employment - Draft Finding 5.1

It is agreed that discrimination in employment remains a significant issue. Draft Recommendation 12.5 recommends that Human Rights and Equal Opportunity Commission (HREOC) should replace the Frequently Asked Question for employment with guidelines in order to provide more formal recognition under the Disability Discrimination Act (DDA). The implementation of draft recommendation 12.5 may go some way to help address the issue of disability discrimination in employment.

Access to public buildings - Draft Finding 5.3

It is agreed that potential inconsistencies exist between the DDA and the technical provisions of the Building Code of Australia (BCA). This has created uncertainty for operational and management areas in their administration of the law. The experience has been that compliance with the BCA does not guarantee any building owner or occupier, immunity from actions brought against them under the DDA by aggrieved individuals or groups on the grounds of discrimination.

Draft finding 5.3 notes that the DDA *has been less effective in improving the accessibility of existing buildings and the proposed disability standard will not address this*. The Department of Public Works has expressed the view that the proposed Disability Standard for Access to Premises provides an appropriate mechanism for improving access to buildings by linking the extent of any building work to be undertaken in existing premises to a level of compliance with the new standards. (Public Works)

Access to transport - Draft Finding 5.4

It is agreed that the DDA has been relatively effective in improving the accessibility of Transport. Queensland is at the forefront in the introduction of wheelchair accessible taxis. At the present time there are 170 wheelchair accessible taxis in Brisbane and 169 such taxis in other regional and rural centres throughout Queensland. The Queensland Government provides funding of \$3M each year to assist urban bus operators to purchase wheelchair accessible buses. Since 1996 about 49 wheelchair accessible buses have been purchased and operate in regional centres throughout Queensland. (Transport)

2. Equality before the law

The Desirability of developing an accommodation disability standard - Request for Information following Draft Finding 6.3

The Productivity Commission sought further comment on the desirability of developing an accommodation disability standard, and the forms of

accommodation such a standard should cover (for example, private rental accommodation, supported accommodation and/or institutional accommodation).

The development of such a standard is supported, and the following points are raised for consideration in its development.

- a. A broad definition of "accommodation" which includes all types of residential accommodation accessed by people with a disability (eg. private rental accommodation, social housing, supported accommodation and/or institutional accommodation) would be appropriate. Given the breadth of the proposed definition, and the broader meaning of the term "accommodation/s" in the DDA, it is proposed that the term "disability housing/ accommodation standard" be used to make it clear that these standards apply to a broad range of housing solutions.
- b. The applicability of one set of accommodation standards for all forms of accommodation may not achieve the desired results as they would be too broad. However, a range of standards based on the overarching principles of the Act and the specific characteristics of different accommodation types may have greater capacity to ensure that the rights and needs of people with a disability are met.
- c. Housing for people with a disability does not always have to be different or special. Housing can be planned, designed and constructed to be easy to use and safe for all people.
- d. Clarification is required with respect to the linkages with existing legislative requirements such as the *Residential Services (Accommodation) Act 2002 (Qld)* and *Residential Services (Accreditation) Act 2002 (Qld)*.
- e. Strategies to support the implementation of the standards will be critical. Consideration must be given to publicity about the standards, training, review, evaluation and ongoing monitoring.
- f. Resource implications for government and industry to comply with the standards need to be understood in light of the restricted funding experienced by all Governments.
- g. A range of sanctions and remedies for non-compliance with the accommodation standards should be developed. (Housing)

3. Promoting Community Recognition and Acceptance

Role of HREOC - Draft Finding 7.10

Draft Finding 7.10 states that HREOC has a role in developing a schools resource specifically addressing disability issues, along the lines of that developed for race discrimination issues.

It is agreed that HREOC has a role in developing a schools resource specifically addressing disability issues, however such a schools resource must be designed to be relevant to existing school curriculums. For example it must be able to be

integrated into part of a key learning area such as Studies of Society and Environment. (Education)

Educative Role of Developing Standards - Draft Finding 7.5

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

Standards play a very important role in reducing the uncertainty surrounding how to ensure compliance with the requirements of the DDA. They can also set timetables for achieving compliance, which give impetus to work conducted to achieve compliance. The ongoing difficulties surrounding their development can only slow down progress towards achieving greater access and participation of people with a disability in various activities and areas of community life.

The development of the Disability Standard for Accessible Public Transport was long and protracted and involved lengthy liaison with many interested stakeholders. However, it still requires clarification in order for industry to implement. It is considered that there is also a lack of general awareness that the Transport Disability Standard has been formally in place since late 2002. (Transport)

4. Competition and Economic Effects of the DDA

The costs and benefits to organisations of complying with the provisions of the DDA and disability standards - Request for Information - Chapter 8.

The Productivity Commission has sought information on the costs and benefits to organisations in complying with the provisions of the DDA and disability standards. The Commission welcomes information on the nature of these costs and benefits, and on their magnitude.

It is recognised that there are difficulties associated with analysing the costs and benefits of complying with the provisions of the DDA. For example, conducting a cost benefit analysis on the provision of dwellings which comply with the DDA standards would require:

- 1 Analysis that would begin with the determination of the "status quo" eg. providing a dwelling which is inaccessible. This could prove difficult because providers would not be in a position to deny access to services and a comparison with the private rental market may not be valid as the population profiles are different;
2. Work on characterising/costing the benefits eg improved life style and integration into the community, better health, reduction in the need for formal or informal support; and

3. Work to establish a proven direct link between the provision of a dwelling which complies with the DDA standards and the benefit it delivers would be difficult without extensive research.

In order to reflect the costs and benefits of implementing the DDA, a cost benefit analysis would ideally capture the costs and benefits across government agencies, community and private industry. The scope of the analysis would need to be clearly defined particularly where the costs and benefits to individuals and organisations may extend beyond the direct benefits to people with a disability. For example there may be indirect benefits associated with the ability of a parent with a double stroller to access a dwelling independently.

Should the Productivity Commission consider that a cost benefit analysis is warranted there would be clear benefits from developing a standard methodology, which would provide for meaningful comparisons across States and Territories. The Queensland Government would be interested in contributing to the development of such a methodology, as this could assist in quantifying the costs and benefits of services provided by Government departments such as the Department of Housing, to people with a disability. (Housing)

5. Defining Discrimination

Amendment of the definition of "disability" - Draft Recommendation 9.1

The amendment of the definition of disability for the purposes of the DDA as proposed in Draft Recommendation 9.1 to include, medically recognised symptoms where a cause has not been medically identified or diagnosed and genetic abnormalities and conditions is supported. However, there is concern that the inclusion of "behaviour that is a symptom or manifestation of a disability" in the definition may mean that behaviour, in for example an educational or employment setting, that adversely impacts upon the health and safety of others and their ability to go about their activities, will be tolerated as to do otherwise could amount to discrimination.

In education, the proposed extension of the defence of unjustifiable hardship to different accommodation and services required after enrolment may help to alleviate this concern.

Amendment of definition of direct discrimination - Draft Recommendation 9.2

Draft Recommendation 9.2, proposes making failure to provide "different accommodation or services" required by a person with a disability "less favourable treatment". Disability Services Queensland agrees that this definition requires further clarification. The definition of "direct discrimination" contained in the Queensland *Anti-Discrimination Act 1992* provides a much clearer statement of the law.

The implications of this proposed amendment would depend on the definition of "*different accommodation or services*" required by a person with a disability and on the consequential costs of accommodating the person's needs.

This proposal may have significant financial implications for governments and the community. However, it is recognised that the implications of the proposed amendment have to be considered within the context of the proposed expansion of criteria for determining unjustifiable hardship in the DDA to include "*community wide benefits and costs*".

Amendment of definition of indirect discrimination - Draft Recommendation 9.3

Disability Services Queensland supports the amendment of the definition of indirect discrimination proposed in Draft Recommendation 9.3 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'; placing the burden of proving the requirement or condition is reasonable on the respondent and to cover incidences of proposed indirect discrimination. This amendment is supported with a view to achieving greater clarity of the meaning of the provision for the community and potential complainants. Disability Services Queensland considers it appropriate in this context that the respondent should be required to prove that a rule or condition is reasonable.

6. Defences and Exemptions

Unjustifiable Hardship as defence in all substantive provisions of the Act - Draft Recommendation 10.1

The extension of the unjustifiable hardship defence in all substantive provisions of the Act that make discrimination on the ground of disability unlawful is supported. (Public Works and Employment and Training)

Criteria for determining unjustifiable hardship - community wide benefits and costs take into account - Draft Recommendation 10.2

Draft Recommendation 10.2, which proposes the amendment of s11 to clarify that community-wide benefit and costs should be taken into account, is supported. This amendment would assist people with a disability and other interested parties to better understand what constitutes unjustifiable hardship. (Qld Transport)

7. Complaints

Time for lodging complaints - Draft Recommendation 11.3

The proposal to amend the *Human Rights and Equal Opportunity Commission Act 1986* to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service is supported in principle.

8. Regulation

Scope of DDA should only be altered via amendment of the Act, not via disability standards -Draft Recommendation 12.1

Draft Recommendation 12.1, which recommends that the DDA should only be altered via the amendment of the Act, not via disability standards is supported.

Disability Standards to displace general provisions of State and Territory Anti-Discrimination legislation - Draft Recommendation 12.2

Draft recommendation 12.2 proposes the amendment of s13 to make it clear that disability standards displace the general provisions of State and Territory anti-discrimination legislation.

It is acknowledged that the relationship between disability standards and the State and Territory anti-discrimination legislation requires clarification. However, while the objective of providing more certainty is supported it is considered that the appropriate course of action is for consultation to occur with the States and Territories with a view to developing agreement on amendments, for example, by way of amendment of State legislation, to clarify the relationship. (Justice)

Disability Standards for all areas in which it is unlawful to discriminate - Draft Recommendation 12.3

Draft recommendation 12.3 proposes that s31 be amended to allow for disability standards to be introduced in any area in which it is unlawful to discriminate on the grounds of disability. Additionally the standard making power should extend to the clarification of the operation of statutory exemptions.

However, there is insufficient detail in the Draft Report to compel a conclusion that the standard making power should be extended. (Justice)

Imposition of time limits on development of standards - Draft Finding 12.6

It is highly desirable that future standards are more swiftly/speedily formulated but not at the expense of public comment and expert input.

Replace frequently asked questions for employment with guidelines - Draft Recommendation 12.5

The implementation of Draft Recommendation 12.5 which proposes the replacement of the frequently asked questions for employment with guidelines, would go some way towards helping address the issue of disability discrimination in employment. (Employment and Training)

Improved clarity around action plans - Draft Recommendation 12.6

Draft Recommendation 12.6 proposes that s59 be amended to clarify that voluntary action plans can be developed and registered by employers.

As the nature of action plans are voluntary in nature, amending the DDA to clarify that such plans can be developed and registered by employers may have little to no effect on the number of plans developed and lodged. However, there is a need to encourage organisations to develop action plans. It is noted that HREOC has very helpful information published on its website about how to go about developing an effective action plan. However, there is little in this information that provides a source of encouragement for the development of an action plan. Given that action plans are not compulsory, perhaps as a source of encouragement, more emphasis needs to be placed upon the potential benefits that could result from the development of an action plan. Without such encouragement, many organisations may conclude that an action plan will be more effort than it is worth. (Employment and Training and DSQ)

9. Broad Options for Reform

Cost sharing of adjustments - Request for Information following Draft Finding 13.2

It is suggested in the draft report that one way of addressing the disadvantages faced by people with a disability in obtaining employment would be to impose an active requirement upon employers to address barriers to employment of people with a disability. The draft Report considers the case for a "limited positive duty" on employers where "... employers would be required to take 'reasonable steps' to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities." Such a duty could be balanced by improved government funded programs to offset, in part, the adjustment costs of hiring people with disabilities.

The Productivity Commission has sought views on how the costs of adjustment should be shared between governments, organisations and consumers.

The Australian Government presently provides employment assistance to people with a disability under the Commonwealth-State-Territory Disability Agreement (CSTDA) and is also responsible for income support arrangements for people with a disability. The Queensland Government therefore considers that it would be appropriate that the Australian Government provide assistance to employers to meet these requirements should they be implemented. (Treasury)

The Queensland Government already provides some assistance of this nature in the area of training. For example, training providers are expected to make reasonable adjustments to for example, the course enrolment process; the physical environment and other facilities and services; course or program activities and the way training is delivered and skills are assessed. However, the Queensland Department of Employment and Training operate services and fund programs to bear or share the costs of certain adjustments for training providers delivering training that is funded by the department. One such mechanism is the VET Disability Support Service that offers a range of services to assist students with a disability. Support services include:

- Assessment of learning support requirements;
- Adaptive and ergonomic equipment (as part of a pool or loan scheme) and training in its use;
- Support personnel (such as sign language interpreters, specialist support workers) for students undertaking training funded through certain Queensland training schemes.

The amount of support provided will vary and is based on individual requirements. There is no cost to the student or the training provider.

10. Other Issues

Provision of Disability Services - Draft Finding 14.3

Draft finding 14.3 notes that it is the role of Governments, not the DDA, to determine the level of funding and eligibility criteria for disability services. It is, however, appropriate for the Act to apply to the administration of disability services.

Disability Services is in agreement with this draft finding and seeks to ensure that its disability services are provided in a non-discriminatory manner. It is acknowledged that there is a perception amongst some members of the community that the DDA applies to the funding of disability services and supports. This perception must be dispelled so that there is less confusion about the application of the DDA and a greater awareness of the type of matters that are discriminatory under the DDA.

Departments consulted regarding *the Review of the Disability Discrimination Act 1992*

Appendix A

Department of Corrective Services
Department of Emergency Services
Department of Employment and Training
Education Queensland
Department of Families
Queensland Health
Department of Housing
Department of Industrial Relations
Department of Innovation and Information Economy, Sport and Recreation
Department of Justice and Attorney-General
Department of Local Government and Planning
Department of Natural Resources and Mines
Commissioner of Police
Department of Primary Industries
Department of Public Works
Department of State Development
Queensland Transport
Treasury Department