Submission to Productivity Commission

In reply to the "Review of the *Disability Discrimination Act*, 1992: Draft Report"

16 March 2004

People with Disability Australia Incorporated

Introduction to People with Disability Australia Incorporated

People with Disability Australia Incorporated (PWD) is a national disability rights and advocacy organisation. We provide representation for people with disability at the New South Wales and national levels. We also provide a range of disability rights services for people with disability and their associates, at either the New South Wales or national levels.

Individuals with disability and organisations of people with disability are our primary voting membership. We also have a large associate membership of people and organisations committed to the disability rights movement.

PWD was founded in 1980, in the lead up to the International Year of Disabled Persons (1981), to provide people with disability with a voice of our own. We have a fundamental commitment to self-help and self-representation for people with disability, by people with disability.

PWD has a cross-disability focus – membership is open to people with all types of disability. Our services are also available to people with all types of disability, and their associates.

We are governed by a Board of directors, drawn from across Australia, all of whom are people with disability. We employ a professional staff to manage the organisation and operate our various projects. A majority of our staff are also people with disability.

We are part of an international network of disabled peoples organisations through Disabled Peoples International.

We are a non-political, non-profit, non-governmental organisation incorporated under the *Associations Incorporation Act,* 1984 (NSW).

Our activities are supported by substantial grants of financial assistance from the Commonwealth and New South Wales Governments, as well as a growing number of corporate and individual donors. This financial assistance is acknowledged with great appreciation.

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1. Introduction

1.1 PWD's previous submissions

PWD has previously made submissions to the Productivity Commission in Public Hearings held in Sydney on 15 July 2003 and 20 February 2004. PWD expressly relies upon and incorporates those submissions . Those submissions can be accessed at: http://www.pc.gov.au/inquiry/dda/trans/sydney030715.html; and http://www.pc.gov.au/inquiry/dda/trans/sydney040220.html

PWD notes that the Productivity Commission in its Draft Report is in agreement with certain of our submissions made 15 July 2003, and we comment briefly on these below.

1.2 Definition of disability

PWD supports **draft finding 9.3** and **draft recommendation 9.1** except to the extent that they refer to behaviours related to disability. The issue of such matters being within or outside the definition of disability would appear to be no longer contentious since the High Court of Australia's decision in *Purvis* v *New South Wales (Department of Education and Training* [2003] HCA 62, *11 November 2003,* S423/2002 ('the Purvis Case').

1.3 Standards

PWD supports **draft findings 12.3 – 12.6** and **draft recommendations 12.2-12.4,** and strongly supports the development of a Standard in the area of accommodation. In particular, PWD believes that an Accommodation Standard could address issues of adaptable and affordable housing (in much the same way that various NSW environmental planning instruments do).

Recommendation: In respect of a plenary Standards making power, PWD recommends that a process be legislated through which the community can be engaged in setting priorities for Standards development. Such a mechanism would need to engage all relevant sectors of the community, the Human Rights and Equal Opportunity Commission ('HREOC'), and the Minister responsible for Standards under the *Disability Discrimination Act,* 1992 ('DDA'), the Attorney General.

1.4 Advocacy and legal assistance

PWD supports **draft finding 14.1** regarding the funding of the Disability Discrimination Act Legal Services ('DDALS') Network of Services. PWD believes that a similar finding could be made in respect of disability advocacy services funded under Commonwealth and State *Disability Services Acts,* community legal centres ('CLCs'), and Legal Aid Commissions ('LACs'). PWD also believes that a particular point needs to be made about access to legal and disability advocacy services in

regional and remote areas. In these areas, the limited resources provided to advocacy - both legal and disability - creates a major barrier to accessing the DDA complaints mechanism adequately.

Recommendation: PWD therefore calls on the Productivity Commission to recommend an enhancement to DDLAS funding, in particular to fund:

- a central education and development function which will then develop information, training and resources to build the capacity of disability advocacy services, CLCs and LACs to deal with disability discrimination matters;
- Rural and remote outreach; and
- A part-time secretariat to facilitate greater resource sharing and cooperation within the DDALS network, and generally to enhance capacity to provide casework assistance to individuals including those identified as having to date received less benefits from the DDA (Draft Report, pp. 103-111).

1.5 HREOC as intervenor and initiator of complaints

PWD objects strongly to the *Australian Human Rights Commission Legislation Bill 2003's* proposed amendments that would require HREOC to obtain the Attorney General's leave to intervene in Court proceedings. We regard this amendment as an unwarranted intrusion on HREOC's independence, and a major impediment to the human rights concerns of people with disability being heard, in cases involving the Commonwealth in particular.

Accordingly, PWD does not agree with **draft finding 6.1** regarding the role of HREOC in intervening in the Australian Industrial Relations Commission ('AIRC'). PWD instead agrees with the Anti-Discrimination Board of NSW [submission 101] and the NSW Office of Employment and Diversity's submission [submission 172] suggesting that HREOC's intervention powers should be expanded to cover proceedings involving industrial relations issues in the AIRC. There are so few cases within the AIRC to date that apply the DDA, concepts of substantive equality, and concepts of accommodation or adjustment, that should the President of HREOC consider it appropriate, in the circumstances of a particular case, to intervene or appear as amicus in AIRC proceedings to clarify these issues, then such an intervention should be permitted. Discrimination on the basis of disability in the area of employment is one of the most serious social problems addressed by the DDA. Access to employment is critical to the economic and social participation of people with disability.

PWD notes the recent intervention in the 'National Wage Case' at the AIRC by the National Council on Intellectual Disability and Disability Employment and Action Centre. PWD is fully supportive of the right of disability peak and advocacy bodies to intervene in litigation in the public interest, however, the need for such bodies to do so would be minimised if HREOC could or would intervene in their place.

PWD also believes that the role of HREOC in initiating complaints in certain circumstances should be reinstated and as such supports **draft recommendation 11.4**. Concerns for conflicts of interest can be managed by maintaining the

administrative separation between legal and complaints units, and between the complaints initiation and complaints handling functions.

2. Matters arising since PWD's submission of 15 July 2003

2.1 Imminent expiry of term of the Disability Discrimination Commissioner

PWD believes that there needs to be a permanent appointment to the office of Disability Discrimination Commissioner. The current temporary appointment expires in April 2004.

Soon after the passage of the DDA in 1992, Ms Elizabeth Hastings was appointed as Australia's first Disability Discrimination Commissioner. Her term of Office was completed at the end of 1997. Since that time, no permanent Disability Discrimination Commissioner has been appointed. Instead, people already appointed to full-time roles in other areas of HREOC have been appointed for short terms as Acting Disability Discrimination Commissioner.

Ms Hastings was a woman with disability, who possessed a clear understanding of the discrimination which people with disability face every day in Australian society. Furthermore, the fact that she had a disability sent a clear message to the Australian community that people with disability are valued citizens, and that the Government recognised that such a person was an appropriate appointee to this role. Since the end of Ms Hastings' term, none of the acting Commissioners has identified as having a disability.

In recent years there have been a number of administrative and other barriers that have prevented the role of Acting Commissioner being fulfilled effectively. HREOC has attempted to address these issues by contracting a Deputy Disability Discrimination Commissioner, but he only works three days a week, and does not have the full status of a Commissioner.

The Australian Government is of the view that specialist Commissioners should not head HREOC. However, whilst these legislative roles remain, the appointment of a permanent Commissioner in the area of disability is well overdue. Such an appointment would send a positive message to the community regarding people with disability, and resource the disability area of HREOC to continue the effective work it has done over the past few years. A dedicated Commissioner role is essential to the overall effectiveness of the DDA.

Recommendation: PWD calls upon the Productivity Commission to recommend the retention within the DDA of the position and functions of a specialist Disability Discrimination Commissioner, and that the appointee must be a person with a disability.

2.2 The Disability Discrimination Amendment Bill 2003

The Senate Legal and Constitutional Committee are currently inquiring into the provisions of the *Disability Discrimination Amendment Bill,* 2003. If enacted, the Bill

would amend the DDA to limit its applicability to people living with drug dependence. PWD has made a submission to the Senate Legal and Constitutional Committee's Inquiry into this Bill (number DR342), opposing the Bill on the following grounds:

- It is unnecessary to achieve its stated purpose;
- It will result in an increase in unlawful discrimination, harassment, and vilification on the ground of disability for people who are living with addiction, and their associates, irrespective of their participation in accepted treatment programs and services;
- It will undermine effective public health and social policy that promotes treatment, and the social and economic participation of people living with addiction, by removing the human rights protections that buttress this policy;
- It undermines the broad and inclusive definition of disability that underpins the protection of the human rights of people with disability in Australia;
- It has the effect, and possibility the intention, of creating a moral distinction between impairments that are acquired as a result of perceived voluntary acts, and those that are involuntarily present or acquired;
- It is contrary to Australia's international obligations to enact and maintain laws that protect people with disability from discrimination.

One of the DDA's strengths is its broad and inclusive definition of disability, and the fact that this definition has objective, accepted social and medical frameworks underlying it (see the Purvis Case, per McHugh and Kirby JJ at pars 67-80, referring, *inter alia,* to the World Health Organisation's *International Classification of Impairment, Disability and Handicap*). It is an extremely dangerous precedent to select out from all such objectively accepted impairments one for particular, adverse treatment.

Recommendation: PWD therefore calls upon the Productivity Commission to find that the DDA extending to all people with disability equally is of fundamental importance to maintaining the integrity and effectiveness of the DDA.

3. The draft report's 'key points'

The Key Points are listed at p. xxiv of the Draft Report, and PWD agrees with them unreservedly, other than those discussed below:

3.1 Key point 1: Substantive equality or formal equality?

Both PWD and the Productivity Commission believe that the DDA was intended to give Australians with disability the right to substantive equality in the areas it covers. The Productivity Commission has stated:

"People and organizations covered by the DDA must make adjustments to ensure equality of opportunity for people with disabilities. But they do not have to do so if it would impose an 'unjustifiable hardship'…This is the right approach. There should be an obligation to make adjustments to allow equality of opportunity, but adjustments should be made only where…they do not impose [unjustifiable

hardship]. The DDA does not require equality of outcomes for people with disabilities". (emphasis added, Draft Report, pp xxviii, xxix)

The 'obligation to make adjustments' is at the heart of both PWD's and the Productivity Commission's conceptualisation of 'substantive equality' insofar as it differs to both 'formal equality' (equal treatment) and 'equality of outcome'.

However, in the Purvis Case the High Court held that the DDA requires only formal equality or the right to 'equal treatment', and specifically rejected the contention that the DDA provides for substantive equality. The majority held:

"Substantive equality directs attention to …the reduction or elimination of barriers to participation in certain activities. It begins from the premise that 'in order to treat some persons equally, we must treat them differently'…The principal focus of the Act, however, is on ensuring equality of treatment…The Act does *not* explicitly oblige persons to treat disabled persons differently from others in the community. The Act does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B to 28G of the 1995 UK Act which expressly oblige employers and educational authorities to make 'reasonable adjustments' to accommodate disabled persons" (per Gummow, Hayne and Heydon JJ, pars 202,203, see also pars 213, 217, 229 and Callinan J agreeing, par 273).

At par 218 the majority added the following:

"There is no textual or other basis in s 5 for saying that a failure to provide such accommodation or services ['which a disabled person needed'] would constitute less favourable treatment of the disabled person for the purposes of s 5".

As a consequence of the High Court's decision in the Purvis Case, it would appear that the DDA requires amendment to incorporate an 'obligation to provide required accommodation, services, or adjustments' (up to the point where such would constitute unjustifiable hardship) if it is to have the effect intended by Parliament of providing substantive equality for people with disability in the areas covered by it. The inclusion of such an obligation would clarify and give effect to the intended position at law, and would result in real and practical changes to the current, inadequate state of compliance. (PWD notes that such a provision would require its own interpretation section defining the words "accommodation" and "services", which are defined separately in s 4 with meanings attributable to a different context).

Indeed, PWD considers that the Productivity Commission's various findings to the effect that the DDA has a 'mixed report card,' so far as its effectiveness is concerned, are linked directly to the failure of the DDA to expressly require such adjustments. With the benefit of hindsight, contributed to by the experience of ten years of complaints, the outcome of the Purvis case, and with the benefit of observing the formulations of more recent legislation in other jurisdictions (see Purvis Case, par 203), it is now hard to see how the DDA's objective "to eliminate, as far as possible, discrimination against persons on the ground of disability" in certain areas, can ever be achieved without such an obligation.

Returning to the ‘practical changes’ referred to above, currently the many cases in which disagreement about the nature or extent of the required adjustments are in issue are contested in the absence of any -or at least any reasonable attempt - by the respondent to provide the adjustments sought by the person with disability. As a result, DDA cases have become fertile ground for expert evidence wherein the opinion of experts is provided on the hypothetical inquiry involved in assessing the costs and benefits of the ‘adjustments required’, for the purpose of determining the application of the unjustifiable hardship defence, in the absence of any, or any reasonable attempt to actually provide or offer them.

PWD considers that the need for such ‘hypotheticals’ will be minimised if there is a requirement to provide adjustments up to the point where such adjustments give rise to unjustifiable hardship. This is because, where a respondent has made a reasonable attempt to provide or offer such adjustments as a result of the requirement, the contentious issue of whether or to what extent to provide adjustments is then largely removed from the abstract realm and made real. Evidence in such a case would then reflect the actual circumstances of the very matter often in dispute in applying the unjustifiable hardship defence, rather than those projected by often-conflicting expert opinions.

But as with any legal obligation it would not be enough to state it as such without anything more. Obligations are not really obligations unless when breached adverse consequences flow to the person in breach. The quote above from the majority in the Purvis Case at par 218 gives some clue as to the required further step if the DDA is truly to embrace substantive equality for people with disability. The majority recognised that a failure to provide the required adjustments does not, currently, of itself constitute less favourable treatment of a person with disability for the purposes of s 5. PWD considers that this situation must be reversed if an obligation to make adjustments is to be made meaningful. To fail to take this next step would be to invite increased evasion of the obligation, thereby undermining its very purpose and the practical benefits that PWD considers will flow from a greater compliance with the obligation.

The Purvis Case itself provides a reasonable example to which PWD’s contentions can be applied. There is a very real possibility that the behaviour of the young person in question might have been mitigated if the adjustments requested by Mr and Mrs Purvis had been provided by the school in a timely fashion, rather than not at all. In other words, the very substance of a dispute that ended up in the High Court could conceivably have disappeared, or been greatly minimised, if the School had made a real attempt to provide the adjustments as required.

We will of course, now, never know for sure what might have happened, or whether the young person in question and his foster parents might have had a relatively unremarkable (and relatively anonymous) educational experience if such adjustments had been provided. However, if there had been an obligation to provide the adjustments required, and if a failure to provide the required adjustments was itself to be considered as less favourable treatment, it is conceivable that the School’s response to the foster parents’ reasonable requests might have been greatly different, that the benefits intended by Mr and Mrs Purvis might have flowed

to their foster son and the School, and that the potential for dispute between the parties might have been greatly minimised.

The majority in the Purvis Case did not deal with the potential for mitigation of the behaviour as a consequence of the provision of such adjustments. However, Commissioner Innes at first instance did consider the potential of the required adjustments to bring about the positive behavioural and educational effect intended by Mr and Mrs Purvis, and found that such adjustments in all probability would have had a reasonable prospect of mitigating the behaviours at the very heart of the case, and of eliminating the need for their foster son's suspension or expulsion. Justices McHugh and Kirby, dissentients in the Purvis Case, also considered the potential for the required adjustments to address the behavioural issues and agreed with the findings of Commissioner Innes in this respect (pars 16,20,56-58,107,136). In the absence of any relevant finding by the majority, it is therefore reasonable to accept the findings of Justices McHugh and Kirby, and Commissioner Innes on this issue.

What matters, then, is that there be real attempts to eliminate discrimination, or to provide substantive equality of opportunity for people with disability, and the beneficial, community-wide consequences that flow from those attempts. Discriminatory attitudes, the precursor to the denial of the participation of people with disability, need to be shifted by an obligation to take positive actions to provide the required adjustments. Currently many people with disability are still not making it 'through the door' due to the lack of any positive actions to provide the accommodation, services or adjustments that we require. PWD believes that in the great majority of cases such positive actions will result in the unproblematic participation of people with disability in areas of life currently denied to us, and in the enrichment of the life experience of all members of the Australian community.

For these reasons PWD strongly supports **draft recommendation 9.2** suggesting that failure to provide the accommodations or services required by a person with disability shall be deemed 'less favourable treatment'.

Recommendation: Further, PWD calls on the Productivity Commission to recommend the inclusion of an obligation to provide the accommodation and services required by a person with disability. For the reasons above, PWD regards the lack of such an obligation as fatal to the DDA's intended aim to bring about substantive equality for people with disability. Indeed, the DDA's objectives can never be fulfilled without it.

Recommendation: PWD also calls on the Productivity Commissioning to make further consequential, yet substantial amendments, namely:

- The inclusion of a definition of substantive equality of opportunity;
- The inclusion of an object dealing with substantive equality of opportunity in s 3; and
- The deletion of the words "equal opportunities" in s 45(a) and their replacement with "substantive equality of opportunities".

3.2 Key point 4: Discrimination in schools

PWD disagrees with the statement that access to education has improved more than employment opportunities, or indeed any other area. As with all the areas covered by the DDA, there are examples of individual excellence in inclusive education, and there are examples of outright harassment and discrimination. PWD has, in its extensive information, referral and advocacy provision to in excess of 10,000 people per year, noted no overall improvement in the provision of non-discriminatory educational opportunities for school students with disability over the last decade. Rather, PWD has witnessed limited advances in some areas, only to witness retreats in others.

PWD is concerned that education providers might take comfort from the statement, and fail to take the major further steps required to eliminate the current, widespread discrimination in schools.

It is recognised that the number of students with disability in mainstream schools has grown substantially, however, this does not indicate either the success of, length of, or quality of a student with disability's 'inclusion' in the mainstream or regular classroom environment. 'Inclusion' in this sense refers to the full participation of a child with disability in a regular classroom, with such accommodation or services as are required by the student provided in the classroom environment except where otherwise agreed by the child's parents. In this sense an inclusive education is a totally non-discriminatory education in a regular classroom.

It has been suggested by many commentators that the increase in students with disability in mainstream schools is for the most part explained by increased identification of disability in students of the sort who have historically always been in mainstream schools, rather than segregated environments (Special Schools or Special Education Units) but whose disability traditionally went unidentified. It is suggested that these pupils are now more prone to be identified given developments in diagnosis and recognition of 'new conditions' (ADHD for example) and a change in the nature of funding programmes that are often targeted to students with specific types of disability. As the Productivity Commission has recognised:

"The main cause for the increase in FTE [full-time equivalent] students identified as having a disability [in mainstream schools] was better diagnosis and a broadening of eligibility for disability programmes, rather than the integration of students previously enrolled in special schools into mainstream schools". (Draft Report, p. 91)

"In particular, PWD has not witnessed any advance in the willingness of schools to include children with disability where the degree or type of disability suggests to the school that the student should be enrolled in a Special School or Special Education Unit, for example children with severe disability or children with challenging behaviour. The most frequent inquiry PWD receives in the area of education is that of parents who require certain services or accommodations so that their son or daughter can be included in a regular classroom at the local school. The complaint most frequently is that the school will not fund the services or accommodations and so rejects the enrolment of the child, or if it accepts the enrolment of the child then

limits that child's access to the regular classroom to only those hours when it is prepared to make available those accommodations or services.

In the latter situation, the position is exacerbated where the regular school has a Special Education Unit on site. In that situation the child will be removed from the regular class and placed in the Unit whenever the accommodations or services are not to be provided. One example of a family in this situation involved a family in regional NSW who were 'permitted' to have their daughter with disability attend the mainstream class for only two days per week (the days a teacher's aide was provided to the class), and 'required' to have her attend the Special Education Unit the remaining three days per week (when a teacher's aide was not provided). In our experience, variations of this situation occur throughout NSW and Australia. (PWD therefore concurs with **draft finding 14.2** and the difficulties mentioned therein).

In such schools a funding anomaly may not allow for the provision of the necessary disability programme funding within the mainstream class as the school is already accessing substantial programme funding for its Special Education Unit. In these cases there is a barrier to meeting the needs of students with disability in the regular classroom, precisely because of the existence of a segregated education option. This is the situation that confronted the family above.

There are many such mainstream school environments with segregated components (Special Education Units, Isolation Rooms etc.), and it is the experience of PWD that many students within mainstream schools are in fact segregated into these disability specific environments, if not for the entire school day then for a lengthy portion of it. (A recent case in point is the revelation of a cage being used as a form of behaviour modification in a Western Australian school).

PWD therefore considers that there would need to be a great deal more study done than that referred to by the Productivity Commission before a view could be expressed that access to disability programmes (presumably a reference to the provision of the services and accommodations required by the population of students with disability) in mainstream schools has grown substantially since the DDA was enacted (**draft finding 5.2**). PWD does not believe that the evidence within the Draft Report's Appendix B substantiates that comment.

Indeed it is likely that given the increased identification of students with disability, the quality of access to such disability programmes as do exist in mainstream schools may well have declined given the number of students now identified as requiring access to those programmes. PWD believes that the resourcing of disability programmes in mainstream schools has not kept pace with the increased identification of students with disability seeking to access those programmes, such that many students with disability are denied access to disability programmes and many others are obtaining only insufficient accommodations or services. In either situation, PWD believes that therein lies a *prima facie* instance of structural disability discrimination in education.

PWD also notes that discrimination in higher education remains a point of concern, and features regularly in PWD's information, referral and advocacy provision to individuals.

PWD will return to this discussion when considering the Special Measures exemption (s 45) below.

4. Summary of findings, recommendations and requests

Unless commented upon above or below, PWD is in general agreement with each of the draft findings and recommendations in the Draft Report. PWD has elected to comment specifically upon issues on which it has particular knowledge, or where PWD believes that it may have something new to add to the Productivity Commission's considerations.

4.1 Chapter 5 - Effectiveness in eliminating discrimination

PWD agrees with **draft finding 5.8**, which suggests that "given its relatively short period of operation, the [DDA] appears to have been reasonably effective in reducing overall levels of discrimination". This finding supports the retention of the Act, and indicates that legislative interventions of this kind are worthwhile.

That said, PWD is of the view that the Act could and ought to be significantly strengthened. The success of the DDA to date provides no grounds for complacency. As the Productivity Commission acknowledges at various points in its draft report, discrimination on the ground of disability remains very widespread, and there are a significant number of technical problems and shortcomings in the Act that ought to be addressed.

Recommendation: That the Productivity Commission continue to recognise the importance of the DDA in addressing discrimination on the ground of disability, and call for its refinement and strengthening to further combat the continuing widespread discrimination against people with disability in the Australian community.

4.2 Chapter 6 - Equality before the law

Access to Justice

Recommendation: PWD strongly supports **draft recommendation 6.1** regarding a Commonwealth inquiry into access to justice for people with disability with a particular focus on practical strategies for protecting their rights within the criminal justice system. PWD notes that such an inquiry would of necessity be multi jurisdictional and therefore very complex. PWD also believes that a particular focus should be directed to the protection of the rights of people with disability in the civil justice system. This might require two such inquiries.

Equality Before the Law Provision

Recommendation: In response to the **Request for Information** at page 141, PWD strongly supports the inclusion within the DDA of a provision such as s 10 of the *Racial Discrimination Act,* 1975. PWD notes that there may be concerns about the

impact of such a section on state based mental health and guardianship laws, but notes that such laws could be 'prescribed', if believed necessary, under s 47 of the DDA and associated Regulations, thereby exempting actions taken under such laws totally from the DDA. PWD, however, believes that there is a preferable approach to 'prescribing' such laws, and discusses this below.

Voting

Draft Finding 6.6 and Draft Recommendation 6.2 are totally inadequate by themselves to address voting discrimination against people with disability. They totally fail to deal with issues of accessible information, eg for people with cognitive impairment or who are blind, or to identify the importance of confidentiality in voting, especially for people who are blind or have other difficulties reading material.

Recommendation: PWD calls upon the Productivity Commission to recommend a joint Inquiry by HREOC and the Australian Electoral Commission into the issue of Disability Discrimination in the area of voting.

4.3 Chapter 7 - Promoting community recognition and acceptance

PWD agrees with all draft recommendations in this section and notes the resource implications for HREOC if it is to enhance its current work in improving community awareness of disability issues.

HREOC strategic planning

Recommendation: In light of HREOC's limited resources when compared with the aspirational scope and intent of the DDA, PWD considers that HREOC should engage in periodic strategic planning around its functions dealing with the DDA to ensure that those resources are used in both a planned and maximally strategic fashion. PWD believes that such a strategic planning approach needs to be transparent and to involve broad community participation in a similar way to this inquiry. PWD believes that such periodic strategic planning would allow for any relevant issues to be identified and for the prioritising by HREOC to be based on sound and identifiable reasoning. PWD considers that HREOC should be additionally resourced to fulfil this function and believes that the undertaking of the function itself would have a positive impact on improving community awareness of the DDA. PWD calls upon the Productivity Commission to make a recommendation that the functions of the Disability Discrimination Commissioner be extended to undertaking such a process every three years.

4.4 Chapter 8 - Competition and economic effects of the DDA

PWD does not agree with **draft finding 8.6** if the reference to 'consumers' therein is intended to refer to people with disability ourselves, rather than 'consumers' in the sense of the overall population of people demanding a service (of which people with disability form part). PWD's objection to the singling out of people with disability for cost sharing while other consumers do not pay for the costs of DDA compliance is both historical and financial in origin.

Historically, the discrimination against and oppression of people with disability is a wrong that needs addressing. It is obscene, and will be rejected entirely, if the compliance costs of the DDA are sheeted home to individuals with disability while the broader population, who have benefited from the oppression of people with disability, do not share the cost burden, if any, either through higher costs for goods and services, or through higher taxes.

Financially, people with disability have already borne the cost, or paid the price, for our isolation from that which much of society takes for granted. As Box 1, p. xxv shows we have lower incomes than the non disabled population, and we often live in institutional or other segregated or 'special' environments. Further, many studies have established that having a disability is actually more costly than not having a disability. For these reasons, again, it would be obscene to impose upon us anything like a 'user pays' system for the privilege of not being discriminated against.

4.5 Chapter 9 - Defining discrimination

Definitions of discrimination, harassment and vilification

In both the review of the *Ant-Discrimination Act,* 1997 (NSW) and our submissions to this inquiry, PWD has advocated for the replacement of the 'comparator' with a 'detriment test'. PWD does not resile from this position.

Nonetheless, in the event that the Productivity Commission does not accept those submissions, PWD would wish to express general agreement with **draft findings 9.5-9.7** and **draft recommendation 9.2**, subject to some suggested further amendments.

Recommendation: In clarifying what constitutes circumstances that are 'not materially different' for comparison purposes, the DDA should contain a provision that seeks to avoid the construction of the comparator in the Purvis Case by expressly providing that the comparator shall have none of the characteristics or consequences of the other person's disability, and shall require no services or accommodations.

In the High Court's consideration of the Purvis Case the majority arrived at a view that the DDA provided for only formal equality - the right to be treated exactly the same as everyone else – and so when constructing a comparator for the purposes of direct discrimination, the majority was able to construct a comparator who had the same characteristics as the person with disability and who was likely to be treated in exactly the same manner.

The majority's construction would appear to provide for direct discrimination only on the basis of an impairment, in that case brain injury, rather than on the basis of the characteristics (or functional implications of) the impairment – the 'disability'. To put it conversely, in the comparison between the young person in question and the 'comparator', the only difference, effectively, between them was that the young person in question had an impairment. It is a perverse outcome indeed for a disability discrimination act to so narrow down direct discrimination as to create a

comparison where the only difference between a person with disability and the person to whom they will be compared is the existence of an impairment at the body part level, rather than the implications of what that impairment gives rise to, a 'disability'.

It is submitted that the approach to the comparator by the majority in the Purvis Case has also erected additional barriers to participation for all people with disability whose behaviour is consequentially affected by their impairment, even where this affect is mild or moderate in degree. This group includes many people who have intellectual disability, acquired brain injury, mental illness and neurological impairments; the very people identified by the Productivity Commission as being those for whom the DDA has already been least effective in assisting (Draft Report, pp 103-104). PWD cannot therefore support the retention of the comparator test without additional provisions such as those suggested above that effectively reverse the decision of the majority on the comparator issue.

Recommendation: PWD also wishes to advise of an apparent oversight by the Productivity Commission concerning ss 7-9 of the DDA. Incongruously, these sections, forming part of the definition of disability discrimination, fail to cover incidences of proposed discrimination. As with its **draft recommendation 9.3** concerning indirect discrimination, PWD calls on the Productivity Commission to recommend that each of ss 7-9 be amended to cover incidences of proposed discrimination.

In respect of the DDA's provisions regarding harassment (see **draft finding 9.12**) PWD can see absolutely no reason why the coverage of these provisions should not apply to all substantive areas covered by the DDA. The current failure of the provisions to do so is anomalous, and counter-effective to the objects of the DDA being met. PWD does not believe that the Productivity Commission's legal advice on this issue should find any substantial impediment to the constitutionality of such broader protection. In short, the 'matters of international concern' addressed by the DDA are sufficiently broad to include harassment (and vilification, post.). (See *Soulitopoulos v La Trobe University Liberal Club* [2002] FCA 1316 (25 October 2002) per Merkel J of the Federal Court of Australia)

Recommendation: That the Productivity Commission recommend that the DDA's harassment provisions (ss 35-40) be extended to cover all areas, individuals and organisations covered by the other substantive provisions of the DDA.

Recommendation: That the Productivity Commission recommend the inclusion within the DDA of a provision such as that which exists in the NSW *Anti-Discrimination Act* making the vilification of people with disability unlawful.

4.5 Chapter 10 - Defences and exemptions

Commonwealth laws and programs and unjustifiable hardship

Draft recommendation 10.1 suggests the applicability of the unjustifiable hardship defence to all substantive provisions in the DDA. PWD agrees with this

recommendation, but for the inclusion of s 29 regarding Commonwealth Laws and Programs. There are several reasons for this.

Firstly, as a signatory to international human rights instruments requiring non-discrimination against people with disability, the Commonwealth is in fact the main party responsible for implementation of international human rights norms and standards, including anti-discrimination legislation, in Australia. Such instruments do not themselves qualify the non-discrimination principle by reference to 'unjustifiable hardship', so it may be argued that the Commonwealth is in breach of its international obligations by so limiting their obligations.

Secondly, the Commonwealth has a responsibility to show leadership through the administration of its laws and programs in a non-discriminatory fashion. PWD considers that such leadership would allow the Commonwealth to develop a Research and Development capacity, for example in the flexible delivery of services, that could be employed to educate the wider community. This potential resource, effectively 'best practice' in the area of the provision of non-discriminatory services, would be of inestimable value to the community and business, particularly given the trends towards an increasingly ageing and disabled society, and the increased export of Australian expertise in the area of services. It would be a false economy to allow the Commonwealth to retreat from this obligation for short term costs reasons, when the long term economic benefits of the national government showing leadership and sharing its intellectual property with the community is likely to be immense, both domestically and globally.

Lastly, any concerns about the impact of section 29 without the benefit of an unjustifiable hardship defence appear to be unfounded. **Figure 5.2** of the Draft Report, p. 78 establishes that HREOC receive only 3% of their total DDA complaints in this area. PWD has in fact found only a single decided case relying on s 29! The Commonwealth's exposure to complaints would therefore appear to be relatively insignificant, and would appear to pose none of the risks raised by the Productivity Commission at p. 50 of the Draft Report.

Recommendation: That the unjustifiable hardship defence should not apply to s 29, Commonwealth Laws and Programs

Special measures

PWD also strongly disagrees with **Draft recommendation 10.5** and **draft finding 14.3** so far as they refer to the eligibility criteria for 'special measures'. It is important to note that PWD's objection is a qualified one. PWD does not believe that discrimination legislation should exempt a special measure that cannot demonstrate that its exclusion of people with a particular type or types of disability, through the application of eligibility criteria, directly or indirectly, serves a valid purpose, and furthers the purpose of the special measure. In particular, PWD is aware of many such services that exempt, or omit to include within funding agreements, people with mental illness for no apparent reason.

PWD is also concerned that the provision of accommodation or services not be confused with the provision of a special measure. In particular, where a person

requires accommodation or services and is instead offered something else that the provider maintains is provided as a special measure, PWD does not believe that the exemption should apply. The case mentioned above regarding the young girl with disability seeking to be enrolled full-time in a mainstream class is on point. (Notwithstanding the recommendation that administration of special measures not be exempt, PWD can envisage arguments presented by respondents to the effect that a decision taken in an individual case is so interwoven with a consideration of the equitable distribution of resources across the special measure target group as to constitute a decision that goes to the funding arrangements for their special measures and so is exempt).

Recommendation: That s 45 be amended to prohibit its application to a special measure that cannot demonstrate that its exclusion of people with a particular type or types of disability, through the application of eligibility criteria, directly or indirectly, serves a valid purpose, and furthers the purpose of the special measure.

Recommendation: PWD would also like to see some clarification within s 45 regarding its relationship with other sections of the DDA:

- Building on **draft recommendation 10.6,** PWD believes that s 45 should in fact state explicitly that the section has no application where a more particular exemption applies;
- PWD also believes that s 45 should state explicitly that it does not have application where the complaint is of direct discrimination and the less favourable treatment alleged is, or includes, the failure to provide the required accommodation or services. PWD does not consider that s 45 was intended to provide an exemption to any entity that offers some, albeit inadequate accommodation or services in any of the areas covered by the Act and might then claim to have provided 'special measures'. In this context, PWD refers to the example cited earlier of the failed attempt to include a young girl with disability in a mainstream classroom. PWD is concerned to ensure that where the accommodation or services required, in that case by the parents, are not provided in whole or in part, but other accommodations or services are, that the provider of the non-required or incomplete accommodations or services should not get the benefit of protection under s 45.
- Lastly, PWD does not consider that a special measure exemption should apply to a measure imposed upon a person with disability without their consent or that of a lawful guardian. The beneficial nature of something done without lawful consent is clearly questionable. PWD notes that an amendment of this sort might impact in particular on coercive regimes under legislation such as Mental Health Acts. To this extent, PWD notes that it is open to governments to 'prescribe' such laws and thereby gain an exemption. PWD addresses a preferred scheme for obtaining such exemptions below.

Prescribed laws

Recommendation: PWD believes that a preferable approach to that embodied in s 47 (2) would be to build into the DDA a process similar to the temporary exemption process under ss 55-57 whereby a government wanting to exempt a law from the operation of the DDA would make application to HREOC for that exemption. Upon

HREOC determining the matter, interested parties would be entitled to seek review of the determination in the Administrative Appeals Tribunal.

In this way the contentions of governments about the need to exempt certain legislation could be tested, and it is conceivable that consistent with the principle of adopting the least discriminatory alternative, some resulting decisions may be to the effect that some parts only of certain Acts need to be exempted rather than the Acts as a whole. The spirit of **draft finding 10.10**, that exemptions "must be clearly defined and restricted to only those aspects of legislation or regulation for which an exemption is necessary for other public or social policy reasons" has equal application in the context of a government seeking to have a law 'prescribed', and PWD believes that this approach to prescribing legislation would ensure that only the relevant aspects of legislation were prescribed.

Insurance

PWD agrees with **draft finding 10.5** and **draft recommendation 10.3** regarding insurance. It is regrettable that the Productivity Commission does not have the advantage of a decision in the matter of *QBE v Bassanelli*, a Federal Court Appeal from a decision of the Federal Magistrates Court that will be point. PWD intervened as *amicus curiae* in that case and believes that the decision will in all likelihood provide some much-needed clarity regarding s 46. PWD is happy to make its submissions to the Court, and those of the other parties, available to the Productivity Commission should the Commission require.

PWD notes that the Inquiry into 'Protection of Human Genetic Information' by the Australian Law Reform Commission has looked at the issue of insurance, genetic information and the DDA.

Recommendation: PWD supports that inquiry's proposal (24-6, Discussion Paper 66, August 2002) that the DDA should be amended to clarify the nature of the information required to be disclosed by an insurer and to ensure that the complainant is entitled to access the information so disclosed. This is a clear reference to the amendments required of s 107.

Migration

PWD does not believe that Australia's discriminatory migration policy and practice should be maintained.

Recommendation: PWD disagrees with draft recommendation 10.4 and calls upon the Productivity Commission to recommend the removal of the exemption of the Migration Act (s 52).

Action plans

PWD believes that those provisions of the DDA that provide for the development and lodgement with HREOC of voluntary action plans should be significantly strengthened in three dimensions. First we believe that there should be a specialist advisory service established to assist agencies in the development of action plans.

This function should be resourced separately from the existing Disability Rights Unit, to ensure that it can effectively continue with other functions to an adequate level. Second, the DDA ought to be amended to empower HREOC to accept or reject a voluntary action plan, to deal with a situation where an agency develops a wholly inadequate or misdirected action plan, yet seeks to claim compliance with the DDA on the basis of the plan. Obviously an inadequate plan would not provide protection from a complaint of discrimination, but the individual complaints process is an inefficient way to deal with problems in voluntary action plans, and a structural remedy is greatly to be preferred. Thirdly, we believe that the DDA should be amended to require the development of (mandatory) action plans by Commonwealth government agencies, and those with an annual turnover of more than $10million. This proposal is loosely based on the Affirmative Action Agency established in the sex discrimination area.

Recommendation: PWD recommends that the DDA's Action Plan provisions be significantly strengthened by establishing a specialist advisory service to assist agencies in the development of these plans, amending the Act to allow HREOC to reject an inadequate or misdirected plan, and amending the Act to make action plans mandatory for Commonwealth Government agencies and agencies with a turnover of more than $10million.