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Ms Helen Owens  
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Disability Discrimination Act Inquiry  
Productivity Commission  
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**By email: [dda@pc.gov.au](mailto:dda@pc.gov.au)**

Dear Ms Owens

**Submission to the Productivity Commission on Draft Report: Review of the Disability Discrimination Act 1992**

I attended two days of hearings on the draft report in Sydney in February 2004. Although the transcripts are placed on the Commission's website, I wanted to get a sense of the way in which hearings were conducted and their general accessibility. In my view the proceedings were highly inclusive, enabling members of the general community to tell their stories and to be listened to in the most respectful way.

I was particularly struck by two stories that I heard in relation to employment. These stories were ones of people struggling to find productive work that would enable them to construct a sense of identity for themselves and to participate in the broader community. They were stories of people sending out hundreds of resumes over periods of years and literally getting nowhere. They were stories of great courage and perseverance.

I would like to make a brief submission springboarding from this observation. The Draft Report is at its most pessimistic in relation to employment. It concludes that the DDA has been relatively ineffective overall in eliminating disability discrimination in employment and that people with disabilities have persistently poorer employment outcomes than people without disabilities. The Commission's Draft Finding 5.1 is that "the number of complaints under the Disability Discrimination Act 1992 and the participants' views indicate that disability discrimination in employment remains a significant issue. Overall, the Act appears to have been least effective in reducing discrimination in employment".

This finding is of considerable importance given the centrality of employment to the scheme of the DDA and to notions of disability in general. Stone, for example, argues that 'disability' is an administrative category of the welfare state (stemming from the English poor laws) according to which the boundary between work and welfare is drawn (Deborah A Stone, *The Disabled State*, Temple University Press, 1988). She argues that the concept of need embodied in the categories which came to make up disability "was the mirror image of the concept of work" (ibid, 55). Engel and Munger's recent study of the ADA is premised on the assumption that the "link between

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identity and work is fundamental" (David M Engel and Frank W Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*, University of Chicago Press, 2003, at 116) and that "for persons with disabilities, therefore, attaining employment is a crucial step in the quest to achieve recognition as independent and worthy participants in society" (ibid, at 117).

In respect of strengthening the DDA in relation to employment, I support the Commission's recommendations for the imposition of a limited positive duty on employers. However, although an 'up front' duty that may arise as part of a firm's business planning process is a good thing, enforcement as part of an ad hoc complaints process may limit its utility. I also support any measures that would strengthen the use of the DDA's systemic powers, in particular the ability of the Disability Discrimination Commissioner or HREOC to initiate complaints, the use of representative complaints and adequate resourcing for the DDC to participate in Federal Court litigation as amicus curiae.

However, I wanted to also bring to your attention the general thesis of the Engel and Munger book referred to above. This book, *Rights of Inclusion*, is a study of the first 10 years of the ADA and traces the connections between the new law and the day to day lives of a group of interviewees with disabilities. The book examines the role of "rights" beyond the making of formal complaints, it asks "how newly enacted civil rights, such as those in the ADA, become interwoven with the life histories and legal consciousness of individuals who might assert them" (ibid, at 7).

While none of Engel and Munger's subjects filed a legal claim, the authors' view is that the role of rights is both "subtle and pervasive" and "significant" (ibid, at 240). The other aspect of Engel and Munger's work which is important is their drawing out of the relationship between rights and identity. Basically, work is fundamental to identity. Historically, disability has meant inability to work. The ADA contemplates the ability of millions of people to undertake work and thus to transform their identities. Engel and Munger conclude that the ADA's employment rights have been variably beneficial and this has depended less on the "formal qualities of the law" than on the ways that rights have become implicated in the construction of the identity of the ADA's beneficiaries and on their social circumstances (ibid, at 245). The law's traditional focus on "doctrinal battles" in appellate court decisions provides an "extremely limited and at times distorted picture of the difference the ADA has made" (ibid, at 250).

While I do not by any means advance this perspective as a reason to cease to advocate for better implementation and enforcement of the DDA, I do think it is interesting to look at the subtle effects of the law on the rights consciousness of people with disabilities, employers, service providers, governments and other members of civil society.

Thank you for the opportunity to participate in the inquiry.

Yours sincerely

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