

19 May 2003

Ms Helen Owens
Commissioner
Productivity Commission
LB2 Collins Street East
Melbourne VIC 8003

Dear Ms Owens

Thank you for the opportunity to comment on the National Competition Policy Review of the Disability Discrimination Act (the Act) 1992. I understand that the Productivity Commission is to report on the appropriate arrangements for regulation, taking into account the Terms of Reference.

It is unfortunate that the Terms of Reference for the review are phrased in the negative, that is — what parts of the Act inhibit competition principles.

Furthermore I submit that ‘competition principles’ may not be the appropriate measure of how well the Act has achieved its Objects. Indeed, the term ‘competition principles’ is not explicitly defined in the Productivity Commission Act 1988.

It is my understanding that the purpose of the Act is to eliminate discrimination against people with a disability in prescribed areas rather than to foster growth, innovation and productivity.

I agree with the ‘Issues Paper’ that the focus of discussion should be on how well the Act has achieved its objects — not whether those objects are appropriate. This submission concentrates on the area of employment, whether the Terms of Reference adequately describe the problems that the Act should address and makes recommendations where appropriate.

This submission draws on information from lessons learned from years as an employment practitioner to throw some light on matters raised for consideration.

Yours sincerely

SUBMISSION TO THE PRODUCTIVITY COMMISSION

Inquiry into the effectiveness of the Disability Discrimination Act 1992

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

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'.

I submit that 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.

Furthermore 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 restricting it.

Definition of disability

The definitions in the Act have 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.

‘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 which prohibit unlawful discrimination in the workplace, direct and indirect discrimination.

Use of the term to make ‘reasonable’ adjustment should be re-cast and clarified. It is my experience that the idea of reasonableness is confusing, subjective and misleading for non-lawyers.

The intention is clearer if the term 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 gives guidance on how to take pro-active steps to employ qualified

individuals. Clarity about making work-related adjustments also assists an affected party to understand the distinction between justifiable and unjustifiable hardship.

It is important that the Commission 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.¹
- 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.²
- 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 financial incentives provided to employers should be sufficient to remove any 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 “actually discouraged employment by increasing the labour costs associated with this group of workers” is out of place in this review.

The Act should be amended to define a reference to ‘work related-adjustments’ so further practical advice can be provided to employers. Such a reference could be included in Part 1 of the Act, in Section 4 on Interpretation or in Section 5(2) on Disability Discrimination of the Act where a reference to the requirement first appears in —

... circumstances in which a person treats or would treat another person with a disability are

¹ These costs are from the US Department of Labour’s employment program known as the Jobs Accommodation Network (April 2002).

² MJ Kluck (1981) *14 University of California Davies Law Review* 731.

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 guideline or regulation. These guidelines should draw heavily on resources arising from successful conciliation cases in the Human Rights and Equal Opportunity Commission (HREOC). This recommendation will necessitate that HREOC systematically and routinely maintain such records.

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.

It would be difficult to make a legitimate defence of unjustifiable hardship in employment given the points made above. 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 incentives for employers to make work-related adjustments.

Guidance on the meaning and application of this concept in relevant circumstances is currently clear and helpfully stated in the Act. These guides have been helpful in giving an objective test and reference points for employers.

It would assist an employer if this term in the Act ³ 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 recommendation necessitates that HREOC systematically and routinely collect and maintain such records.

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

³ Part 2, section 15 4(b)

positive encouragement for 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 recommendation necessitates that HREOC systematically and routinely collect and maintain such records.

⁴ Part 2, section 15 4(a)

Matters relating to impact of the Objects of the Act

Standards

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 adopted as the Standard of the Act to inform and provide the necessary practice information. This is recommended so that developers and town planners can avoid costly litigation and redevelopment costs while simultaneously using best practice for the whole community.

If the Objects of the Act are to be realised greater efforts are required to bring forward the introduction of the Act's Transport Standards.

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 primary carer roles rather than risk involvement in the local systems. Migrant families are generally hard working and make a considerable contribution to competition, profits and tax revenue. As family members that have a disability become adults they too 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.

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 arising from a power to make and enforce determinations no longer exists. This power allows 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.

Attachment 1

Terms of reference

2. The Productivity Commission is to report on the appropriate arrangements for regulation, taking into account the following:

- 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 its effectiveness in eliminating, as far as possible, discrimination on the ground of disability, ensuring equality between people with disabilities and others in the community, and promoting recognition and acceptance of the rights of people with disabilities;
- b) any parts of the legislation which restrict competition should be retained only if the benefits to the community as a whole outweigh the costs and if the objectives of the legislation can be achieved only through restricting competition.
- c) without limiting the matters that may be taken into account, in assessing the matters in (a) and (b), regard should be had, where relevant, to:
- d) the need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication;
- e) compliance costs and the paper work burden on small business should be reduced where feasible.

Attachment 2

Objects of the *Disability Discrimination Act 1992*

The objects of the DDA 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 people 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 people with disabilities have the same fundamental rights as the rest of the community.

Source: Disability Discrimination Act 1992, s. 3.