SUBMISSION TO THE PRODUCTIVITY COMMISSION

Inquiry into the effectiveness of the Disability Discrimination Act 1992

ABOUT THIS AGENCY

The NSW Office of Employment Equity and Diversity (Office of the Director of Equal Opportunity in Public Employment) administers Part 9A of the New South Wales *Anti-Discrimination Act* (the ADA) 1977.

Part 9A was added to the ADA in 1984 in recognition that anti-discrimination law is an inadequate means of addressing systemic discrimination in the New South Wales Public Sector. Introduction of this Part[1] meant that more pro-active approaches could be taken to inform and guide public employers in how they can, (a) practically eliminate and ensure the absence of unlawful employment practices and (b), promote employment opportunities to members of declared equal employment opportunity groups including people with a disability.

Insofar as the New South Wales Public Sector is concerned the Government has imposed a pro-active duty on its agencies to include people with a disability into the workforce. This duty includes providing the necessary goods, services and facilities to enable them to carry out the inherent requirements of a position without causing an unjustifiable hardship.

These New South Wales Public Sector-related additions to the ADA are unique in Australia and provide an important indicator of how the Disability Discrimination Act (the Act) and the Human Rights and Equal Opportunities Commission (HREOC) might move toward a more proactive and preventative model for the future. If such a pro-active and non-legal model were adopted it would also keep pace with recommendations of the ILO Report[2] on the fundamental principles and rights of work and keep pace with advances made in England, Canada and Northern Ireland.

The New South Wales Government annually collects workforce data to maintain a workforce profile. The workforce profile includes the collection of data about employment equity groups including people with a disability. The Government has set a benchmark of a twelve percent level of representation by people with a disability and seven percent for people requiring a work-related adjustment. As data on people with a disability includes people who require some form of work-related adjustment progress or otherwise can easily be monitored**.**

---

[1] Including the creation of an Office to administer its regulatory and other functions

[2] ILO *Time for Equality at Work: Global Report under the Follow-up to the ILO Declaration on the Fundamental Principles and Rights of Work*, International Labour Conference 91st Session 2003, International Labour Office, Geneva, Switzerland.

Recommendation 1: That the Act be amended to adopt a more proactive and instructive focus and, that positive duties on the Federal Public Service be enacted based on the UK model.

ABOUT THE TERMS OF REFERENCE

Term of reference 2(a)

The social impacts in terms of costs and benefits that the legislation has had upon the community as a whole and people with disabilities in particular

This term is an unfortunate choice in that it can be argued that in the first decade of its operation the Act has proven its early doomsday critics wrong as it has not been neither 'an intolerable burden on business', 'dangerous and wasteful' or funded 'at the expense of service delivery'.

The benefits of increased participation brought about by the Act have benefited the whole community. For example, improved access to the built environment has increased participation in many areas of commerce, social interaction and generated increased competition provision of goods and services.

If there is an argument to make here it is that time has shown that the Act did not go far enough in addressing systemic discrimination in employment. It neglected to establish a mechanism to encourage better business practice by way of providing a positive incentive system to reward businesses (ie., with tax breaks etc) that deal effectively with discrimination in their employment practices.

Terms of reference 2(d)

The need to promote consistency between regulatory regimes and efficient regulatory administration

The term reflects concerns that the Human Rights and Equal Opportunity Commission may be hindered in effectively implementing the requirements of the Act.

This term raises an unnecessary and misguided concern of reconciling social justice policies with fiscal responsibilities. It is our reading of the Act that it is focused on implementing or protecting human rights and to achieve social benefits rather than efficient service delivery. The legislation should reflect more effectively the rights and interests of people with a disability as influenced by Australian law and social policy.

Terms of reference 2(b) and 3

Competition principles

The Act has contributed to the reduction of unlawful discrimination against people with disabilities in all employment sectors across Australia. This Office submits that the reduction in turn enhances the social capital of the nation and ultimately contributes to growth in the Gross National Product (GNP). The reduction in unlawful discrimination can aid GNP in a number of ways. The enhancement of the economic and social participation of people with disabilities contributes to both the supply and the demand side of the economy. Greater participation of people with disabilities in training, education and employment directly affects the productive capacity of the nation.

Any interpretation of competition principles should include consideration of the opportunities afforded by elimination of unlawful discrimination. Any interpretation of national competition principles should factor in the reduction in the burden of making social welfare payments, increasing workforce participation and swelling the number of contributing tax payers. The positive economic and social benefits to the community as a whole is considerable and outweigh any individual cost. Indeed, greater levels of participation are far more likely to increase competition than restrict it.

DEFINITIONAL ISSUES

Disability

The broad definition in the Act has been the basis for some State and Territory based legislation and has informed amended definitions in others. It is the experience of this Office that there is a consistency and clarity of definition for the purpose of employment that should not be diminished by reference to definitions used in other legislation or for other purposes.

However, with increasing tendencies overseas and potentially in Australia to seek and to use genetic information to inform decisions an explicit amendment should be made to the definition. This amendment should ensure that protection of genetic information against discrimination is covered in the broad definition, clarify that such discrimination is unlawful and provide certainty regarding peoples rights in law.

Recommendation 2: That the definition of disability be amended to explicitly protect genetic information and include genetic mutation and chromosome abnormality.

'Reasonable' adjustment

The requirement to make adjustments for job applicants and employees with a disability arises from the operation of three related sections of the Act. These sections prohibit unlawful discrimination in the workplace, direct and indirect discrimination.

Usage of the term to make 'reasonable' adjustment should be re-cast and clarified. It is the experience of this Office that the idea of reasonableness is confusing, subjective and misleading for non-lawyers. The intention is clearer if

the term used refers to 'making work-related adjustments'. It is the experience of this Office that this usage provides helpful guidance to employers to take positive action to avoid discrimination and guidance on taking pro-active steps to employ qualified individuals. Clarity about making work-related adjustments will also assist an affected party to understand the distinction between justifiable and unjustifiable hardship.

This Office submits that the Act should be amended to define a reference to 'work related-adjustments' in Part 1 of the Act, in Section 4, Interpretation, or in Section 5(2), Disability Discrimination, where a reference to the requirement first appears in —

> **…** *circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.*

It would assist employers if this term in the Act were further clarified by introduction of practical guidelines or regulations. These guidelines should draw heavily on resources arising from successful conciliation cases in the Human Rights and Equal Opportunity Commission (HREOC). This will necessitate that HREOC systematically and routinely maintain such records.

Recommendation 3: That the Act be amended to

(i) include an explicit reference to 'making work-related adjustments' and

(ii) to clearly and explicitly require steps be taken to make adjustments to accommodate the needs of people with a disability, subject to appropriate defences.

Recommendation 4: That conciliation outcomes be used to inform guidelines and regulation on making work-related adjustments.

The defence of unjustifiable hardship

Experience has shown that unjustifiable hardship is not an onerous burden for employers and to comply does not necessarily inhibit employment. This defence provides a practical and objective test to assist employers.

It would be difficult for an Australian employer to make a legitimate defence of unjustifiable hardship in employment given the points made **at Appendix 1**. A defence would be even more difficult against recruiting a person with a disability when Commonwealth Government labour market programs such as the New Apprenticeships program provides wage and wage related costs to employers are taken into account. These labour market programs also include financial incentives for employers to make work-related adjustments.

The meaning of this concept in relevant circumstances is currently clear and helpfully stated in the Act and provides an objective test and reference point for employers.

It would however assist an employer if this term in the Act[3] were further clarified by introduction of guidelines or regulations on the meaning and practical application of this concept. The guidance should draw heavily on resources arising from successful conciliation cases in the Human Rights and Equal Opportunity Commission (HREOC). This will necessitate that HREOC systematically and routinely maintain such records eg, in its 'conciliation register'.

Recommendation 5: That the current defence is clear and should not be amended and,

Recommendation 6: That guidelines or regulations using HREOC conciliation outcomes be developed to assist employers on the practical application of this concept in making work-related adjustments.

Inherent requirements

The need for an employer to make a work-related adjustment where required is constrained by two related considerations: (a) the persons' ability to do the inherent requirements of the particular job for which he or she is being considered and (b) the requirement to determine whether or not it would pose an unjustifiable hardship on the employer.

It is difficult to understand how meeting the inherent requirements of a job could be anything other than a positive indicator to encourage employer participation as it ensures that only a skilled, qualified and capable person be appointed to fill a vacant job. Employment of qualified persons notwithstanding that they have a disability is a driving force for productivity and competition.

It would assist an employer if this term in the Act [4] were further clarified by introduction of guideline or regulation. The guidance should draw heavily on resources arising from successful conciliation cases in the Human Rights and Equal Opportunity Commission (HREOC). This will necessitate that HREOC systematically and routinely maintain such records eg, in its 'conciliation register'.

Recommendation 7: That guidelines or regulations using HREOC conciliation outcomes be developed to assist employers on the practical application of this concept in making work-related adjustments.

Indirect discrimination

The definition of indirect discrimination is a difficult one for practitioners and people with a disability to understand. It would further the purposes of the Act if the definition were simplified. Such a clarification could be achieved by removing the proportionality tests need for a complainant prove that a 'higher proportion' or a 'substantially higher' proportion of people without the

[3] Part 2, section 15 4(b)
[4] Part 2, section 15 4(a)

complainants particular attribute are able to comply with the requirement or condition. Anti-discrimination laws in the Commonwealth , States, the ACT and Territories already exist that do not require a differential rate of compliance — only that there has been some adverse effect caused by the requirement or condition.

This Office is in accord with the submission of the NSW ADB that the Act be amended to mirror the simpler test of indirect discrimination found in s.5 of the (Cth) *Sex Discrimination Act* 1984 (as amended 1995). Such a test will more readily assist people with a disability and potential respondents to understand and implement their rights and responsibilities.

Recommendation 8: That the Act be amended to mirror the simpler test of indirect discrimination found in s.5 of the (Cth) *Sex Discrimination Act* 1984 (as amended 1995).

ABOUT MATTERS RELATING TO IMPACT OF THE OBJECTS OF THE ACT

Disability Standards

Purpose of Disability Standards

The aims of an effective standard are that they should provide a means to

- create societal change without exhaustive personal cost;
- make inaccessible places and services accessible without the need for personal confrontation;
- have rights that are clearly defined and articulated, so that a breach may be readily recognised and quickly remedied.

It is an understandable aspiration for people to want a situation where their rights as a person with a disability (or an associate of a person with a disability) are sufficiently well documented that they need only present the relevant disability standard, identify that it has not been complied with by reference to an easily measurable, objective benchmark or deadlines, and redress will be swift and smooth. Unfortunately, Legal and Human Rights systems are not swift or smooth and so we should attempt to explore alternative procedures.

Standard on access to the built environment

The provisions of the Act have had a significant impact on areas such as, access to the built environment and continues to do so. The social participation enjoyed today owes much to the prohibitions of the Act itself. It would be advisable if the Standards of the Australian Uniform Building Code were called up and adopted as the Standard of the Act for physical access to the built environment and to provide the necessary practice information. This is so that developers and town planners can also avoid costly litigation and redevelopment costs while simultaneously using best practice for the whole community.

Areas such as access to the physical environment, to transport, education, employment and to goods and services are closely related and largely determine the level of integration with the rest of the community and the quality of life people can enjoy. If the Objects of the Act are to be realised greater efforts are required to also bring forward the introduction of Transport Standards.

Recommendation 9: That the Australian Uniform Building Code be adopted as the Standard for physical access to the built environment.

Effective employment standard/s

This Office made a submission to the revised Disability Discrimination Act Employment Standards issued in January 1998. In its submission this Office expressed its concern about introducing standards that take away potential rights of individuals covered by the Act.

Effective standards should provide a definitive reference point so that persons can judge whether their rights in a particular situation have been respected. When a standard is adopted it becomes law and replaces that part of the Act it relates to. The relevant part of the Act that an employment standard would replace is section 15 which protects the following elements of employment.

1. How a person with a disability, or their associate, gets a job: what selection procedures should be used including: methods of advertising the vacancy, selecting applicants for interviews, and setting criteria for determining who gets the job.

2. What happens once a person with a disability is offered a job: what are the terms and conditions of employment offered including: hours of work, wages, superannuation and work practices.

3. What happens once a person with a disability starts work and continues working: how the terms and conditions of employment apply in practice, including the provision of necessary work-related adjustments.

4. What happens when the person with the disability looks for advancement: how to ensure an employee has equal access to opportunities for promotion, transfer or training, or to any other benefits associated with employment.

5. When can a person with a disability be lawfully dismissed: how can dismissal procedures be undertaken without discrimination.

A standard needs to be a document which an employer or an employee can reliably read to find the answer to these questions. *The awards system provides a good model of how a standard should work in practice.* In the award system, an employer can look to the relevant award to determine what hours a particular employee should be working and the minimum wage/salary for that position.

When a standard is adopted it becomes law having replaced that part (section 15) of the Act it relates to (except insofar as it protects 'associates' of a person with a

disability). A complaint that would otherwise have been taken under section 15 of the Act would be taken under the standard instead. If an employment right for a person with a disability is addressed in section 15, but neglected in the standard, the right is extinguished.

A standard is also a means of measuring actions eg, deadlines and benchmarks and therefore needs to make mention of benchmarks and deadlines. An effective standard will also need to discuss in depth the issue of dismissal which could have the effect of excluding the rights of the person with a disability to take an action of disability discrimination if they are dismissed on the ground of their disability.

Recommendation 10: That any future standard on employment look to and be guided by the awards system to protect all areas currently protected by s.15 of the Act..

Recommendation 11: That any future standard on providing work-related adjustments look to and be guided by the awards system.

Migration

The overall impact of valuing human rights in Australia is diminished by an immigration policy that vigorously discriminates against people with a disability taking citizenship.

In most cases families undertake the primary carer roles rather than risk involvement in unfamiliar local systems. Migrant families are generally hard working and make a considerable contribution to competition, profits and tax revenue. Migrants, migrant families are a driving force in the Australian economy and ultimately create wealth and resources far in excess of any costs associated with migration. As family members that have a disability become adults they too will want to participate in all aspects of society and to make their own contribution to the economy. The Act and other necessary statutes should be amended to abolish this form of discrimination.

It is understood that immigration of people with a disability is a political decision and not the province of this review. However, as the Act recogises the rights of citizens with a disability and their ability to participate in and make valuable contributions to society including in the area of employment. The inconsistencies between these rights and the absence of human rights of non-citizens with the same mix of skills and abilities is contradictory and out of step with our international obligations.

Recommendation 12: That the review explicitly recognise the equal human rights of non-citizens with a disability to the Attorney General and recommend that in accordance with international instruments their rights to immigrate be proclaimed.

Disability Commissioner's power

As HREOC can no longer make determinations it is desirable that the power for the Disability Commissioner to initiate complaints be restored as the conflict no longer exists. This power will allow the Commissioner to ensure important matters are heard that might otherwise never be addressed. Reintroduction of this power may go some way to eg., addressing systemic discrimination in employment.

Recommendation 13: That the power for the Commissioner to initiate complaints be restored.

Jurisdiction

Discrimination is an industrial issue. In 1998, the ABS found 19% of the NSW population had some form of disability that impaired their ability to work. This finding has major implications for job design and there are huge issues for unions and employers.

Currently in NSW a disability employment-related complaint can be heard in Human Rights and Equal Opportunity Commission (HREOC) or the Anti-Discrimination Board (ADB). These jurisdictions are hard pressed to hear and conciliate matters in a timely manner. Matters that proceed to determination in this process entail their own problems of time and cost. There must be an alternative way these matters can be satisfactorily addressed.

In NSW discrimination and equity provisions are also enshrined in the *Industrial Relations Act* 1996 (IRA). Section 167(2) of the IRA gives the President of the ADB the power to intervene in proceedings involving unlawful discrimination. In the interest of complainants and respondents alike it is desirable that disability employment-related matters have been referred to the NSW Industrial Relations Commission (IRC).

Under section 143(1C)(f) of the *Workplace Relations Act 1996* the Australian Industrial Relations Commission has a specific obligation to ensure that the terms of industrial agreements do not discriminate on certain grounds including disability.

Greater utilisation of the IRC in employment discrimination matters avoids many of the procedural and other bottlenecks in hearing complaints and handing down determinations which plaque HREOC, the High Court, the NSW Anti-Discrimination Board (ADB) and the NSW Administrative Appeals Tribunal (ADT).

It is the experience in NSW that if complaints are put into the jurisdiction which knows about industrial relations matters are heard and adjudicated swiftly.

Recommendation 14: That a more proactive Act should encourage greater use of 'mainstream' industrial jurisdictions to address disability-related employment complaints.

Recommendation 15: That consideration be given to providing the HREOC with intervention rights in the Australian Industrial Relations Commission based on the NSW model.

If this Office can be of any further assistance on this or any other matter please do not hesitate to make contact with me directly on 92483510 or Paul Jenkin, Disability Adviser, on 9248 2555.

Attachment 1

Labour cost of making work-related adjustments

It is important that the Productivity Commission also acknowledge that the costs of adjustments are very low.

- Of all work-related adjustments made eighty one percent fell within the zero (19%) to one thousand dollar range. The remaining nineteen percent of costs fell within the one thousand to five thousand dollar range. [5]

- One United States survey of 200 organisations ranging from offices to factories found that the average cost dealing with the cost of workplace redesign was five cents per square foot when at the same time cleaning costs averaged 13 cents per square foot. [6]

- In the New South Wales Public Sector a Technical Equipment Program provides funds to agencies to offset the impact of equipment or workplace modification. The eligibility criteria requires the agency to find the first $750 and most agencies can afford to meet such costs from their office fit-out or maintenance budgets.

- In addition, from 1 July 2003 the Commonwealth Government will provide wage and wage related funding to employers that use its labour market programs through the Disability Award Wage Scheme (DAWS).

The low cost of making adjustments and financial incentives provided to employers are sufficient to remove any actual or perceived barriers or hardship to employing people with a disability. The reference in the issues paper citing research into the Americans with Disabilities Act 1990 suggesting that it may have "actually discouraged employment by increasing the labour costs associated with this group of workers" is misleading in the Australian context and out of place in this review.

[5] These costs are from the US Department of Labour's employment program known as the Jobs Accommodation Network (April 2002).

[6] MJ Kluck (1981) *14 University of California Davies Law Review* 731.

Executive summary of recommendations

Concerning a proactive model Act for the future.

Recommendation 1: That the Act be amended to adopt a more proactive and instructive focus and that positive duties on the Federal Public Service be enacted based on the UK model.

Concerning the definition of disability.

Recommendation 2: That the definition of disability be amended to explicitly protect genetic information and include genetic mutation and chromosome abnormality.

Concerning the definition of Work-related adjustments'.

Recommendation 3: That the Act be amended to

(iii) include an explicit reference to 'making work-related adjustments' and

(iv) to clearly and explicitly require steps be taken to make adjustments to accommodate the needs of people with a disability, subject to appropriate defences.

Recommendation 4: That conciliation outcomes be used to inform guidelines and regulation on making work-related adjustments.

Concerning the defence of unjustifiable hardship.

Recommendation 5: That the current defence is clear and should not be amended and,

Recommendation 6: That guidelines or regulations using HREOC conciliation outcomes be developed to assist employers on the practical application of this concept in making work-related adjustments.

Concerning the inherent requirements of jobs.

Recommendation 7: That guidelines or regulations using HREOC conciliation outcomes be developed to assist employers on the practical application of this concept in making work-related adjustments.

Concerning adopting a simpler test of indirect discrimination.

Recommendation 8: That the Act be amended to mirror the simpler test of indirect discrimination found in s.5 of the (Cth) *Sex Discrimination Act* 1984 (as amended 1995).

Concerning the standard for access to the built environment.

Recommendation 9: That the Australian Uniform Building Code be adopted as the Standard for physical access to the built environment.

Concerning employment standards and the awards system.

Recommendation 10: That any future standard on employment look to and be guided by the awards system to protect all areas currently protected by s.15 of the Act.

Recommendation 11: That any future standard on providing work-related adjustments look to and be guided by the awards system.

Concerning issue of migration.

Recommendation 12: That the review explicitly recognise the equal human rights of non-citizens with a disability to the Attorney General and recommend that in accordance with international instruments their rights to immigrate be proclaimed.

Concerning the Commissioner's power to initiate complaints.

Recommendation 13: That the power for the Commissioner to initiate complaints be restored.

Concerning alternative jurisdictions for complaint resolution.

Recommendation 14: That a more proactive Act should encourage greater use of 'mainstream' industrial jurisdictions to address disability-related employment complaints.

Recommendation 15: That consideration be given to providing the HREOC with intervention rights in the Australian Industrial Relations Commission based on the NSW model.