PRODUCTIVITY COMMISSION REVIEW
Disability Discrimination Act 1992 (DDA)

We endorse and adopt the submission of the *Disability Rights Network* in which our Centre participates.

Further,

2.1 Definitionall issues
Would an alternative definition of disability be more appropriate?

The *Social Security Act* and State and Territory worker's compensation legislation definitions operate on a medical model, involving impairment tables and ability/inability to work. The preoccupation there is to allocate benefits according to a hierarchy of need.

The DDA correctly on our view focuses on discrimination arising out of a disability rather than on the nature/degree of the particular disability. The DDA's function is to protect rights and promote equality.

Definitions of disability used for different purposes are appropriate.

Expansion of the definition by any means which will avoid technical arguments seeking to isolate a "disability" from its manifestations as contended for by the *Disability Rights Network is* supported.

Do you have any comments on the definitions of direct and indirect discrimination?

We again adopt the comments of the *Disability Rights Network* in respect of the shifting onus of proof, "doubling" of "defences" and the consequences of a successful section 11 "Unjustifiable hardship" defence.

Fortunately the High Court has shown an inclination to give the "inherent requirements of the job" defence a restricted operation. It has done so in order to "prevent self-definition by employers of the "requirements" of employment which taken at face value would permit them to escape the higher requirements of the Act". The Court has said to do so would allow the "requirements" to "extend to

whatever an employer declares to be necessary, convenient or efficient for its operation."
X v Commonwealth of Australia & Anor (2000)EOC 93-054

Reasonable adiustment and unjustifiable hardship

A successful resort by a respondent to the "Unjustifiable hardship" defence has the capacity to be a "once and for all" defence if the temporal aspect of "hardship" is not acknowledged. What may constitute unjustifiable hardship this year for a respondent service or business can usually be characterised as "reasonable adjustment" by planning and costing out over a period of time. Temporary exemption is therefore an appropriate mechanism to achieve the objects of the DDA rather than a "point in time" determination of "unjustifiable hardship" which will in effect sanction the discrimination to continue. It holds out the possibility to a respondent that there is a "win" to be had which does not involve either a change of attitude or behaviour.

This is a means whereby the cost of litigating an "unjustifiable hardship' defence can be directed towards furthering the objects of the DDA. Why bother to expend resources on an "unjustifiable hardship" defence if the best result you could hope for was a temporary exemption and the requirement for an action plan?

Impact on competition of reasonable adjustment

A complaints driven process will impact earlier in time on some than on others. But there is a cost in delay and a competitive advantage in being amongst the vanguard.

How has the prohibition of harassment worked in practice?

Anecdotally at least it is not working well. We have received complaints. In most instances it is perpetrated on disabled youth/young adults in their first or near first workplaces. Given the difficulties faced by this group in accessing the workforce in the first place, unsurprisingly their preference is to attempt to blend in rather than draw further attention to themselves by making a complaint once they become aware of their rights. It is an appropriate and overdue reference for the Commission's investigation function.

Do the offlects of the DDA adequately describe the social, environmental and economic problems that the legislation should address?

We question why the objects(a) and (b) contain the words "as far as possible" and "as far as practicable". We believe those words perpetuate stereotypes of persons with disabilities as "different" and that there is some qualification to the absolute right to be treated in a non-discriminatory fashion and equally before the law to be afforded to people with disabilities. We believe attitudinal change is a prerequisite to lasting behavioural change and equality before the law is a paramount human right. A reordering of the objects to reflect that hierarchy is suggested.

How to measure the effects of the DDA

We draw the Inquiry's attention to HREOC recently (10 years of the DDA forum in Darwin April 2003) referring to statistics identifying participating employment rates for people in the APS having a disability has shrunk significantly over the ten year period.

Progress in eliminating discrimination in different areas and for different types of disability

Non English Speaking Background (NESB)
Remote/regional
Race
Poor outcomes in these areas which are all very important in the Northern Territory context.

Equality before the law

Parents with a disability have been found to have markedly poorer outcomes in the child welfare jurisdiction in NSW. No study we are aware of has been undertaken in the Northern Territory but we would be surprised if the outcomes are not even poorer in the Northern Territory.

We also wish to address the Inquiry on the issue of Complaints specifically the issues of

What affects the willingness and ability of people with disabilities to make complaints to HREOC and proceed to the Federal Court?

Presence of any one of the indicia of disadvantage or a combination of these will affect willingness and ability to access the process. As discussed below, the Federal Courts' determination to position itself as a costs jurisdiction will:

Restrict the range and number of matters brought before the court;

Restrict the likelihood of innovative or novel claims

Damage the public perception of the process as accessible for a group who may already be suffering dis-empowerment as a consequence of a disability.

There are particular barriers to making complaints in the Northern Territory.
These include:
The lack of pro bono assistance available
The lack of skilled practitioners in jurisdiction
The lack of knowledge about individual rights especially in remote areas Cultural barriers
Fear of being labelled as a trouble maker in a small town

Whether the introduction of the Federal Magistrate's Service has led to improvements in the hearing of complaints.

Refer to comment on treatment of costs in the Federal Magistrates' Court.

Should the DDA be amended to allow HREOC andlor other appropriate bodies to initiate complaints?

This would provide a protection for individuals who are unwilling to lodge a complaint for fear of repercussions. This fear is heightened when living in a 'small town' and where there are few options in terms of either service providers or facilities.

Is there sufficient publicity for complaints and outcomes?

Absolute Confidentiality as a term of negotiated settlement is the norm. This means the lesson is lost in the broader educative sense.

Further we wish to address the inquiry on emerging trends in respect of the *treatment of legal costs in discrimination matters corning before the Federal Magistrate's Court.*

The following statement contained in the Issues Paper:

> *"Unless the Court regards a case as frivolous or vexatious complainants can usually expect to pay only their own costs even if they lose the case."*

is, we believe no longer accurate.

That was the position adopted by the Court in the early days of the Federal Magistrates' Court jurisdiction (Tadawan v State of South Australia [2001] FMCA 25, per Raphael J para 62). Such cases clearly articulate that at least initially the Court was anxious not to discourage complainants from bringing claims which may well have merit because of a fear of an adverse costs order in the event that the claim was unsuccessful.

Cases such as Minns v State of NSW (No2) [2002] FMCA 197 have ruled that

> Tadawan was decided very shortly after the commencement of legislation which saw discrimination matters being finally decided in Federal Courts;
>
> Before that time preliminary determination of anti-discrimination matters federally and the final determination in the States was made in non costs tribunals;
>
> There was concern in the community that putting these matters into a costs arena might discourage potential applicants from bringing their claims;
>
> To the extent that it may be considered a precedent for the non-imposition of costs in "deserving cases" this should no longer continue;
>
> The superior Courts have now made it clear what the law should be in relation to applications in the anti-discrimination area.
>
> That if public interest is to be used to mitigate the usual order for costs ie the winner gets costs paid by the loser; then that public interest must go beyond mere precedent value. Once some

> exclusively personal benefit is sought, the prospects of the proceedings having the necessary quality of public interest is much diminished,

The intention in the Federal Magistrates' Court to award legal costs against an unsuccessful applicant in anti-discrimination proceedings instituted subsequent to an unsuccessful conciliation outcome and a notice of Termination by the President of HREOC on the bases outlined above is of enormous concern to complainants.

It creates a situation where the power equation between a complainant and a respondent has tilted mightily in favour of a respondent. A recalcitrant respondent can refuse to meaningfully conciliate (no consequence to that), have the complaint terminated by HREOC and force the complainant into court proceedings where a respondent will be clearly advantaged in terms of available resources. The complainant will have the very real apprehension of substantial costs. The moment compensation comes into the equation (some exclusively personal benefit) the Court appears to be saying a complainant is at risk of costs.

In Minns v NSW the Court appears to speak of that concern *in the past tense.* For our clients it is very likely the single most important consideration in deciding whether to continue with a complaint beyond a terminated conciliation in the Commission.

This development puts undue pressure on applicants to agree to unsatisfactory outcomes at conciliation which are further undermined by the application of absolute confidentiality clauses which always seem to be a fundamental term of any settlement.

This development neutralises what could otherwise be a robust complaints driven process.

Barriers to accessing the DDA in the Northern Territory context.

The single most significant barrier to accessing relief under the DDA in the Northern Territory is cost.

We also wish to address the Inquiry on the issue of **Employment** specifically the issues of

How the eligibility criteria for Disability Support Pension and employment support services affected incentives for people with disabilities to participate in the labour force ?

The eligibility criteria for Disability Support Pension ("DSW) see (section 94 of the *Social Security Act 1991)* being primarily a medical model coupled with an ability/inability to work assessment (usually also performed by a medical practitioner rather than an expert in occupational therapy/workplace assessment) as implemented has emerged as a particularly blunt instrument of social policy. We are seeing numerous people who have been on DSP for long periods of time having DSP revoked on the basis of cursory medical assessments/reviews by CMO's who are seeing a person for the first time. Many people feel their disabilities are being ignored or trivialised by this process.

We also wish to address the Inquiry on the issue of *proposed amendments to the HREOC Act being considered by the Senate Legal and Constitutional Legislation Committee*

The proposal to make HREOC's intervention function in proceedings subject to the Attorney-General's approval is ill conceived. HREOC has intervened in 18 proceedings where the Commonwealth was a respondent. HREOC made submissions contrary to the Commonwealth's position on 16 of those occasions.

The proposal to abolish specialist Commissioners is opposed.

Power to recommend payment of compensation/damages is an essential remedial power for the HREOC to retain.

It is proposed to expand this outline by way of supplementary written material prior to addressing the Inquiry in Darwin.

This Outline of Submissions was prepared by DARWIN COMMUNITY LEGAL SERVICE Inc 8 Manton Street Darwin 0801. Phone 08 89 82 1111 Please direct all inquiries in the first instance to the attention of Ms Wendy Morton, Disability Discrimination Advocate.

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