5 March 2004

Ms Helen Owens
Commissioner
Productivity Commission
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Dear Ms Owens

Thank you for the opportunity to comment on the draft findings and recommendations of the National Review of the Disability Discrimination Act 1992. This Office understands that the Productivity Commission is to report on the appropriate arrangements for regulation.

It is our understanding that the purpose of the Act is to eliminate discrimination against people with a disability in prescribed areas.

This submission therefore concentrates on the area of employment and makes recommendations where appropriate.

If this Office can be of any further assistance on this or any other matter please do not hesitate to make contact with Paul Jenkin, Disability Adviser, on 9248 3540.

Yours sincerely

Di Fruin
Acting Director

SECOND SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY BY THE NSW OFFICE OF EMPLOYMENT EQUITY AND DIVERSITY

Into the effectiveness of the Disability Discrimination Act 1992

Introduction

The Office of Employment Equity and Diversity which is part of the NSW Premier's Department acknowledges that since its initial submission to the Productivity Commission's inquiry into the *Disability Discrimination Act* (DDA) that the recent High Court decision in Purvis v NSW (Department of Education and Training) has clarified some important matters under consideration and raised the need for clarification in other areas.

This Office along with Basser, L.A.[1], believe that the High Court decision impacts on the draft report in a number of important areas including: ─

- Definition of disability
- Disability discrimination
- Indirect discrimination
- Identifying the comparator for the purposes of section 5
- The requirement to make 'reasonable' adjustments under the DDA
- 'Unjustifiable hardship'.
- Standards

Definition of disability ─ SECT 4

The High Court decision in *Purvis* clarified and affirmed the breadth of the definition of disability in the DDA. Both the majority of the High Court (Gummow, Hayne and Heydon JJ) and the minority judges (McHugh and Kirby JJ) agreed that the definition of disability is an inclusive one and has to be read as a whole, not as a list of mutually exclusive criteria. They rejected the distinction drawn by the NSW Department of Education and Training between a disability and behaviour which is a manifestation of the disability. In this case the High Court has made it clear that, behaviour which is a consequence or manifestation of a disability is included in the Act.

This Office reiterates its recommendation that there is no need to amend the broad and inclusive definition.

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[1] Lee Ann Basser, Associate Professor of Law & Legal Studies, La Trobe University
Impact of *Purvis v NSW (Department of Education and Training) 2003* HCA 62

Disability discrimination — SECT 5

The Commission's draft report identified the problem of establishing an appropriate 'comparator' for the purposes of defining direct discrimination in draft recommendation 9.2.

The decision in *Purvis* highlights the need for further clarification in the DDA. The majority of the High Court judges held that the appropriate comparator was — a person without a disability who exhibited similar behaviour. Basser contends that the use of such a comparator seriously undermines the operation of the Act, especially in the absence of any positive duty to make work-related adjustments.

By contrast the approach of the minority judges is consistent with the Objects of the DDA. The minority held that the appropriate comparator is — a person without the complainant's disability. The approach of the minority is consistent with section 5 when read as a whole.

The section 5 provision on direct discrimination includes a provision that circumstances are not materially different merely because the person with a disability requires 'different accommodation or services'. Section 5(2) recognises that people with disabilities may require accommodations to enable them to participate on an equal footing with their non-disabled peers. Using a comparator who does not have the complainant's disability is consistent with this approach and with the objects (attached) of the DDA.

This Office contends that draft Recommendation 9.2 should therefore adopt a comparator which is consistent with the Objects of the DDA and that it should make it clear that the appropriate comparator is a person without the complainant's disability.

Indirect discrimination — SECT 6

The definition of indirect discrimination used when drafting the DDA was derived from the *Sex Discrimination Act* 1984. The definition is a difficult one for practitioners and people with a disability to understand.

Since the passage of the DDA, the *Sex Discrimination Act* definition of indirect discrimination has been revised (1995) in the interests of simpler interpretation and operation. The issues of appropriate methods for comparison have not presented the same difficulties in applying the DDA as occurred in applying Sex Discrimination law which necessitated complex debates about appropriate formulas for determining whether a substantially higher proportion of one gender than another comply with a condition or requirement. Clearly there are no sophisticated mathematics required to determine for example that a requirement to enter a building by stairs will disadvantage people who use a wheelchair compared to people who do not. However, adopting a simpler definition may assist people with rights and responsibilities under the legislation.

This Office recommends amending section 6 to adopt the draft Recommendation 9.3 for a simpler test of the DDA's indirect discrimination provision along the lines of section 5 of the revised SDA.

The simplification should cover incidences of proposed indirect discrimination.

Duty to make work-related adjustments

There is no express duty to accommodate or duty to make 'reasonable' adjustments in the DDA. The duty is implied from the terms of various provisions of the DDA including sections 5, 6, 11, 15 and 22.

Basser points out that, while the majority of judges in the High Court in *Purvis* did not consider the duty to make reasonable adjustments in any detail, the minority judges did consider the issue in some detail. The minority judges McHugh and Kirby held there is currently no implied positive duty to make reasonable adjustments under the DDA. Rather, they held that, in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to them there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination.

To be consistent with the objectives of the DDA and the operation of the Act. It is necessary to amend the DDA to include an express duty to make reasonable adjustments. The duty to make adjustments, including work-related adjustments, should be to the point of unjustifiable hardship. The definition of the term 'reasonable adjustments' or 'reasonable accommodation' should be very broad to allow the necessary case by case assessment.

The term 'reasonable' should not be used in the phrasing of the duty in the amended Act. Use of the term began with an early rehabilitation Act in the United States of America and is redundant in today's anti-discrimination statutes. It is the experience of this Office that the concept of 'reasonableness' is also confusing, subjective and potentially misleading. A duty in the Act 'to accommodate by making work-related adjustments' should be sufficient.

This Office recommends that the final Report adopt an amendment to include an express duty to make work-related adjustments on all grounds covered. The duty should be to the point of unjustifiable hardship and linked with an extension of the defence of unjustifiable hardship to all substantive areas covered by the Act.

Request for information:
Costs of adjustment

The Commission has also sought views on how the costs of work-related adjustment should be shared between governments, organisations and consumers, the adequacy of existing government funding schemes for work-related adjustments, and the advantages and disadvantages of extending eg, portable grants.

It is the general experience of this Office that so far as the NSW Public Sector is concerned that talk about the costs of work-related adjustment are greatly exaggerated as they are routinely met from within recurrent budgets. In practice Public Sector agency's do not make use of funding when it is available. The Technical Equipment Program administered by the NSW Government's Department of Education and Training has operated a $65,000 budget in the public sector for over ten years and it has never been overspent. Agencies can only access these funds after they have met the first $750.

In the same period the Commonwealth government has administered a much larger work-related budget for its New Apprenticeships program. As this Office understands it these employment programs are not limited to any one sector and should be an invaluable source of information about costs of work-related adjustment. It is likely that many other employers have simply absorbed the costs.

More recently in 2002 this Office began a traineeship program to recruit job seekers with a disability into Public Sector agencies. The program agreed to meet the wage and related costs and to meet the costs to public employers of making work-related adjustments. The availability of the funds was very well advertised but not one employer requested funding. Upon enquiry this Office established that wherever a work-related adjustment had been made the costs were such that agencies simply picked up the cost. The only exception to this situation was where the program was asked to pick up the costs for an AUSLAN Interpreter to assist a deaf person at interview.

Request for information:
Potential impact of introducing a limited positive duty.

Notwithstanding the previous comments on the costs of work-related adjustment. It is difficult to estimate how readily private sector employers would respond to the introduction of a limited positive duty to take 'reasonable steps' to identify and work toward removing barriers to employment of people with a disability.

Where large business is concerned there is no reason to think that they would behave differently to the NSW Public Sector agencies. In fact many of them

have adopted a somewhat similar approach as a matter of good corporate citizenship and their opinion should be specifically sought on this question.

Where small business is concerned there are many situations where they are primarily family concerns and source staff almost exclusively from that pool of people. Others will have a small number of long-term employees and very low staff turnover and limited resources to recruit. It is these types of employers who are most likely to be disadvantaged by even a limited duty and for whom the duty could pose an unjustifiable hardship. Some form of assistance for these employers may be necessary.

The best sources of information will be from the Council for Equal Opportunity or from England, Canada, Northern Ireland and the USA.

Unjustifiable hardship – SECT 11

The duty to make 'adjustments' should be to the point of 'unjustifiable hardship'. The defence of 'unjustifiable hardship' should, therefore, be extended to all substantive areas under the DDA, as recommended in 10.1 of the Draft Report.

The factors to be taken into account in assessing 'unjustifiable hardship' were considered by McHugh and Kirby JJ in *Purvis*. Their Honours make it clear that an assessment of 'unjustifiable hardship' under section 11 must take into account the benefit and detriment to all persons concerned in the case.

Some of the earlier case law makes it clear that in particular cases it may be necessary to include an assessment of community wide costs and benefits. However, the Draft Report goes further and recommends that section 11 be amended to 'clarify that community-wide benefits and costs should be taken into account'. While this appears to be an attractive proposal, it has the potential to seriously undermine the DDA. At present it is clear that each situation is judged on its own merits. The defence currently allows distinctions to be made between the ability of a small business to make work-related adjustments and that of a large employer. If community wide costs and benefits are to be taken into account in every case it is possible that the duty to make reasonable work-related adjustments could be severely undermined to the detriment of people with a disability. At present community wide costs and benefits can be taken into account where they are relevant but otherwise need not be taken into account. It is unnecessary and potentially counter productive to extend the criteria in section 11 as set out in Draft Recommendation 10.2.

This Office recommends that broadening the current defence of unjustifiable hardship to all substantive areas covered by the DDA is a sufficient expansion of the defence.

Disability Standards ─ SECT 31

Purpose of Disability Standards 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 also consider alternative procedures.

Standard on access to the built environment

The provisions of the DDA have had a significant impact on some 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 DDA itself.

The draft standard on access to public buildings is being developed by the Australian Building Codes Board to form part of the Building Code of Australia so that compliance will be monitored through mainstream planning processes. This regulatory framework is more efficient than setting up a separate disability standard and separate compliance framework. A similar approach should be adopted for disability standards wherever practical to do so

This Office recommends that:

- ***wherever practical as proposed in draft recommendation 12.4 to incorporate monitoring and enforcement into existing regulatory processes and,***
- ***the section be amended as proposed in 12.3 to allow standards to be introduced to all areas in which it is unlawful to discriminate on the ground of disability.***

Effective employment standard/s

This Office made a submission to the revised *Disability Discrimination Act* 1992 Employment Standards issued in January 1998 expressing its concern about introducing standards that take away potential rights of individuals covered by the DDA.

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 DDA it

relates to. The relevant part of the DDA 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 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.

This Office recommends that in the final report:

- ***any future standard on employment look to and be guided by existing regulatory processes proposed by draft recommendation 12.4 including the awards system to protect all areas currently protected by s.15 of the DDA,***

- ***section 13 of the DDA be amended to make clear that disability standards replace the general provisions of State and Territory anti-***

discrimination legislation as proposed in draft recommendation 12.2, and

- ***in accordance with draft recommendation 12.1 the scope of the DDA 1992 should only be altered via amendment of the DDA, not via disability standards.***

Jurisdiction

Disability discrimination is also 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 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 is an alternative way these complaints 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). Complaints heard in the IRC are routinely heard in less time than in other jurisdictions.

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 plague the 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 they are heard and adjudicated swiftly.

This Office recommends that:

- ***a more proactive Act should encourage greater use of 'mainstream' industrial jurisdictions to address disability-related employment complaints, and***
- ***consideration be given to providing HREOC with intervention rights in the Australian Industrial Relations Commission based on the NSW model.***

Migration – SECT 52

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. Research[2] shows clearly that migrant families are generally hard working and make a considerable contribution to competition, profits and tax revenue. 'Migrant families contribute more in taxes than they consume in benefits, and goods and services. As a result migrants generate surpluses for government. The contribution by migrants to supply and demand and their indirect contribution to government surpluses (or smaller deficits) enhance Australia's economic growth.'

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 recognises 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 international obligations.

The exception of the *Migration Act* 1958 in the *Disability Discrimination Act* 1992 should be amended to ensure that it exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision-making for Australian entry and visa categories but does not exempt more general actions done in the administration of Commonwealth migration laws and programs.

This Office recommends that the exception of the Migration Act 1958 in the Disability Discrimination Act 1992 (section 52) be amended in accordance with recommendation 10.4 of the draft report to ensure that it exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision-making for Australian entry and visa categories but does not exempt more general actions done in the administration of Commonwealth migration laws and programs.

Disability Commissioner's power

[2] The Impact of Permanent Migrants on the Commonwealth Budget, Report for the Department of Immigration and Multicultural and Indigenous Affairs 2002, prepared by Access Economics. See also, Productive Diversity: Australia's Competitive Advantage, Department of Immigration and Multicultural and Indigenous Affairs.

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 that necessitated the removal of this power 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.

This Office recommends that the Human Rights and Equal Opportunity Act 1986 (s. 46P) should be amended in line with draft recommendation 11.4 to allow HREOC to initiate complaints under prescribed conditions be restored. Administrative separation should be maintained between its complaint initiation and complaints handling functions.

DISABILITY DISCRIMINATION ACT 1992 - SECT 3

The objects of this Act are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:

(i) work, accommodation, education, access to premises, clubs and sport; and
(ii) the provision of goods, facilities, services and land; and
(iii) existing laws; and
(iv) the administration of Commonwealth laws and programs; and

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.