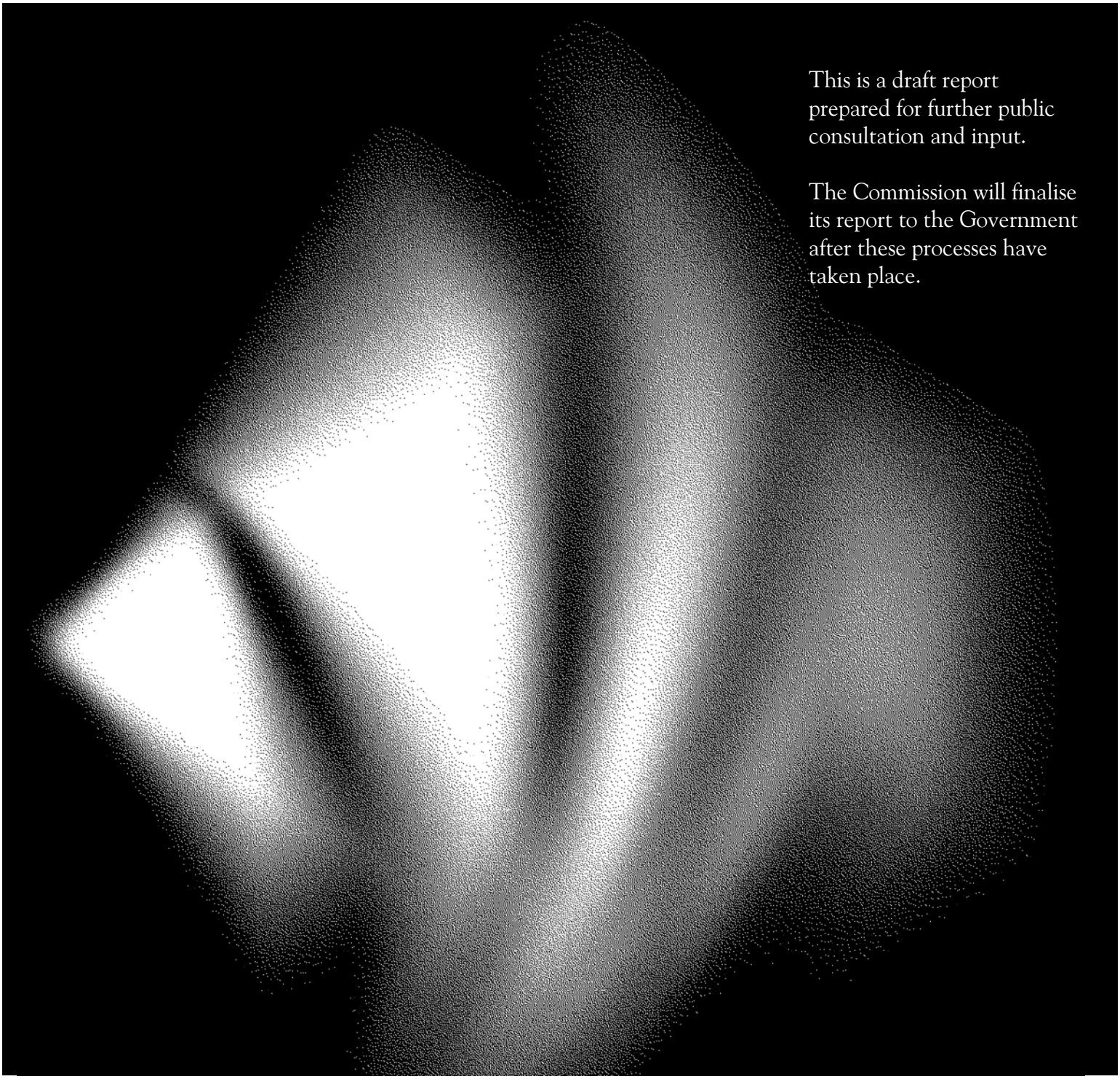
PRODUCTIVITY COMMISSION

Review of the *Disability Discrimination Act 1992*

Draft Report



This is a draft report prepared for further public consultation and input.

The Commission will finalise its report to the Government after these processes have taken place.

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Publications Inquiries:
Media and Publications
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Tel: (03) 9653 2244
Fax: (03) 9653 2303
Email: maps@pc.gov.au

General Inquiries:
Tel: (03) 9653 2100 or (02) 6240 3200

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The Productivity Commission

The Productivity Commission, an independent agency, is the Australian Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Information on the Productivity Commission, its publications and its current work program can be found on the World Wide Web at www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.

Opportunity for further comment

You are invited to examine this draft report and comment on it in writing and/or by attending a public hearing.

Public hearings will be held in capital cities and other locations where there is sufficient interest from participants. Confirmation of dates and venues will be advertised through our circulars and in major newspapers and on our website. Public hearings will be commencing late January 2004. Anyone interested in attending a hearing should fill in a registration form or contact the Productivity Commission.

Additional hearings may be organised via telephone or video conference for those people unable to attend venues.

The final report will be prepared after the public hearings and further submissions have been received and will be forwarded to the Australian Government in 2004.

Appendices

The Productivity Commission drafted a number of descriptive appendices on specific topics in the course of preparing this report. These appendices support the analytical chapters of the report. Copies of appendices are available on request from the Commission.

Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Helen Owens	Presiding Commissioner
Cate McKenzie	Associate Commissioner

Terms of reference

National Competition Policy Review of the *Disability Discrimination Act 1992*

PRODUCTIVITY COMMISSION ACT 1998

I, IAN CAMPBELL, Parliamentary Secretary to the Treasurer, under Parts 2 and 3 of the *Productivity Commission Act 1998* and in accordance with the Commonwealth Government's Legislation Review Schedule, hereby refer the *Disability Discrimination Act 1992* (DDA) and the Disability Discrimination Regulations 1996 ("the legislation") to the Productivity Commission for inquiry and report within 12 months of the date of receipt of this reference. The Commission is to hold hearings for the purpose of the Inquiry.

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:

      i) social welfare and equity considerations, including those relating to people with disabilities, including community service obligations;

      ii) government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity;

      iii) economic and regional development, including employment and investment growth;

      iv) the interests of consumers generally or of a class of consumers (including people with disabilities);

v) the competitiveness of Australian business, including small business;

vi) the efficient allocation of resources; and

vii) government legislation and policies relating to ecologically sustainable development.

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.

3. In making assessments in relation to the matters in (2) the Productivity Commission is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement and the Government's guidelines on regulation impact statements. The Report of the Productivity Commission should:

a) identify the nature and magnitude of the social (including social welfare, access and equity matters), environmental or other economic problems that the legislation seeks to address;

b) ascertain whether the objectives of the DDA are being met, including through analysis and, as far as reasonably practical, quantification of the benefits, costs and overall effects of the legislation upon 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;

c) identify whether, and to what extent, the legislation restricts competition;

d) identify relevant alternatives to the legislation, including non-legislative approaches;

e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of the alternatives identified in (d), including on, or in relation to, people with disabilities.

f) identify the different groups likely to be affected by the legislation and alternatives;

g) list the individuals and groups consulted during the review and outline their views, or reasons why consultation was inappropriate;

h) determine a preferred option for regulation, if any, in light of the factors set out in (2); and

i) examine mechanisms for increasing the overall efficiency of the legislation, including minimising the compliance costs and paper burden on small business, and, where it differs, the preferred option.

4. In undertaking the review, the Productivity Commission is to advertise nationally, consult with State and Territory Governments, key interest groups and affected parties (in particular, people with disabilities and their representatives) invite submissions from the public, and publish a draft report. To facilitate participation by people with disabilities, the Productivity Commission is to ensure that all hearings are held at accessible venues and that documentation and information distributed during the consultative and review processes including the draft and final reports, are available in accessible formats.

5. In undertaking the review and preparing its final report and associated recommendations, the Productivity Commission is to note the Government's intention to release the report and announce its responses to the review recommendations as soon as possible, with the response to be prepared by appropriate Ministers, including the Attorney-General.

IAN CAMPBELL
5 February 2003

Contents

Appendices

Copies of the appendices listed below are available on request from the Commission.

BOXES

FIGURES

TABLES

Acronyms

ABA	Australian Bankers' Association
ACROD	National Industry Association for Disability Services
ADA	*Americans with Disabilities Act 1990*
AHRC	Australian Human Rights Commission
AHURI	Australian Housing and Urban Research Institute
AIHW	Australian Institute of Health and Welfare
ANAO	Australian National Audit Office
ANTA	Australian National Training Authority
APS	Australian Public Service
ATO	Australian Tax Office
ATSIC	Aboriginal and Torres Strait Islander Commission
BAS	Business Activity Statement
BCA	Building Code of Australia
CAL	Copyright Agency Limited
CDS	Commonwealth Disability Strategy
CPA	Competition Principles Agreement
CRS	Commonwealth Rehabilitation Service
CSDA	Commonwealth State Disability Agreement
CSTDA	Commonwealth State and Territory Disability Agreement
DDA	*Disability Discrimination Act 1992* (Cth)

DDLS	Disability Discrimination Legal Service
DEST	Department of Education, Science and Technology
DSA	*Disability Services Act 1986*
DSP	Disability Support Pension
FAQs	Frequently Asked Questions
FCA	Federal Court of Australia
FMS	Federal Magistrates Service
FTE	Full time equivalent
GBE	Government Business Enterprise
HILDA	Household, Income and Labour Dynamics Australia
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ILO	International Labour Organisation
MCEETYA	Ministerial Council on Employment, Education, Training and Youth Affairs
MCS	Multiple Chemical Sensitivity
MOU	Memorandum of Understanding
NESB	non-English speaking background
NILS	National Information and Library Service
NCVER	National Centre for Vocational Education Research
NCYLC	National Children's and Youth Law Centre
NRS	National Relay Service
OH&S	Occupational Health and Safety
RDA	*Racial Discrimination Act 1975* (Cth)

RIS	Regulation Impact Statement
SAISO	Strategic Assistance for Improving Student Outcomes
SDA	*Sex Discrimination Act 1984* (Cth)
SOCOG	Sydney Organising Committee for the Olympic Games
TAFE	Technical and Further Education
TTY	Telephone Typewriter
UNCHR	United Nations Commission on Human Rights
UNCSD	United Nations Commission for Social Development
VET	Vocational Education and Training
WHO	World Health Organisation

Glossary

activity restriction	The impact of an impairment on an individual's ability to function without assistance
disability	A restriction on, or lack of, ability to perform an activity in a normal manner as a result of an impairment
direct discrimination	Treating a person less favourably, in response to their her disability, than a person without the disability would be treated in similar circumstances
equality of opportunity	Treating all individuals on merit. That is, decision making should not account for irrelevant characteristics.
equality of outcome	Taking account of disadvantage by requiring positive differential treatment of disadvantaged groups to achieve the same outcome as for advantaged groups
equivalent access	Access by people with disabilities to a premises with an equivalent standard of amenity, availability, comfort, convenience, dignity, price and safety. Equivalent access does not include a segregated or parallel service.
formal equality	An extreme form of equality of opportunity, which rules out any adjustment or favourable treatment for disadvantaged groups because to do so would discriminate against those who do not receive the preferential treatment
handicap	The social, behavioural and psychological consequences of disability. That is, the disadvantages facing the individual as a result of an impairment or disability.

harassment	Humiliating comments, actions and/or insults about a person's disability, which create a hostile environment
human rights	Rights recognised as inherent in every person by virtue of common humanity and innate dignity as human beings. They tend to be derived from moral or ethical codes and social mores. Many human rights are recognised in international conventions and local legislation
impairment	Any loss or abnormality of bodily function, whether physiological, psychological or anatomical
indirect discrimination	Applying the same rule or condition to everybody but with a disproportionate effect on people with a disability (and when the rule is not 'reasonable' in the circumstances)
inherent requirement	The activities that are essential to the satisfactory completion of the tasks required in a particular job
medical model	A view of disability that places it in a medical context as a condition to be 'cured'
open employment services	Services that assist in the transition of people with disabilities from special education or employment in a supported work setting, to paid employment in the open labour market. Recipients of these services are not paid by the service provider, but by their employer
pre-market discrimination	A situation in which a worker is disadvantaged in the labour market as a result of discrimination experienced in education
post-market discrimination	A situation in which a worker is discriminated against in the labour market solely as a result of their disability, not for their other characteristics
social model	A view of disability that places it in a social context and focuses on social barriers to participation

substantive equality	taking limited account of disadvantage by providing assistance to disadvantaged groups so they have the same opportunities as those of advantaged groups
supported employment services or business services (previously known as sheltered employment)	Services that provide support *and* employment to people with disabilities. Recipients of these services are employed and paid by the service provider, which receives part funding from the Australian Government
supported wage system	A system whereby people with a disability receive a proportion of the full Award wages equivalent of their level of productivity relative to that of a fully productive worker. Someone who is 70 per cent productive, for example, may receive 70 per cent of the Award wage.
unjustifiable hardship	Requirements to provide adjustments for people with disabilities are limited to the point where it would impose an 'unjustifiable hardship', taking into account likely benefits or detriments to any persons concerned and the financial circumstances of the provider.
victimisation	Threatening or subjecting a person to a detriment because they have made (or propose to make) a discrimination complaint.
vilification	Offensive, insulting, humiliating and/or intimidating behaviour.

Key points

- The *Disability Discrimination Act 1992* (DDA) seeks to provide a fair go for Australians with disabilities—it gives them the right to substantive equality of opportunity in areas like employment, education and public transport.
- The DDA appears likely to have provided net benefits to the Australian community:
  - many benefits are intangible but widespread
  - costs of complying with the DDA should be quite small for many organisations
  - in-built safeguards help ensure costs are outweighed by benefits
  - its impact on competition is likely to be limited.
- But there is not enough information to quantify these costs and benefits. Comment is requested on costs and benefits both for people with disabilities and businesses.
- Overall, the DDA has been reasonably effective in reducing discrimination. But its report card is mixed and there is some way to go before its objectives are achieved.
  - People with physical disabilities have been helped more than those with mental and intellectual disabilities.
  - Access to transport and education has improved more than employment opportunities.
  - People in regional areas, from non-English speaking backgrounds and Indigenous Australians still face particular disadvantages—but race discrimination, language, socioeconomic background and remoteness also play a part.
- Minor changes would make the DDA more effective, including:
  - changes to the Act (to clarify definitions, extend the power to make disability standards and restrict the scope of exemptions)
  - changes to complaints processes (to provide more certainty about court costs and allow organisations and HREOC to initiate complaints)
- Further measures may be considered to improve employment opportunities for people with disabilities, consistent with economic efficiency. Comment is sought on:
  - the appropriate sharing of costs of adjustments between government and business
  - the introduction of a 'positive duty' on employers to identify and work toward removing barriers to the employment of people with disabilities
- The DDA, and HREOC, need the support of mainstream mechanisms wherever possible:
  - in monitoring and enforcing disability standards
  - through co-regulation (backed by disability standards)
- These recommendations would promote the objectives of the DDA and enhance its net benefits to the Australian community.

Overview

The *Disability Discrimination Act 1992* (DDA) is about providing a fair go for Australians with disabilities.

This inquiry examines the DDA's progress over the past decade and explores ways to improve its effectiveness. It has its origins in the Competition Principles Agreement (CPA) between Australian governments to review legislation that affects competition.

There is broad agreement that the rights of people with disabilities should be protected. But in practice, large numbers of Australians with disabilities are disadvantaged in many areas of life (box 1). The DDA seeks to eliminate any of this disadvantage caused by discrimination.

Box 1 **Disability and disadvantage**

A person with a disability is less likely to:

- complete year 12 schooling
- have a post-school qualification
- have a job

and is more likely to:

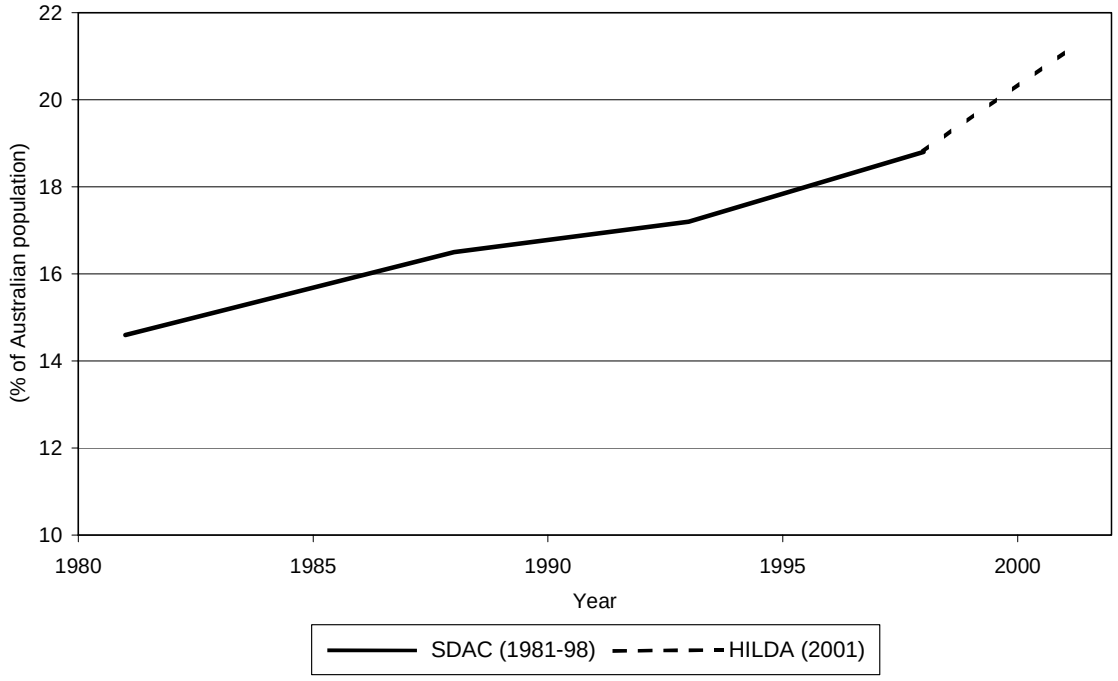
- have a lower income
- receive a government pension
- live in institutional accommodation
- rent public housing
- be in prison.

People with disabilities are a diverse group with different degrees of disability, and make up a large share of the Australian population. The Australian Bureau of Statistics (ABS) estimated that 3.6 million people had a disability in 1998, almost one-fifth of the total population. The DDA covers even more people than this estimate, because its definition of disability is much broader than that used by the

ABS.[1] The DDA also covers the families, friends and carers of people with disabilities.

The proportion of people reporting a disability is increasing over time (figure 1). This rise is partly due to better diagnosis and greater scope and willingness to report disability. But it also reflects the ageing of the population. This trend is expected to continue.

Figure 1 **The reported disability rate has risen[a]**



a The disability rate has been standardised to allow meaningful comparisons over time.

The DDA at a glance

The DDA makes it unlawful to discriminate against people because of disability. It has three objectives:

- to eliminate 'as far as possible' discrimination on the ground of disability
- to ensure 'as far as practicable' equality before the law for people with disabilities

[1] The ABS records the number of people who report having a disability that is current, has lasted for six months or more and that affects everyday activities. The DDA has no duration or effect requirements and states that the disability can occur in the past, the present or the future.

- to promote community acceptance of the rights of people with disabilities.

The Productivity Commission has identified many ways in which the DDA could be improved, but it does not suggest changing these aims.

The DDA operates along-side similar legislation in each State and Territory. There are good reasons to keep both systems (box 2). But cooperation among anti-discrimination bodies could be improved.

Box 2 **The DDA and State and Territory anti-discrimination laws**

All States and Territories have anti-discrimination laws that cover disability, most pre-dating the DDA. Despite some overlap between these Acts and the DDA, the Commission considers that the current approach is appropriate.

- Anti-discrimination legislation is an important statement about the human rights principles that underpin each government's view of society.
- The States have clearer Constitutional power to legislate in this area than the Australian Government.
- The DDA provides a national framework and covers Australian Government departments and agencies.
- There is the opportunity for regulatory benchmarking by jurisdictions.
- Arrangements will converge over time as DDA disability standards are introduced.

The definition of disability in the DDA is very broad. It includes physical disabilities, intellectual disabilities, mental illness and many other forms of disability. It covers people who have had a disability in the past, currently have a disability, or might have a disability in the future. This focuses attention on possible discrimination, not whether a person has a disability.

The DDA makes it unlawful to discriminate in specific areas of activity because of disability (box 3). Taken together, these activities cover nearly all areas of community life.

Discrimination can be either *direct* or *indirect.*

- Direct discrimination occurs when a person is treated less favourably because of a disability.
- Indirect discrimination occurs when a rule or condition that applies to everyone particularly disadvantages people with disabilities.

The DDA relies largely on individual complaints for enforcement. But it also allows for public inquiries, disability standards and voluntary action plans.

Box 3 **Areas of activity covered by the DDA**

There is no blanket prohibition on disability discrimination in the DDA. It makes it unlawful to discriminate in the following areas of activity:

- employment
- education
- access to premises used by the public (including public transport)
- the provision of goods, services and facilities
- accommodation
- the purchase of land
- activities of clubs and associations
- sport
- the administration of Commonwealth laws and programs
- requests for information.

A number of statutory exemptions limits the DDA's coverage.

Source: Disability Discrimination Act 1992, ss 15-30, 45-55.

The DDA is one of a suite of human rights Acts. Others are the *Human Rights and Equal Opportunity Commission Act 1986,* the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. There is also a proposed Age Discrimination Bill. The Human Rights and Equal Opportunity Commission (HREOC) administers all of this legislation.

Achieving equality

The DDA is based on a 'social' model of disability. It aims to remove barriers that prevent people with disabilities from enjoying equal opportunities to participate in the life of the community.

The DDA gives people with disabilities the right to 'substantive equality' (box 4). People and organisations covered by the Act 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'.

'All relevant circumstances' must be considered when deciding if there is 'unjustifiable hardship'. These include the effect on the person with a disability and the effect on the person or organisation that has to make the adjustment. The effect

on the whole community can also be taken into account—for example, where heritage considerations make it difficult to make a building accessible.

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 the benefits outweigh the costs and they do not impose undue financial hardship.

The DDA does not require equality of outcomes for people with disabilities. For example, people with disabilities must be able to meet the inherent requirements of a job, and employers are able to choose the best applicant on merit. Improving outcomes for people with disabilities is important, but should be pursued more directly through improved disability services and other mechanisms. The DDA should not cover the establishment, funding or eligibility criteria of disability services—these are properly the responsibility of government. But the DDA should apply to the administration of those services.

Box 4 **Equality can have different meanings**

Equality is central to anti-discrimination law, but different people use the term 'equality' to mean different things.

Formal equality is the right to be treated exactly the same as everyone else. But sometimes treating a person with a disability exactly the same as a person without a disability will not remove the barriers to participation. Receiving the same printed information as everyone else is no help if you are blind.

Equality of outcome is the right to end up with the same outcome as other people. But it can be hard to agree on what this means. For example, what role should merit play? Often the only way to achieve equal outcomes is to provide disability services. This goes beyond the scope of anti-discrimination legislation.

Substantive equality refers to a middle course—the right to have the same opportunities as others. It goes further than just equality of treatment. People and organisations must make sure that people with disabilities can take advantage of the same opportunities as other people, even if this means treating them differently. But it does not go as far as requiring equality of outcomes. It is up to individuals to turn equal opportunities into outcomes, based on individual merit. It also places limits on what people and organisations are expected to do, to help ensure any adjustments are in the best interests of the community as a whole, and that they do not impose undue financial hardship.

Impact of the DDA

It is difficult to measure how well the DDA has met its objectives. First, it is hard to untangle the effects of the DDA from other influences, such as:

- State and Territory anti-discrimination legislation
- the availability of disability services and the Disability Support Pension
- de-institutionalisation and 'mainstreaming' of many people with disabilities
- improved diagnosis and treatment of people with disabilities
- demographic changes such as the ageing of the population
- technological developments, such as new information technologies, that have reduced barriers faced by people with disabilities.

Second, there is no single direct measure of discrimination. The Commission looked at many sources of information including:

- the number of DDA complaints
- outcomes for people with disabilities (such as employment rates and educational achievement)
- indicators of accessibility (such access to public transport)
- results of DDA complaints and inquiries.

The Commission has used these measures, as well as many thoughtful submissions, to assess the effectiveness of the DDA against each of its objectives.

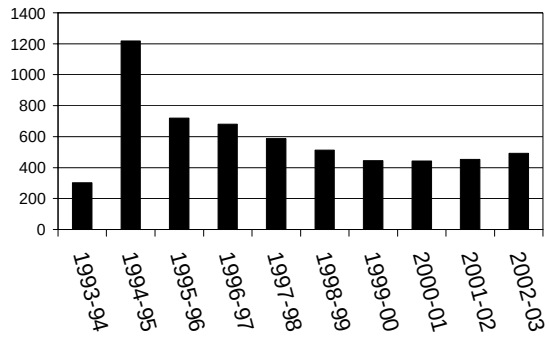
Eliminating discrimination

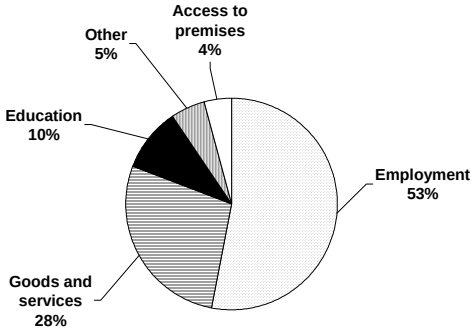
The first objective of the DDA is to eliminate discrimination 'as far as possible'. The number of complaints gives some information about the effectiveness of the DDA in reducing discrimination.

The number of DDA complaints fell from 1994-95 to 1998-99, but has been relatively stable since (figure 2). Taking account of the increase in the number of people with disabilities, the 'complaints rate' has fallen significantly. But this 'improvement' in the complaints rate is not conclusive. Only small numbers of complaints are made each year, and they might not reflect the experiences of people who do not formally complain. Other factors, such as the accessibility of the complaints process, might also affect the number of complaints.

Figure 2 **DDA complaints**

Complaints have fallen … … and they are dominated by employment[a]





a DDA complaints to HREOC, 1993-94 to 2002-03. **a** DDA complaints to HREOC, 2001-02.

The DDA has only been in place for ten years. Overall, after allowing for other influences, it appears to have achieved mixed results in different areas of activity.

In 2001-02, as in most years, almost half of all DDA complaints were in the area of employment. The second largest area of complaints was the provision of goods, services and facilities (over one quarter of all complaints). Fewer complaints were made in other areas.

By a number of other measures, the DDA appears to have been:

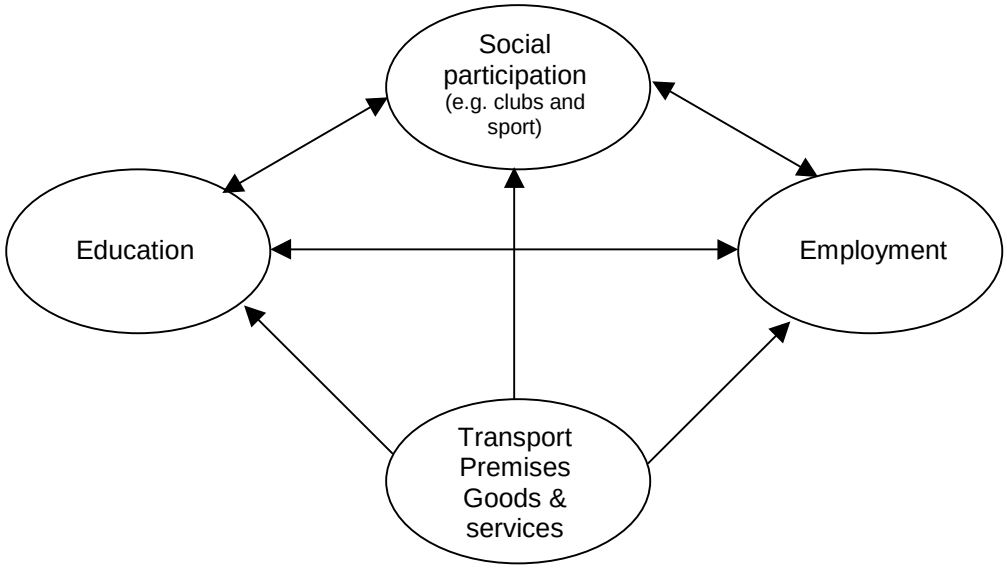
- least effective in reducing discrimination in employment
- more effective in improving educational opportunities for school students with disabilities. The number of students identified as having disabilities in mainstream schools has grown substantially. But this has strained the resources of many schools, especially in the non-government sector.
- somewhat effective in making public transport more accessible. A public transport disability standard was introduced last year and many providers are already well ahead of agreed targets. Most improvement has been in cities, but even there, some services (such as taxis) are much less accessible than others. A truly accessible and affordable public transport service is still some way off for many people with disabilities.
- reasonably effective in improving access to new public buildings. But its effectiveness has been limited by inconsistencies with the Building Code of Australia. It has been less effective at improving the accessibility of existing buildings, particularly those with heritage considerations.
- effective in reducing discrimination in areas such as telecommunications and electronic banking. But concerns remain about discrimination in other areas, such as insurance.

The DDA also appears to have achieved uneven results for different groups of people with disabilities. It appears to have been:

- more effective for people with mobility, sight or hearing impairments than for people with mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome.
- less effective for people with dual or multiple disabilities and people living in institutions.
- less effective for people living in rural and remote regions, those from non-English speaking backgrounds and many Indigenous Australians. However, this might reflect disadvantages other than disability—such as race discrimination, language barriers, socioeconomic background and remoteness.

This is a somewhat mixed report card. But ten years is not a long time in which to achieve the fundamental changes sought by the DDA. Everything is linked to everything else—reducing discrimination in one area of society can have flow-on benefits in many other areas (figure 3).

Figure 3 **Discrimination in one area has flow-on effects**



Accessible public transport can be fully enjoyed only when destinations become accessible. Discrimination in education feeds into limited employment opportunities—and access to both requires accessible transport and buildings. Limited employment opportunities, in turn, affect income levels and opportunities for social participation. 'Vicious cycles' of disadvantage can easily emerge. But by

removing barriers, the DDA can promote 'virtuous cycles' based on improved accessibility and full participation.

Equality before the law

Inquiry participants raised four areas of concern relating to this second objective of the DDA:

- institutional accommodation
- decision making by and for people with cognitive disabilities
- access to justice and civic participation
- laws with discriminatory effects.

The DDA has few provisions that deal directly with this objective, and there are practical limits to the DDA's potential impact in these areas. The States and Territories have primary responsibility for many important issues, such as institutional accommodation, legal guardianship and many areas of justice.

Promoting community acceptance

The DDA appears to have had some success in achieving this third objective, mainly through high profile complaints and inquiries, and the development of disability standards. HREOC has also used its limited resources to provide useful information through research, guidelines and a comprehensive website.

However, knowledge of the DDA among many people with disabilities and the general community still appears to be limited. There is significant scope to improve awareness.

Competition and efficiency

Although social issues are a major focus of this inquiry, competition and economic efficiency issues are also important. As noted, this is a CPA Review. CPA principles require that legislation should not restrict competition unless the benefits to society of that restriction outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition. Restricting competition imposes efficiency costs on the whole community—including people with disabilities.

Benefits and costs

On the one hand, the DDA could improve the operation of the economy if reducing disability discrimination in employment increased the quantity of labour. It could also improve efficiency if this led to better matching of jobs and job seekers. The DDA's limited effectiveness in employment means these potential benefits are not being fully achieved.

On the other hand, the DDA could create significant unnecessary costs if large numbers of people and organisations are forced to make expensive adjustments that are not required. However, the DDA has several in-built 'safeguards' that try to balance benefits and costs:

- the unjustifiable hardship test in DDA complaints and disability standards
- disability standards are subject to the Regulation Impact Statement process to ensure they provide net benefits
- HREOC can grant temporary exemptions to disability standards in cases of hardship.

Sharing the costs

But even if the benefits outweigh the costs, the question still arises as to who should bear the costs of pursuing social objectives. There are two different approaches to this issue.

The first approach argues that, if the government (on behalf of the community) has a particular social objective which imposes costs on business, the costs should be funded out of taxes. This implies that government should pay for adjustments needed to provide equal opportunities for people with disabilities. However, it need not mean that government should pay the full cost.

- Producers and employers are part of society and should contribute to society's goals by paying at least some part of the cost.
- Making business pay part of the cost encourages them to identify low cost solutions. It also limits any incentives they might have to ask the government to pay for unnecessary adjustments.

The second approach argues that the costs of social objectives should form part of the cost of producing related goods and services. For example, the cost of better access should be built into the cost of public transport. But in some cases, the government might share part of the cost:

- to take advantage of 'positive externalities' (where people other than the customers and providers might benefit from better access)
- to speed up the process of improving access
- to prevent costs being distributed unevenly among producers and employers.

Both approaches lead to a similar conclusion. In most cases, government and business should share the costs of adjustments. A contribution from government is particularly important where, otherwise, the burden on business would lead to an unfair distribution of costs or would distort competition.

Competition effects

The distribution of compliance costs under the DDA could affect competition if costs are imposed on some businesses and not others.

This could happen where compliance with the DDA relies on individual complaints. Costs are imposed arbitrarily on those businesses that happen to face complaints. However, there is only a small number of complaints. Although the costs they impose might be inequitable (or 'unfair') and affect the *competitiveness* of the individual business involved, they are not likely to affect the overall level of *competition*.

Where compliance is based on disability standards, costs are likely to be spread more evenly across an industry. If all businesses face similar costs, there will be only a limited effect on competition. There might be some competitive effects if an industry competes with another industry that does not face additional costs (for example, public transport competing with private cars). Industries that compete internationally might also be affected—although many other countries have similar requirements.

In both cases, compliance costs should be quite small for many businesses (as suggested by overseas evidence). Costs on business will also be limited:

- by the in-built safeguards that limit the financial impact of adjustments
- where they are offset (at least partly) by government.

Overall, the DDA appears to have a relatively limited impact on competition. In the absence of further information on costs, the DDA seems likely to meet the 'net benefits' test of the CPA. Further, the objective of eliminating discrimination does not seem capable of being achieved without the DDA.

Nevertheless, its operation could be improved to enhance benefits and minimise costs.

The way forward

Given its relatively short period of operation, the DDA appears to have been reasonably effective in reducing overall levels of discrimination. But there is much more to be done before its objectives are achieved.

Improving the DDA

Although the broad thrust of the DDA remains appropriate, the Commission has recommended improvements to definitions in the DDA. These include:

- amending the current broad definition of disability to cover genetic abnormalities and behaviours
- clarifying the definition of 'direct discrimination', retaining the notion of a comparator
- amending the definition of 'indirect discrimination' to remove the 'proportionality' test and include proposed discrimination
- extending the 'unjustifiable hardship' defence to all areas covered by the DDA, including education after enrolment and the administration of Commonwealth laws and programs.

The Commission has also recommended improvements to the DDA exemptions that protect some actions from complaints. These exemptions have some advantages, such as cutting short legal processes. But administrative convenience should not override the rights of people with disabilities. The scope of exemptions should be limited by:

- tightening the partial exemption for superannuation and insurance by clarifying 'other relevant factors' that may be considered
- clarifying the 'special measures' exemption so it applies only to the establishment, funding and eligibility criteria of disability services, not their administration.

Improving the complaints process

Compliance with the DDA is driven mainly by a system of individual complaints. This lets people with disabilities enforce their rights—often just the threat of a complaint can be a powerful force for change.

The Commission supports conciliation as the first step in resolving complaints. But it is important that complainants have the option of going to the Federal Court or the Federal Magistrates Service where conciliation fails.

Some people with disabilities face large barriers to using the complaints process, including:

- uncertainty about court costs being awarded against complainants
- the complexity and potential formality of the process
- fear of victimisation
- the unequal financial and legal resources of complainants and respondents.

These barriers would be reduced by:

- setting criteria for when court costs would be awarded
- allowing disability organisations to make complaints in their own right
- allowing HREOC to initiate complaints in certain circumstances.

Complaints under the DDA use the same HREOC complaints process used for other federal anti-discrimination Acts. The Commission's proposed reforms to DDA complaints handling may have implications for complaints under these other Acts.

Improving other DDA processes

Disability standards spell out in detail how the DDA applies to particular areas of activity. Only the public transport standard has been introduced so far. The process of developing standards can raise community awareness, but standards have more impact when they become law. The drawn-out consultation process has limited their impact.

- Disability standards provide certainty for people with disabilities and service providers. This certainty is reduced if State and Territory requirements differ from the standards. The DDA should make it clear that disability standards also displace the general provisions of State and Territory anti-discrimination legislation.

- Disability standards should not be used to alter the scope of the DDA. Amendments to the DDA should be made in the Act itself, not in subordinate legislation.
- The Attorney General should be able to make disability standards to cover any area of activity and the operation of any statutory exemption in the DDA.

Voluntary action plans are useful tools, but their impact has been limited by the small number that have been lodged by business. Government agencies have lodged more plans than private businesses, but coverage is still far from complete. The Commission's suggested reforms in other areas would encourage voluntary action plans.

Improving equality before the law

The Commission makes several draft recommendations to promote equality before the law for people with disabilities.

- A separate inquiry should be held into access to justice for people with disabilities, with a focus on ways to protect their rights in the criminal justice system.
- The right to vote is one of the most important symbols of equality before the law. Polling places should be accessible to people with disabilities (both physically and in provision of independent assistance). The States and Territories should follow the Australian Government's lead in this area.
- It should be made clear that actions done in compliance with laws that have discriminatory effects are not exempt from challenge under the DDA. If governments want to exempt specific laws from challenge, they should use the existing mechanisms in the DDA to do so.

'Mainstreaming' the DDA

Some people think that it is up to HREOC to ensure the DDA achieves its objects. But HREOC cannot do this alone. Discrimination is found in all areas of society, and there are great benefits from linking the DDA into mainstream mechanisms that cover these different areas.

Disability standards can be made in many areas of activity. It makes sense to rely on experts from those different areas (with input from the disability community) to develop, implement and monitor standards.

The draft standard on access to public buildings, for example, is being developed by the Australian Building Codes Board and will form part of the Building Code of Australia. This means compliance will be monitored through mainstream planning processes. This is far more efficient than setting up a separate disability standard with its own compliance regime.

A similar approach should be adopted for disability standards wherever practical. HREOC's role should be to report to the Attorney General on the operation of those processes.

Cooperative arrangements between HREOC and State and Territory anti-discrimination bodies should be improved.

- Together, they should establish a 'shopfront' presence in each jurisdiction. HREOC would remain responsible for accepting or declining DDA complaints and conducting conciliations.
- Cooperative efforts in awareness raising should also be enhanced.

A co-regulatory approach could encourage the private sector to take a greater role in tackling discrimination. Industries could develop codes of conduct, and codes that meet minimum criteria could be registered with HREOC. Businesses applying a code could be given some degree of protection from complaints under the DDA. The Commission is considering recommending a co-regulatory approach and is requesting further comment on its advantages and disadvantages.

Improving employment opportunities

The DDA appears to have been least effective in tackling discrimination in employment. But having a job helps people participate more fully in society. Therefore, the Commission is considering how employment opportunities for people with disabilities could be improved.

Government and employers should share the costs of adjustments needed to allow people with disabilities to take advantage of employment opportunities. The Commission received little information on the cost of adjustments from businesses and their representative organisations (apart from non-government schools). Overseas information suggests that these costs are often quite small. The Commission is requesting information on the costs (and benefits) of adjustments.

Government currently funds a range of programs to help people with disabilities find employment, and to offset (at least partly) the cost of adjustments. The Commission is calling for comments on the adequacy of these arrangements, and the advantages and disadvantages of extending them.

The Commission is also calling for comment on the possible amendment of the DDA to introduce a positive duty on employers to take reasonable steps to identify and be prepared to remove barriers to the employment of people with disabilities. Various positive duties are imposed on employers of different minority groups in some other countries (box 5).

Box 5 **Duties on employers overseas**

In **Canada**, the *Employment Equity Act 1995* imposes a duty on employers of more than 100 persons to achieve proportional representation of minority groups (that is, a quota), through the adoption of employment equity plans designed to remove barriers to employment participation.

In the **United Kingdom**, the *Race Relations Act 1976*, as amended by the *Race Relations (Amendment) Act 2000*, places a general statutory duty on a wide range of public authorities to promote racial equality and prevent racial discrimination. The UK Parliament is at present considering a bill extending the affirmative action provisions of the Race Relations Act to other minority groups, including people with a disability, and to designated private sector employers.

In **Northern Ireland** the Fair Employment and Treatment (Northern Ireland) Order 1998 and the *Northern Ireland Act 1998* require employers to adopt 'equality schemes' covering racial and religious minorities and periodically review their employment policies.

The Commission makes the following points about the proposed employers' duty.

- It should not impose mandatory quotas or targets.
- It could be balanced by improved government programs to offset, at least partly, the costs of adjustments.
- It should not require employers to make all possible workplace adjustments 'just in case'. They would be expected to take reasonable steps to identify barriers and consider ways of eliminating those barriers in the future.
- 'Reasonable steps' are likely to differ for large and small businesses and different industries, but might include:
  - examining recruitment practices for potential indirect discrimination
  - looking at the characteristics of current staff and reasons for any under-representation of people with disabilities
  - considering access issues or undertaking an access audit
  - developing a voluntary action plan.

A positive duty would have both benefits and costs.

- It would place a greater onus of proof on an employer. If a complainant claimed possible discrimination, the employer would be required to demonstrate that he or she had taken all reasonable steps to prevent discrimination occurring. This could benefit complainants, but could also benefit employers who could demonstrate compliance.
- It could add to the 'compliance costs' of all businesses. But it could reduce the cost of 'surprise' adjustments arising out of complaints if businesses factor non-discriminatory practices into their general planning.

A positive duty on employers could have a significant impact on business. The Commission is seeking views on compliance and other costs, as well as benefits of such a duty.

Resources

Many people with disabilities need legal assistance to enforce their rights through the complaints system. Disability Discrimination Legal Services are the main source of this assistance.

It is generally accepted that such organisations should be given enough resources to match their responsibilities. Inadequate resources for Disability Discrimination Legal Services can undermine the effectiveness of the DDA.

Similarly, HREOC needs sufficient resources to perform its statutory functions. Many recommendations in this report could affect HREOC's need for resources. Any significant additions to HREOC's responsibilities are likely to require additional resources.

In conclusion

The Commission has made a number of draft recommendations for improving the operation of the DDA. It considers that these suggested improvements would promote the objectives of the Act and enhance its net benefits to the Australian community as a whole. It has also requested further information in specific areas.

You are invited to comment on the Commission's draft recommendations and to provide any additional information you think relevant. The Commission will consider inquiry participants' contributions and do further analysis before preparing a final report to the Australian Government in 2004.

1 Summary of findings, recommendations and requests

Chapter 5 Effectiveness in eliminating discrimination

DRAFT FINDING 5.1

The number of complaints under the Disability Discrimination Act 1992 *and 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.*

DRAFT FINDING 5.2

Identification of students with disabilities and access to disability programs in mainstream schools have grown substantially since the Disability Discrimination Act 1992 *was enacted. Although it is difficult to distinguish the effects of the Act from the effects of government policies of integration in education, the Act appears to have had some effect in improving educational opportunities for school students with disabilities.*

DRAFT FINDING 5.3

The Disability Discrimination Act 1992 *appears to have had some impact on making new public buildings more accessible. However, inconsistencies between the Building Code of Australia and the Act limit the effectiveness of the Act. Formally linking the building code to a DDA standard on access to premises will address these inconsistencies.*

The Disability Discrimination Act 1992 *has been less effective in improving the accessibility of existing buildings, and the proposed disability standard will not address this.*

DRAFT FINDING 5.4

The Disability Discrimination Act 1992 *appears to have been relatively effective in improving the accessibility of public transport in urban areas. However, it has been less effective in relation to taxis and in regional areas.*

DRAFT FINDING 5.5

The Disability Discrimination Act 1992 *has played a significant role in reducing discrimination in access to some goods and services, including electronic banking and telecommunications.*

DRAFT FINDING 5.6

The Disability Discrimination Act 1992 *appears to have been more effective for people with mobility and sensory impairments than those with a mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation.*

DRAFT FINDING 5.7

People with disabilities from Indigenous or non-English speaking backgrounds, and those living in regional areas face multiple potential sources of disadvantage. However, reasons for this often relate to factors other than disability discrimination, such as race discrimination, language barriers, socioeconomic background and remoteness.

DRAFT FINDING 5.8

Given its relatively short period of operation, the Disability Discrimination Act 1992 *appears to have been reasonably effective in reducing overall levels of discrimination. However, there is still some way to go to achieve its object of eliminating discrimination.*

Chapter 6 Equality before the law

DRAFT FINDING 6.1

Current arrangements in the Human Rights and Equal Opportunity Act 1986 *(s.46) dealing with discriminatory acts under Awards are appropriate.*

DRAFT FINDING 6.2

People with disabilities living in institutional settings face particular barriers to achieving equality before the law. However, there is limited scope to apply the Disability Discrimination Act 1992 *in this area.*

DRAFT FINDING 6.3

The process of de-institutionalisation needs to be supported by access to quality disability services. However, there are limitations to the use of the Disability Discrimination Act 1992 *to challenge government decisions about provision of services.*

REQUEST FOR INFORMATION

The Productivity Commission seeks further comment on the desirability of developing an accommodation disability standard, and the forms of accommodation such a standard should cover (for example, private rental accommodation, supported accommodation and/or institutional accommodation).

DRAFT FINDING 6.4

There are practical limitations to achieving equality before the law for people with cognitive disabilities. Existing State and Territory arrangements safeguarding the rights of people with cognitive disabilities appear to be working appropriately, but Human Rights and Equal Opportunity Commission research in this area can provide a useful national focus and assist regulatory benchmarking by the States and Territories.

DRAFT FINDING 6.5

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are over-represented in the criminal justice system (as both victims of crime and as alleged offenders).

DRAFT RECOMMENDATION 6.1

The Attorney General should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system.

DRAFT FINDING 6.6

Standards of physical access and independent assistance at polling places are not uniform. Given the importance of voting, it is inappropriate to rely on individual complaints to improve access.

DRAFT RECOMMENDATION 6.2

The Australian Government should amend the* Electoral Act 1918 *to ensure polling places are accessible (both physically and in provision of independent assistance) to ensure the right to vote of people with disabilities.

DRAFT FINDING 6.7

There is uncertainty about the application of the Disability Discrimination Act 1992 *to acts (actions) done in compliance with laws that have not been prescribed under section 47 of the Act.*

DRAFT RECOMMENDATION 6.3

The* Disability Discrimination Act 1992 *should be amended to make it clear that acts (actions) done in compliance with non-prescribed laws are not exempt from challenge under the Act, regardless of the degree of discretion of the decision maker.

REQUEST FOR INFORMATION

The Productivity Commission seeks further information on how the Disability Discrimination Act 1992 *should be amended to clarify the scope to challenge other laws with discriminatory effects, particularly:*

- *the desirability of specific 'equality before the law' provisions (modelled on section 10 of the* Racial Discrimination Act 1975*)*
- *their interaction with provisions relating to 'special measures' (s.45)*
- *their interaction with provisions relating to 'prescribed laws' (s.47).*

Chapter 7 Promoting community recognition and acceptance

DRAFT FINDING 7.1

In general, community awareness of disability issues and attitudes towards people with disabilities appear to have improved in the past decade. Scope for further improvement remains, however, both in certain areas of activity, such as employment, and in relation to particular disabilities, such as mental illness.

DRAFT FINDING 7.2

The Human Rights and Equal Opportunity Commission's education and research function is an important aspect of promoting community recognition and acceptance.

DRAFT FINDING 7.3

Public inquiries appear to have had positive impacts to date on promoting community recognition and acceptance, due to their extensive consultation processes, and public availability of submissions and other material.

DRAFT FINDING 7.4

Some complaints, particularly high profile cases proceeding beyond conciliation, appear to have helped promote community recognition and acceptance. However, the usefulness of many complaints in this respect is constrained by the confidentiality of conciliated agreements.

DRAFT FINDING 7.5

The process of developing and implementing disability standards appears to have had a positive impact on promoting recognition and awareness in some sectors, but the overall educative impact of disability standards has been limited because only one has been completed to date.

DRAFT FINDING 7.6

Voluntary action plans have raised awareness but their overall impact has been limited by the relatively small number that have been lodged.

DRAFT FINDING 7.7

Guidelines and, to a lesser extent, advisory notes appear to have raised awareness of disability issues and Disability Discrimination Act 1992 *requirements.*

DRAFT FINDING 7.8

The Disability Discrimination Act 1992 *appears to have contributed to improvements in community awareness of disability issues and attitudes towards people with disabilities, but there is limited awareness of the Act itself. There is scope to improve awareness of the Act further.*

DRAFT FINDING 7.9

The Human Rights and Equal Opportunity Commission has a role in raising the awareness of the Disability Discrimination Act 1992 *among professional associations and educators.*

DRAFT FINDING 7.10

The Human Rights and Equal Opportunity Commission has a role in developing a schools resource specifically addressing disability issues, along the lines of that developed for race discrimination issues.

DRAFT FINDING 7.11

The Human Rights and Equal Opportunity Commission's website has become an important way for people to access information. Due to limited Internet access

among some groups, however, other means of distributing information remain important.

DRAFT FINDING 7.12

There is potential for the Human Rights and Equal Opportunity Commission to expand cooperation with State and Territory anti-discrimination bodies and other organisations in promoting community recognition and acceptance of the rights of people with disabilities.

Chapter 8 Competition and economic effects of the DDA

REQUEST FOR INFORMATION

The Productivity Commission seeks information on the costs and benefits to organisations of complying with the provisions of the Disability Discrimination Act 1992 *and disability standards. The Commission would welcome information on the nature of those costs and benefits, and on their magnitude.*

DRAFT FINDING 8.1

Available evidence suggests that the costs of complying with the Disability Discrimination Act 1992 *and disability standards vary widely across organisations. For many organisations, these costs could be quite small.*

DRAFT FINDING 8.2

The costs of complying with the Disability Discrimination Act 1992 *can be unpredictable in the case of complaints-based enforcement. Disability standards can help clarify the costs of complying with the Act.*

DRAFT FINDING 8.3

The progress achieved by the Disability Discrimination Act 1992 *in promoting a more accessible physical environment is likely to have removed some barriers to the employment of people with disabilities.*

DRAFT FINDING 8.4

A reduction in disability discrimination is likely to contribute to 'social capital' (community values and principles that facilitate cooperation within and among groups) and so have broad benefits for Australian society.

DRAFT FINDING 8.5

The complaints-based implementation of the Disability Discrimination Act 1992 *has the potential to distort competition by imposing an uneven regulatory burden. By contrast, disability standards tend to promote a uniform playing field and to be more competitively neutral. They might, however, impose larger costs on the economy.*

DRAFT FINDING 8.6

It is generally appropriate for the costs imposed on employers and service providers by the Disability Discrimination Act 1992 *to be shared between organisations, consumers and governments. The extent of government funding would need to vary depending on whether the Act is implemented through complaints or disability standards.*

Chapter 9 Defining discrimination

DRAFT FINDING 9.1

The objects of the Disability Discrimination Act 1992 *(s.3) are appropriate and do not require amendment.*

DRAFT FINDING 9.2

The Disability Discrimination Act 1992 *is based on a 'social model' of disability discrimination, but it uses a medical definition of disability. This is appropriate. A definition of disability based on the 'social model' is not practical.*

DRAFT FINDING 9.3

The definition of disability in the Disability Discrimination Act 1992 *(s.4) does not explicitly include medically recognised symptoms (where the underlying cause is unknown), genetic abnormalities or behaviours related to disabilities.*

DRAFT RECOMMENDATION 9.1

The definition of disability in the* Disability Discrimination Act 1992 *(s.4) should be amended to ensure that it includes:

- ***medically recognised symptoms where a cause has not been medically identified or diagnosed***
- ***genetic abnormalities and conditions***
- ***behaviour that is a symptom or manifestation of a disability.***

DRAFT FINDING 9.4

The distinction in the Disability Discrimination Act 1992 *between direct and indirect discrimination is appropriate.*

DRAFT FINDING 9.5

The requirement to make a comparison between the treatment of a person with a disability and the treatment of a person without the disability to determine direct discrimination in the Disability Discrimination Act 1992 *(s.5(1)) is appropriate.*

DRAFT FINDING 9.6

The definition of direct discrimination in the Disability Discrimination Act 1992 *(s.5(1)) is unclear about what constitutes circumstances that are 'not materially different' for comparison purposes.*

DRAFT FINDING 9.7

The definition of direct discrimination in the Disability Discrimination Act 1992 *(s.5(2)) does not explicitly make failure to provide 'different accommodation or services' required by a person with a disability 'less favourable treatment'. The provision has not been interpreted consistently.*

DRAFT RECOMMENDATION 9.2

The definition of direct discrimination in the* Disability Discrimination Act 1992 *(s.5) should be amended to:

- ***clarify what constitutes circumstances that are 'not materially different' for comparison purposes***
- ***make failure to provide 'different accommodation or services' required by a person with a disability 'less favourable treatment'.***

DRAFT FINDING 9.8

The proportionality test in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(a)) imposes an unnecessary evidentiary burden on complainants.*

DRAFT FINDING 9.9

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(b)) does not provide sufficient guidance on how to determine whether a requirement or condition is 'not reasonable having regard to the circumstances of the case'.*

DRAFT FINDING 9.10

The burden of proving that a requirement or condition is 'not reasonable having regard to the circumstances of the case' in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(b)) falls on the complainant. This is neither appropriate nor efficient.*

DRAFT FINDING 9.11

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6) does not include proposed acts of indirect discrimination. This is not appropriate.*

DRAFT RECOMMENDATION 9.3

The definition of indirect discrimination in the* Disability Discrimination Act 1992 *(s.6) should be amended to:

- ***remove the proportionality test***
- ***include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances of the case'***
- ***place the burden of proving that a requirement or condition is reasonable 'having regard to the circumstances of the case' on the respondent instead of the complainant***
- ***cover incidences of proposed indirect discrimination.***

DRAFT FINDING 9.12

The Disability Discrimination Act 1992 *does not make harassment unlawful in all of the areas of activity in which disability discrimination is unlawful.*

REQUEST FOR INFORMATION

The Productivity Commission requests further information on options for extending the scope of the harassment provisions and addressing the vilification of people with disabilities.

Chapter 10 Defences and exemptions

DRAFT FINDING 10.1

The inherent requirements provisions in the employment sections of the Disability Discrimination Act 1992 *are appropriate and do not require amendment. Guidelines to explain how inherent requirements should be identified in practice could be useful.*

DRAFT FINDING 10.2

An unjustifiable hardship defence in the Disability Discrimination Act 1992 *is appropriate. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting any requirements that would impose excessive costs on individual employers, service providers or others in the community.*

DRAFT RECOMMENDATION 10.1

The* Disability Discrimination Act 1992 *should be amended to allow an unjustifiable hardship defence in all substantive provisions of the Act that make discrimination on the ground of disability unlawful, including education and the administration of Commonwealth laws and programs.

DRAFT FINDING 10.3

The concept of unjustifiable hardship does not lend itself to a generic definition. It is best determined through the broad criteria in the Disability Discrimination Act 1992 *(s.11) that can be applied flexibly to individual cases.*

DRAFT RECOMMENDATION 10.2

The criteria for determining unjustifiable hardship in the* Disability Discrimination Act 1992 *(s.11) should be amended to clarify that community-wide benefits and costs should be taken into account.

DRAFT FINDING 10.4

The absence of the term 'reasonable adjustment' in the Disability Discrimination Act 1992 *is appropriate. It is sufficient for the Act to require adjustments to be made up to the point where they cause an unjustifiable hardship.*

The term 'reasonable adjustment' causes confusion when used in guidelines and other explanatory materials for the Act.

DRAFT FINDING 10.5

A partial exemption for insurance and superannuation in the Disability Discrimination Act 1992 *(s.46) is appropriate, but its current scope is uncertain.*

DRAFT RECOMMENDATION 10.3

The* Disability Discrimination Act 1992 *should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:

- ***stereotypical assumptions about disability that are not supported by reasonable evidence***
- ***unfounded assumptions about risks related to disability.***

DRAFT FINDING 10.6

The limited exemptions in the Disability Discrimination Act 1992 *for combat duties and peacekeeping services in the Defence Forces (s.53) and peacekeeping services by the Australian Federal Police (s.54) are appropriate and do not require amendment.*

DRAFT FINDING 10.7

The scope of the Migration Act 1958 *exemption in the* Disability Discrimination Act 1992 *(s.52) is uncertain.*

DRAFT RECOMMENDATION 10.4

The exemption of the* Migration Act 1958 *in the* Disability Discrimination Act 1992 *(s.52) should be amended to ensure it:

- ***exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision-making for Australian entry and migration visa categories but***
- ***does not exempt more general actions done in the administration of Commonwealth migration laws and programs.***

DRAFT FINDING 10.8

The scope of the 'special measures' exemption in the Disability Discrimination Act 1992 *(s.45) is uncertain.*

DRAFT RECOMMENDATION 10.5

The 'special measures' exemption in the* Disability Discrimination Act 1992 *(s.45) should be clarified to ensure that it:

- ***exempts the establishment, eligibility and funding arrangements of 'special measures' that are reasonably intended to benefit people with disabilities but***
- ***does not exempt general actions done in the administration of 'special measures' that are reasonably intended to benefit people with disabilities.***

DRAFT FINDING 10.9

The current provisions of the Disability Discrimination Act 1992 *dealing with productivity-based wages are appropriate. However, there is some uncertainty*

about the interaction between provisions dealing with productivity-based wages (s.47(1)(c)) and the exemption for 'special measures' (s.45).

DRAFT RECOMMENDATION 10.6

The* Disability Discrimination Act 1992 *should be amended to clarify that the specific provisions governing productivity-based wages (s.47(1)(c)) take precedence over the general exemption for 'special measures' (s.45).

DRAFT FINDING 10.10

On balance, some exemptions from the Disability Discrimination Act 1992 *are appropriate. They 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.*

Chapter 11 Complaints

DRAFT FINDING 11.1

The complaints process, together with the threat of complaints, can be powerful tools for addressing discrimination on the ground of disability.

DRAFT FINDING 11.2

Fear of victimisation can create a significant barrier to use of the complaints process. However, there have been no prosecutions under the Disability Discrimination Act 1992 *victimisation provisions (s.42).*

REQUEST FOR INFORMATION

The Productivity Commission is seeking further comment on how fear of victimisation could be addressed, for example, through improved awareness of the victimisation provisions, changes to the offence provisions or changes to the penalty.

DRAFT FINDING 11.3

People with disabilities can face significant barriers to using the Disability Discrimination Act 1992 *complaints process, which can reduce its effectiveness. Barriers include:*

- *the financial and non-financial costs of making a complaint*

- *the complexity and potential formality of the process (although the introduction of the Federal Magistrates Service as an alternative to the Federal Court has improved access)*
- *the evidentiary burden on complainants*
- *the fear of victimisation if a complaint is made (which can be greater in institutions and small communities)*
- *the inequality of resources and legal assistance between complainants and respondents.*

DRAFT FINDING 11.4

According to Human Rights and Equal Opportunity Commission surveys, both complainants and respondents appear reasonably satisfied with its complaints handling processes.

DRAFT FINDING 11.5

The Human Rights and Equal Opportunity Commission's complaints handling timeliness appears to be comparable to that of the States and Territories. Uncertain case loads and investigation requirements make it inappropriate to impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

REQUEST FOR INFORMATION

The Productivity Commission seeks further comment on whether the enforceability of conciliated agreements should be improved and, if so, what approach should be adopted.

DRAFT FINDING 11.6

The Human Rights and Equal Opportunity Commission's location in Sydney does not appear to be a barrier to Disability Discrimination Act 1992 *complainants outside New South Wales. However, the majority of complainants clearly favour State and Territory based anti-discrimination bodies.*

DRAFT RECOMMENDATION 11.1

The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction. This would reduce confusion for people wishing to obtain advice or lodge a complaint. The Human Rights and

Equal Opportunity Commission should retain responsibility for accepting or declining complaints and for conducting conciliations.

DRAFT FINDING 11.7

There are net benefits from allowing parties to conciliation to determine the level of confidentiality, but for the Human Rights and Equal Opportunity Commission to publicise outcomes as widely as possible subject to maintaining that confidentiality.

DRAFT FINDING 11.8

Transfer of the determination making power to the Federal Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission.

DRAFT FINDING 11.9

Uncertainty about cost orders in the federal courts affects incentives and outcomes at the conciliation stage of complaints handling. It is likely that some cases of unlawful disability discrimination are not being adequately addressed.

DRAFT RECOMMENDATION 11.2

Subject to a review of the implications for other federal discrimination laws, the* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to incorporate grounds for not awarding costs against complainants in the Federal Court and Federal Magistrates Service.

REQUEST FOR INFORMATION

The Productivity Commission is seeking comment on the criteria to be included in guidelines for the Federal Court and Federal Magistrates Service in awarding costs in cases brought under the Disability Discrimination Act 1992. *Participants might like to comment on the criteria suggested by the Disability Discrimination Legal Service or factors considered relevant in previous discrimination cases.*

DRAFT RECOMMENDATION 11.3

The* Human Rights and Equal Opportunity Commission Act 1986 *(s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service.

DRAFT FINDING 11.10

The Disability Discrimination Legal Services make an important contribution to the effectiveness of the Disability Discrimination Act 1992 *complaints process, and to ensuring equality before the law for people with disabilities.*

DRAFT FINDING 11.11

In some circumstances, individual complaints can lead to systemic change. They have been effective in areas involving physical and communication barriers. However, there are limits on the extent to which the individual complaints system can achieve systemic change.

DRAFT FINDING 11.12

There appears to be some confusion about the ability of disability organisations and advocacy groups to initiate representative complaints with the Human Rights and Equal Opportunity Commission and with the federal courts. This is likely to have discouraged organisations from making representative complaints.

REQUEST FOR INFORMATION

The Productivity Commission requests further comment on the implications of allowing disability organisations with a demonstrated connection to the subject matter of a complaint to initiate a Disability Discrimination Act 1992 *complaint with the Human Rights and Equal Opportunity Commission and to pursue that complaint to the federal courts. In particular:*

- *What procedural issues would have to be addressed?*
- *How should disability organisations be defined?*
- *How should a 'demonstrated connection' be defined?*

DRAFT FINDING 11.13

The Human Rights and Equal Opportunity Commission's current complaints handling role is appropriate and should not extend to advocacy for individual complainants.

DRAFT RECOMMENDATION 11.4

The* Human Rights and Equal Opportunity Commission Act 1986 *(s.46P) should be amended to allow the Human Rights and Equal Opportunity Commission to initiate complaints under prescribed circumstances. Administrative separation should be maintained between its complaint initiation and complaints handling functions.

REQUEST FOR INFORMATION

The Productivity Commission requests comment on the circumstances under which the Human Rights and Equal Opportunity Commission should be able to initiate complaints; and whether it should be entitled to claim damages or costs from respondents.

DRAFT RECOMMENDATION 11.5

The Attorney-General's Department should investigate the implications of this inquiry's recommendations about* Disability Discrimination Act 1992 *complaints for other Commonwealth anti-discrimination Acts.

Chapter 12 Regulation

DRAFT FINDING 12.1

It appears that the draft education standard might have the effect of altering the scope of the Disability Discrimination Act 1992 *provisions concerning discrimination in education.*

DRAFT RECOMMENDATION 12.1

The scope of the* Disability Discrimination Act 1992 *should only be altered via amendment of the Act, not via disability standards.

DRAFT FINDING 12.2

A rigorous regulation impact statement process is sufficient to ensure that disability standards reflect the characteristics of good regulation, including flexibility.

DRAFT FINDING 12.3

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints.

DRAFT FINDING 12.4

There is some uncertainty about the relationship between State and Territory anti-discrimination legislation and disability standards.

DRAFT RECOMMENDATION 12.2

The* Disability Discrimination Act 1992 *(s.13) should be amended to make it clear that disability standards displace the general provisions of State and Territory anti-discrimination legislation. Any jurisdiction wanting to introduce a higher level of compliance in an area should request that allowance be made for this through a jurisdiction-specific component in the disability standards.

DRAFT RECOMMENDATION 12.3

The* Disability Discrimination Act 1992 *(s.31) should be amended to allow for disability standards to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standard making power should extend to the clarification of the operation of statutory exemptions.

DRAFT RECOMMENDATION 12.4

Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes. The Human Rights and Equal Opportunity Commission's role should be to report to the Attorney General on the operation and adequacy of those processes.

DRAFT FINDING 12.5

The disability community has sufficient opportunity to consult and comment during the development of disability standards. The Disability Discrimination Act Standards Project is a productive way of engaging people with disabilities in this process but it is not their only means for providing input.

DRAFT FINDING 12.6

The development of disability standards has been very slow and only one set of standards—the Disability Standards for Accessible Public Transport 2003—has been developed to date. However, imposing deadlines could constrain the consultation process.

REQUEST FOR INFORMATION

The Productivity Commission is considering the potential for a co-regulatory approach under the Disability Discrimination Act 1992. *The Commission is seeking views on how a co-regulatory approach might be implemented, including:*

- *the status that should be afforded an industry-developed code of conduct*
- *appropriate deadlines for industry to develop a code of conduct in an area before a disability standard is imposed.*

DRAFT RECOMMENDATION 12.5

***The Human Rights and Equal Opportunity Commission should replace the Frequently Asked Questions for employment with guidelines in order to provide more formal recognition under the* Disability Discrimination Act 1992.**

DRAFT FINDING 12.7

Voluntary action plans are an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of businesses have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

DRAFT FINDING 12.8

The Disability Discrimination Act 1992 *(s.59) does not provide for registration of voluntary action plans by employers.*

DRAFT RECOMMENDATION 12.6

The* Disability Discrimination Act 1992 *(s.59) should be amended to clarify that voluntary action plans can be developed and registered by employers.

DRAFT FINDING 12.9

Some State laws are currently exempted from the Disability Discrimination Act 1992 *by prescription under section 47, while similar laws in other States and Territories are not. There is no consistency in the prescription of laws under section 47.*

DRAFT RECOMMENDATION 12.7

The laws currently prescribed under section 47 of the* Disability Discrimination Act 1992 *should be delisted unless relevant the States request their retention.

Chapter 13 Broad options for reform

DRAFT FINDING 13.1

There are advantages in retaining both the Disability Discrimination Act 1992 *and State and Territory anti-discrimination legislation. However, this places an obligation on all jurisdictions to work cooperatively to meet the needs of people with disabilities and minimise confusion about the two systems.*

DRAFT FINDING 13.2

The advantages of a stand-alone Disability Discrimination Act 1992 *outweigh the advantages of a federal omnibus anti-discrimination Act.*

REQUEST FOR INFORMATION

The Productivity Commission seeks views on how the costs of adjustments should be shared between governments, organisations and consumers. The Commission would welcome comment on the adequacy of existing government funding schemes for such adjustments, and the advantages and disadvantages of extending particular arrangements (such as portable grants).

REQUEST FOR INFORMATION

The Productivity Commission seeks information on the potential impact on businesses and people with disabilities of introducing a limited positive duty on employers to take 'reasonable steps' to identify and work towards removing barriers to employment of people with disabilities, including:

- *the nature of the duty*
- *how it should be implemented and enforced*
- *the costs and benefits for business, including small business*
- *the costs and benefits for people with disabilities*
- *the role of government in sharing costs and maximising benefits.*

Chapter 14 Other issues

DRAFT FINDING 14.1

Inadequate funding of Disability Discrimination Legal Services could undermine the effectiveness of the Disability Discrimination Act 1992.

DRAFT FINDING 14.2

Some inquiry participants expressed concern that current funding arrangements restrict education choice for school students with disabilities to a greater extent than students without disabilities. This could contribute to discrimination by increasing the likelihood that some schools would be able to claim unjustifiable hardship under the Disability Discrimination Act 1992.

DRAFT FINDING 14.3

It is the role of governments, not the Disability Discrimination Act 1992*, to determine the level of funding and eligibility criteria for disability services. It is, however, appropriate for the Act to apply to the administration of disability services.*

DRAFT FINDING 14.4

There appears to be merit in investigating further an Australian electronic book repository for educational (and other) publications.

1 This inquiry

This chapter provides some background to this inquiry and describes the evolution of the *Disability Discrimination Act 1992* (DDA). It also outlines the scope of this inquiry and summarises the inquiry approach taken by the Productivity Commission. It concludes with a brief guide to the rest of this report.

1.1 Background

The DDA was enacted over 10 years ago to promote the rights of Australians with disabilities. This rights-based approach reflected changing attitudes toward disability and recognised disability as a dimension of human diversity like gender, race and culture. Enactment of the DDA and other human rights legislation also had strong symbolic value. It formally legislated society's commitment to principles of equality, fairness and justice for people with disabilities.

The DDA was not the first Australian legislation to prohibit discrimination on the ground of disability. Some States had anti-discrimination legislation dating back to the early 1980s, and all States and Territories had anti-discrimination legislation either in place or under consideration by the early 1990s. Several reasons were given for introducing the DDA in addition to State legislation:

- The DDA implemented the Australian Government's obligations as a signatory to international declarations on the rights of people with disabilities.[1]
- The scope and coverage of existing State and Territory legislation varied, and proposed Northern Territory and Tasmanian legislation had not yet been passed.
- The States and Territories had little ability to regulate discriminatory practices of Commonwealth authorities (Australia 1992a).

The DDA has evolved since its introduction in 1992, through legislative amendment, the accumulation of case law and the development of disability standards. The environment in which the DDA operates has also changed, with increased integration of people with disabilities into the community, the ageing of

[1] The Commonwealth Government lacks specific power to legislate regarding human rights, disability or discrimination. It does have power over external affairs, however, which includes legislating to implement treaties and on matters of international concern (see chapter 4).

the population and changes in technology. It is thus timely to examine the impact of the DDA on people with disabilities and the wider community over the past decade, and to assess whether it is equipped to face the likely challenges of the future.

Development of the Disability Discrimination Act

The DDA has developed over the past 10 years, and continues to evolve. The most obvious changes have been Parliamentary amendments to the DDA and related legislation such as the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The most significant of these changes was the removal in 2000 of the Human Rights and Equal Opportunity Commission's (HREOC) powers to initiate complaints and make determinations (see chapter 4).

Other developments, although more subtle, have also been important. The DDA operates at a fairly high level of principle. It makes discrimination on the ground of disability unlawful in various areas of activity, but does not provide much detail on how the law should be interpreted. Over time, court decisions on individual complaints have begun to flesh out the broad principles set by the DDA, and HREOC has produced guidelines to assist compliance. Issues of definition and interpretation of the DDA are discussed in chapters 9 and 10.

In addition, the DDA allows the Attorney General to make disability standards (subordinate legislation) defining how the DDA will apply in certain areas of activity. Disability standards for public transport were promulgated in 2002, and standards in education and access to premises are well advanced. Disability standards may lead to the creation of a large body of detailed prescriptive regulation, which would be a significant change from the broad principles stated in the DDA. The positive and negative aspects of alternative regulatory arrangements are discussed in chapter 12.

Changes in the environment

The environment in which the DDA operates has also changed over the past 10 years. 'De-institutionalisation'[2] and 'mainstreaming'[3] have exposed many people with disabilities to new opportunities and challenges; they have also exposed many parts of the general community to people with disabilities. Significantly, a generation of children with disabilities are moving through the mainstream

[2] 'De-institutionalisation' refers to a shift from institution-based care to community-based care of people with disabilities.

[3] 'Mainstreaming' refers to a shift from services that cater separately and exclusively for people with particular types of disability to services that cater for the 'mainstream' population.

education system and soon will be seeking higher education and employment. At the same time, their students peers are having a greater experience of interacting with people with disabilities.

Demographic changes are also playing an important role. Predictions of a declining workforce over the next 20 years could improve employment opportunities for people with disabilities, if these people can be equipped with the appropriate skills. The ageing of the population will lead the proportion of the population with disabilities to increase as the 'baby boomer' generation develops age-related conditions.

Technological developments over the last ten years have helped reduce the barriers faced by many people with disabilities. For example, the Internet and screen readers have greatly improved access to information and kneeling buses have improved access to public transport. But technology can also create new barriers, for example, poor design makes some websites inaccessible. New assistive technologies can significantly improve the ability of people with disabilities to participate, raising great expectations among the disability sector. But sometimes the costs of these new technologies raise difficult questions about how they are to be funded.

1.2 Scope of the inquiry

The Commonwealth Government has asked the Productivity Commission to report on the DDA and the Disability Discrimination Regulations 1996. The DDA makes direct and indirect discrimination on the ground of disability unlawful in a wide range of areas, including employment, education, access to premises, and aspects of social participation. It defines disability broadly, to include physical, intellectual and mental disabilities that people have now, have had in the past, might have in the future, or are believed to have. It also protects 'associates' of people with disabilities, such as partners, carers and families. Box 1.1 contains a brief glossary of some commonly used terms. The essential features of the DDA and associated legislation are summarised in chapter 4. Definition issues are examined in chapter 9.

Box 1.1 **Glossary of DDA terms**

Direct discrimination occurs when a person is treated less favourably, as a result of their disability, than a person without the disability would be treated in similar circumstances.

Indirect discrimination occurs when the same rule or condition applies to everybody but has a disproportionate effect on persons with a disability (and the rule is not 'reasonable' in the circumstances).

Discrimination is unlawful under the *Disability Discrimination Act 1992* (DDA) in the areas of: employment; education; access to premises used by the public (including public transport); the provision of goods, services and facilities; accommodation; the purchase of land; activities of clubs and associations; sport; and the administration of Commonwealth laws and programs.

Disability is defined very broadly under the DDA. It covers:

- physical, intellectual, sensory, neurological and learning disabilities, physical disfigurement and the presence in the body of a disease-causing organism
- disabilities that people have now, have had in the past, might have in the future or are believed to have
- people possessing a palliative or therapeutic device, and people accompanied by a guide dog or other trained assistance animal, or accompanied by an interpreter, reader, assistant or carer.

Associates of a person with a disability include partners, relatives, carers and people in business, sporting or recreational relationships.

Source: *Disability Discrimination Act 1992.*

In the terms of reference for this inquiry (box 1.2), the Australian Government asked the Productivity Commission to identify the nature and magnitude of the social, environmental and/or other economic problems that the legislation seeks to address, and to determine whether the objectives of the DDA are being met. The objectives of the DDA can be summarised as:

- to eliminate, as far as possible, discrimination on the ground of disability
- to ensure, as far as practicable, equality before the law for people with disabilities
- to promote community acceptance of the rights of people with disabilities.

In assessing these issues, the Productivity Commission is required to have regard to effects on: the environment; welfare and equity; occupational health and safety; economic and regional development; consumer interests; the competitiveness of business, including small business; and efficient resource allocation.

Box 1.2 **Inquiry terms of reference (summary)**[a]

The terms of reference for this inquiry require the Productivity Commission to report on:

- the effects of the DDA and the DDR on:
  - people with disabilities
  - the wider community
- the effectiveness of the DDA in meeting its objectives of:
  - eliminating discrimination
  - ensuring equality before the law
  - promoting community recognition and acceptance
- any impacts on competition but must consider:
  - costs and benefits to the community as a whole
- social welfare, access and equity considerations
- the nature and extent of disability discrimination
- the relationship of the DDA to other legislation
- improvements and 'alternatives' to the DDA.

The terms of reference also require the Productivity Commission to consult widely with governments, key interest groups and affected parties.

[a] The full terms of reference are reproduced at the beginning of this report.

What is covered?

A legislative review must examine the regulatory framework associated with the Act under review. Under the DDA, for example, the Attorney General can promulgate disability standards, which are subordinate legislation with the force of law. HREOC can produce guidelines than can influence the way in which people comply with the DDA.

This inquiry does not examine the detail of disability standards and guidelines. It does, however, comment on the process for developing standards, and on how standards and guidelines contribute to the effectiveness of the DDA. The inquiry makes particular reference to the use of standards to alter the scope of the DDA (chapter 12). The inquiry also includes the legislative machinery that gives effect to the DDA. The DDA depends on, for example, the complaints mechanism found in the HREOC Act.

Competition Principles Agreement

The terms of reference refer to the Competition Principles Agreement (CPA), which is an agreement between the State, Territory and Australian governments to review legislation that might restrict competition. A fundamental principle of the CPA is that legislation should not restrict competition unless the benefits of the restriction outweigh the costs and the objectives of the legislation can be achieved only by restricting competition.

The DDA might not appear to restrict competition, but virtually all legislation has competition and economic effects. To the extent that the DDA places obligations on all businesses, it might be relatively neutral. The DDA's complaint-based system of enforcement, however, might mean that some firms—or some industries—face costs that their competitors do not. In addition, the DDA might have different effects on small firms relative to large firms, or on domestic suppliers relative to importers. More broadly, compliance with the DDA affects the distribution of resources in the economy, and can have significant economic efficiency issues. The competition and economic effects of the DDA are discussed in chapter 8.

Effectiveness and efficiency of the DDA

The Productivity Commission is required by the terms of reference to assess how well the DDA has achieved its objects. Doing so involves assessing the DDA's effectiveness and efficiency. Both of these assessments are difficult.

Measuring the effectiveness of the DDA involves examining how well the objects of the legislation have been met. In some areas, effectiveness might be measured objectively through numerical indicators—for example, comparing the outcomes for people with disabilities to those of others in areas such as employment, education and the justice system. Measuring effectiveness in other areas of activity relies on more qualitative assessments, such as the substantial anecdotal evidence and some proxy measures—for example, the number of complaints to HREOC and other bodies.

All these measures need to be interpreted carefully. It is difficult to separate the effects of the DDA from influences such State and Territory anti-discrimination legislation and changes to the provision of disability services. Societal changes, such as the ongoing de-institutionalisation of many people with disabilities and the ageing of the population, might also play a role. Further, the DDA's effectiveness is likely to have varied across different areas of activity and for people with different types of disability.

Effectiveness should be distinguished from 'cost-effectiveness' or 'technical efficiency', which are concerned with producing a given level of output (or certain outcomes) at the least possible cost. Although technical efficiency is important, this inquiry is concerned mostly with another form of efficiency: allocative efficiency. Allocative efficiency is achieved when an economy's scarce resources are used to produce the combination of goods and services that society values most.

For legislation such as the DDA, allocative efficiency means that the operation of the Act results in the greatest possible addition to society's welfare, once as many as possible of the Act's cost and benefits have been identified and valued. This is an important concept to consider when deciding how resources should be allocated. Using resources in one way (for example, making adjustments to improve access for people with disabilities) means they are not available for other uses.

The promotion of the rights of people with disabilities is not costless, therefore, because is always has an opportunity cost. These costs (and the associated benefits) are not only financial. The inclusion of an unjustifiable hardship defence in the DDA recognises these potential costs and implies a cost–benefit framework.

While allocative efficiency is concerned with producing the goods and services that society most values, distributive effects (that is, who receives the benefits and who pays the costs) should also be acknowledged. Different groups could bear the costs of an accessible transport system, for example. People with disabilities would meet some costs directly through fares. However, since it would be discriminatory to charge them the full cost of making transport accessible, all transport users could be required to contribute through higher fares. Transport users might also incur costs through less frequent or more crowded vehicles. Further, to the extent that transport providers receive government subsidies, taxpayers would bear some of the costs. Finally, transport providers could absorb some of the costs, by passing them back to shareholders and employees.

Similarly, many groups may benefit from improved access. The welfare gains for people with disabilities could be substantial. More accessible transport might also lead to cost savings in the delivery of disability services, through less reliance on home care and aged care services, and an improved ability to live independently. People without disabilities, such as the elderly and parents with prams might benefit too. Further, there are less tangible, but no less real, benefits in the greater inclusion of people with disabilities.

The effectiveness and efficiency of the DDA are discussed in chapters 5 to 8.

What is not covered?

Although this is a broad inquiry, some areas are not under review. In particular, this is not an inquiry into the provision and funding of disability services. Disability services provided by the Australian and State and Territory governments are coordinated under the Commonwealth, States and Territories Disability Agreement (CSTDA), but neither that agreement nor the suite of legislation underpinnning the provision of government disability services is under review in this inquiry.

Although the Productivity Commission is not reviewing the actual provision of disability services, the interaction between disability services and the DDA can be important. The nature and level of services available to people with disabilities can influence the effectiveness of the DDA, and the DDA might apply to the *manner* in which services are delivered to people with disabilities. An example is the impact of disability services on the effectiveness of the DDA in eliminating discrimination, as discussed in chapter 5. The exemption from the DDA of 'special measures' that are reasonably intended to meet the special needs of people with disabilities is discussed in chapter 10. Chapter 14 raises disability services resourcing issues that may indirectly influence the current and future operation of the DDA.

This inquiry is not reviewing the State and Territory anti-discrimination Acts, Commonwealth legislation that addresses discrimination on other grounds (such as the *Sex Discrimination Act 1984*, the *Race Discrimination Act 1975* and the proposed Age Discrimination Bill 2003), the concept of a Bill of Rights for Australia (see chapter 2), or the Australian Human Rights Legislation Bill 2003. However, the influence of other discrimination legislation on the effectiveness and efficiency of the DDA is discussed in chapters 5 and 8.

Further, the Productivity Commission is not reviewing the HREOC Act, except that it contains the complaints mechanism for the DDA. Although the HREOC complaints mechanism is within the scope of this review, the Commission cannot review or advise on individual complaints. Nevertheless, it is interested in individuals' experiences with the complaints system, where these experiences illustrate strengths or weaknesses of the system or suggest possible reforms.

1.3 Conduct of the inquiry

The Productivity Commission received the terms of reference for this inquiry on 5 February 2003. The inquiry was originally scheduled to be completed within 12 months. Following the death of the Associate Commissioner, Dr John Paterson, a new Associate Commissioner, Cate McKenzie, was appointed and the timetable was extended.

As required by the terms of reference, and in line with normal inquiry procedures, the Productivity Commission has encouraged public participation in this inquiry. To facilitate participation in its processes and outputs, publications were available in standard, large print, audio, Braille and electronic formats. Public hearings and forums were held in accessible venues.

The inquiry was advertised widely and a circular was sent to individuals and organisations thought likely to have an interest in the inquiry. An issues paper was released in March 2003 to assist participants to prepare submissions to the inquiry.

Informal discussions were held with a wide range of organisations and individuals, including HREOC, State and Territory anti-discrimination bodies, people with disabilities and their representatives, members of the Indigenous community, and business and employer groups. Commissioners and staff attended five forums in regional Victoria and one in Perth.

The Productivity Commission received 248 submissions (as at 22 October 2003) in response to the issues paper. It held public hearings in all capital cities between May and July 2003, and teleconference hearings in August 2003. A total of 128 participants took part in public hearings. Those who attended informal discussions, made submissions and participated in hearings are listed in Conduct of the Inquiry.

A high level of public participation allowed the Productivity Commission to draw on contributions from people with disabilities, their associates and representatives, service providers, businesses and those charged with overcoming disability discrimination. The Productivity Commission thanks all participants for their contributions to this inquiry.

Interested parties can respond to this draft report by making submissions.

There is no set structure for submissions: they can range from a short letter outlining views on a particular topic to a much more substantial document covering a range of issues. They can be made in electronic, audio or printed format, and can be sent by mail, fax or email. Arrangements can also be made to record oral submissions over the telephone. Interested parties can also attend further public hearings to be held in January and February 2004.

The Productivity Commission will review the draft report in light of these further processes before submitting a final report to the Treasurer in 2004. The terms of reference for this inquiry note the Government's intention to release the report and announce its responses to the review recommendations as soon as possible.

1.4 Draft report structure

There are four parts to this report.

- Part I comprises background on the inquiry (chapter 1), a discussion of the relationship between disability and human rights (chapter 2), a description of the number and characteristics of people with disabilities in Australia (chapter 3) and a summary of the essential features of the DDA and associated legislation (chapter 4).
- Part II contains an analysis of the effectiveness and efficiency of the DDA. This analysis comprises an examination of the DDA's effectiveness in eliminating discrimination (chapter 5), its effectiveness in ensuring equality before the law (chapter 6), its effectiveness in promoting community acceptance (chapter 7) and its competition and economic effects (chapter 8).
- Part III contains options for improving the DDA. It discusses the definitions and scope of the DDA (chapters 9 and 10 respectively), the HREOC Act complaints process (chapter 11), regulatory arrangements (chapter 12), broad options for reform (chapter 13) and other issues including questions of resourcing (chapter 14).
- Part IV comprises information about the public consultation undertaken during preparation of the report (Conduct of the inquiry) and a list of references.

The Productivity Commission drafted a number of descriptive appendices on specific topics in the course of preparing this report. These appendices support the analytical chapters of the report. Copies of appendices are available on request from the Commission.

Appendices include employment (appendix A), education (appendix B), physical access (appendix C), goods, services and social participation (appendix D), Commonwealth Government laws and programs (appendix E), an overview of anti-discrimination legislation in other jurisdictions (appendix F), technical material supporting the inquiry's econometric work (appendix G) and approaches to changing community attitudes (appendix H).

2 Disability and human rights

This chapter examines different approaches to disability, along with the relationship between disability and human rights. It discusses the implications of different approaches to disability for anti-discrimination legislation. Many of the fundamental issues raised in this chapter are relevant to discussions throughout this report.

2.1 Approaches to disability

Many different individuals and different groups have an interest in this inquiry. They include people with disabilities and their carers and representatives, but also governments (Australian, State and Territory, and local), employers, educators and other service providers, taxpayers and the broader community. Each of these groups might have different views on the nature of disability, the experience of discrimination and what the policy response should be. The Productivity Commission is required to take a community-wide view in its inquiry. It is experienced at accounting for different views and value systems, and incorporating social as well as economic values in its analysis.

In any discussion of people's views, it is important to start with a common terminology. Some of the common terms used in this chapter and elsewhere in this report are defined in box 2.1.

The two main approaches to thinking about disability issues are the 'medical model', which views disability largely as a medical issue to be 'cured' and the 'social model', which views disability as resulting from social barriers to participation. The development of anti-discrimination legislation was largely due to the widespread acceptance of the social approach to disability.

This section explains the significance of these different ways of thinking about disability for defining and addressing discrimination. First, however, it discusses three related terms: 'impairment', 'activity restriction' and 'disability'. Although these terms are often used as synonyms in general language, they can have quite different meanings in this specific context.

Box 2.1 **Glossary of terms**

Impairment is commonly used in a medical sense to refer to any loss or abnormality of psychological, physiological or anatomical structure or function.

Activity restriction refers to the impact of an impairment on the individual's ability to function without assistance.

Disability refers to a lack of ability to perform an action in a normal manner. Disability is a function of both impairment and societal barriers to participation.

The medical model views disability largely as a medical issue to be 'cured'.

The social model views disability as resulting from social barriers to participation.

Human rights are rights recognised as inherent in every person by virtue of common humanity and innate dignity as human beings. They tend to be derived from moral or ethical codes and social mores. Many human rights are recognised in international conventions and local legislation.

Disability rights refer to the human rights of people with disabilities. The term does not necessarily imply any special rights but rather an entitlement to the same rights as those of the rest of society.

Equality of opportunity requires that individuals should be treated on merit. That is, characteristics that are not relevant to merit should not be taken into account when making decisions.

Formal equality is an extreme form of equality of opportunity, which rules out favourable treatment for a disadvantaged group because it could discriminate against those who do not receive preferential treatment.

Substantive equality takes limited account of disadvantage by providing assistance to give disadvantaged groups the same opportunities as advantaged groups.

Equality of outcome requires positive differential treatment of disadvantaged groups to achieve the same outcome as advantaged groups.

Impairment and disability

The term 'impairment' is commonly used in a medical sense. The ABS and World Health Organisation (WHO) define impairment as 'any loss or abnormality of psychological, physiological or anatomical structure or function' (ABS 1999b, p. 68).

The term 'disability' has a broader focus. WHO defines disability as 'any restriction or lack (resulting from an impairment) of ability to perform an action in the manner or within the range considered normal for a human being' (ABS 1999b, p. 66). The ABS defines disability as 'a limitation, restriction or impairment which is likely to

last six months and restricts everyday activities', and identifies four levels of activity restriction—profound, severe, moderate and mild—based on whether a person needs help, has difficulty or uses aids or equipment with any of three core activities—communication, mobility and self-care (ABS 1999b, p. 68).

A number of inquiry participants emphasised the distinction between impairment, activity restriction and disability. Jack Frisch, for example, stated:

> Impairment reflects a medical condition which relates to the individual; an activity restriction reflects the impact of the impairment on the individual's ability to function without assistance and also relates to the person; while a disability reflects design characteristics which have the effect of excluding people with impairment from fully participating in the life of the community. (sub. 196, p. 4)

The Physical Disability Council of Australia drew a similar distinction, arguing:

> The fact of impairment is not synonymous with disability. … Impairment means lacking all or part of the functional capability of a limb, organism or mechanism of the human body.
>
> Disability means the disadvantage or restriction caused by a contemporary social organisation, which takes no account or little account of people who have impairments and the functional or behavioural consequences of those impairments, leading to social exclusion or resulting in less favourable treatment of and discrimination against people with impairments.
>
> Therefore people with disability are people with impairments who are disabled by barriers in society. [The] central theme in this definition is that disability is external to the individual and is a result of environmental and social factors. (sub. 113, pp. 5–6)

The medical and social approaches to disability reflect the distinction between impairment and disability. It could be argued that anti-discrimination legislation, being based on the social approach, should refer to discrimination on the ground of impairment rather than disability. The ACT anti-discrimination Act adopts this approach. However, there seems to be general acceptance of the term 'disability', as exemplified by proposals to amend the ACT Act to increase its consistency with legislation in other jurisdictions. The ACT Discrimination Commissioner, Rosemary Follett, stated:

> I have recently put to our legislation program that we should drop the word 'impairment' in favour of the word 'disability'. It has been my experience that disability is a much more well understood word and, whenever we use the word 'impairment' we have to put 'disability' in brackets after it anyway. Impairment also, to some people, has rather a pejorative overtone — that there is you know something wrong with you — and I think we can do without that. I think disability is the common term. It's well understood, and that's the word we should use. (trans., p. 718)

The Productivity Commission recognises the technical distinction between impairment and disability (see chapter 9). However, unless otherwise noted, this

report uses the term 'person with a disability' in the commonly accepted sense of a person covered by the *Disability Discrimination Act 1992* (DDA).

Medical and social approaches to disability

Traditional concepts of disability were derived from the medical approach. This approach viewed disability in terms of impairments, which were viewed almost exclusively as medical matters. This focus on the 'disabling' effect of the impairment has been argued to have contributed to the segregation and marginalisation of people with impairments. Further, because the medical approach focused on the needs of people with impairments, rather than recognising their rights, assistance for people with disabilities was often viewed as welfare or charity (Degener and Quinn 2002a).

In contrast, the social approach is based on a view of human rights that assumes all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community. The social approach introduced a change in emphasis, from focusing on the 'problem' of disability, to focusing on the 'problem' of discrimination:

> A dramatic shift in perspective has taken place over the past two decades from an approach motivated by charity towards the disabled to one based on rights. In essence, the human rights perspective on disability means viewing people with disabilities as subjects and not as objects. It entails moving away from viewing people with disabilities as problems towards viewing them as holders of rights. Importantly, it means locating problems outside the disabled person and addressing the manner in which various economic and social processes accommodate the difference of disability — or not, as the case may be. The debate about the rights of the disabled is therefore connected to a larger debate about the place of difference in society. (Degener and Quinn 2002a, p. 5)

Rather than focusing on the disabling effect of an impairment, the social approach views disability as arising from physical, emotional and psychological barriers erected by society that exclude people with disabilities from participation. People with disabilities are part of society and have the same rights as other citizens, so society must change by dismantling physical, social and attitudinal barriers.

Although many commentators speak of the social approach having superseded the medical approach, the two approaches are complementary. In relation to discrimination law, a medical approach has a role in defining impairments and identifying people with disabilities, while the social approach has a role in describing how discrimination takes place and how it should be addressed. The scope of the DDA and definitional issues are discussed in chapters 9 and 10.

2.2 Human rights

The social approach to disability emphasises that people with disabilities have the same rights as those of other members of the community. There is broad agreement about the importance of human rights, as reflected in the following statement by Dr Ozdowski, the Australian Human Rights Commissioner and Acting Disability Discrimination Commissioner:

> Human rights are rights recognised as inherent in each and every one of us by virtue of our common humanity and innate dignity as human beings. They are the rights that must be respected if we are each to fulfil our potential as human beings. They are not luxuries — they are the basic and minimum necessities for living together in human society. (Ozdowski 2002c, p. 3)

Bodies such as the United Nations and the International Labor Organisation have several long standing declarations and conventions that specifically recognise the human rights of people with disabilities (see chapter 3). These declarations and conventions recognise various forms of human rights, including:

- civil and political rights—such as rights to life, liberty, free speech, movement, political thought and religious practice, a fair trial and privacy, the right to found a family and the right to vote
- economic, social and cultural rights — such as rights to adequate food and water, health care, education, a clean environment, respect for cultural practices and welfare assistance
- humanitarian rights, which are the rights of those who are involved in, or affected by, armed conflict—such as the treatment of prisoners of war, the wounded or sick, those shipwrecked, civilians, and women and children in particular
- various rights as defined by the nature of the holders—such as the rights of workers, women, children, minority groups, refugees, Indigenous peoples and people with a disability (HREOC 2001b, section 3, p. 1).

However, as with many generally agreed terms, 'human rights' can have different meanings to different people. Different arguments are put forward to explain the underlying bases and significance of human rights (box 2.2).

There is ongoing debate about which rights constitute human rights of 'ubiquitous validity' (that is, equally valid to all communities) and which are 'social rights' (that is, dependent on a community's traditional culture, level of development etc.) (Kis-Katos and Schulze 2002, p. 102). This inquiry does not cover the foundations of human rights, but it does have to grapple with important rights-related issues.

Box 2.2 **Bases of human rights**

Some people argue that human rights are based on moral or ethical codes. These codes are likely to derive from (or be the basis of) religion or culture.

Others argue that human rights can arise out of social mores or be provided by law. In either case, the right may be morally neutral (or even amoral for some) and yet be considered a human right. The right to free speech for example, could include the right to 'hate speech'.

Still others argue that rights are no more than privileges bestowed on individuals by society or, at least, by the law makers. According to this reasoning, rights are discretionary because they can be taken away as easily as they can be granted.

Human rights can have greater degrees of authority or primacy, depending on the accepted basis. Where rights are expressed in moral or ethical terms, they might be regarded as absolute and immutable. Where they are expressed in terms of prevailing social or cultural norms or customs, they may be seen as flexible, changeable or replaceable. If expressed in purely legal terms, then depending on the nature of the legal system in question, they might be considered to be fully or partially entrenched (for example, in a constitution or Bill of Rights) or not entrenched at all (that is, easily altered as decided by the law makers).

Source: HREOC 2001b, section 3, pp. 1-3.

Valuing human rights

Merely talking about valuing human rights is controversial. Many human rights advocates argue that human rights are of incalculable value and should be pursued at whatever cost. However, this is not always possible in practice. Some human rights can be enjoyed equally by all without creating potential conflicts. These include many fundamental civil and political rights, such as the right to personal liberty, the right to vote and the right to equal protection before the law. As discussed below, however, other rights can conflict. When they do, difficult tradeoffs must be made.

Society has limited resources and many competing demands. Sometimes, decisions must be made about how far various rights will be pursued. In many circumstances, discrimination is not unlawful under the DDA, if preventing it would create unjustifiable hardship. The right to freedom from discrimination is not absolute; it is limited to circumstances in which removing discrimination results in an overall benefit to society. The effects of the DDA on resource allocation is discussed in chapter 8.

Conflicts between rights

Different 'rights' can conflict—for example, the 'right' not to be discriminated against conflicts with the 'right' of employers to employ whom they like, or the right of service providers to provide whichever services they choose. Some extreme views, like those of libertarians regard no restriction of the freedom of individuals to make voluntary contracts as justifiable (box 2.3).

Box 2.3 **Libertarian views on rights**

Libertarians are sometimes called 'contractarians', because they believe the socially optimal distribution of income and goods would result from voluntary contracts among unconstrained adults with different tastes and different endowments, with each person trying to satisfy their own preferences. Political action to constrain free choices would reduce social welfare.

The libertarian approach argues that it is impermissible for the government to compel contracts between parties when all parties do not choose to contract voluntarily. Thus, ordering an employer to hire or retain someone whom they would not choose to hire is impermissible, even if the employer is motivated by prejudice.

At the same time, libertarians would argue that the government must not forbid voluntary contracts from being made. The role of anti-discrimination law should be limited, therefore, to ensuring the government does not mandate discriminatory practices.

Libertarians argue that discrimination will persist only where the government mandates it. Market pressures to maximise profits will prevent entrepreneurs from acting on prejudice.

Source: Kelman and Lester 1997, pp. 198–201.

In some cases, society (through Parliament) makes clear how these conflicts should be resolved, through anti-discrimination legislation. In other cases, rights might be reconciled less formally, through generally accepted societal norms—for example, the implied right to free speech is tempered by generally accepted use of language. Informal mechanisms can come under pressure during times of social change, as different views of what is 'acceptable' conflict.

Some potential conflicts are difficult to resolve. Anti-discrimination legislation can interact with occupational health and safety legislation, for example. How should potential conflicts between non-discrimination and the right to a safe workplace be resolved? Other examples arise where governments (at State or federal level) pass laws that might have discriminatory effects. To what extent should anti-discrimination law over-ride these other laws? What criteria should be used to determine precedence? This issue is discussed in chapter 6.

Defining outcomes

Different views of human rights can lead to different ideas about what outcomes should be pursued. There is little disagreement, for example, that a desirable outcome is for people with disabilities to be able to participate in the life of the community. However, there is more disagreement about how this outcome should be defined.

To many disability advocates, *how* things are achieved can be as important as *what* is achieved. They argue, for example, that people with disabilities are entitled to non-discriminatory access to 'mainstream' services. The only acceptable outcome, therefore, is accessible mainstream services. On the other hand, some service providers argue that outcomes should be defined in terms of what those services are meant to achieve (such as mobility or employment). They argue that this approach would allow a better assessment of the costs and benefits of different ways of achieving the outcomes. The second approach, for example, might argue that mobility could be provided most cost-effectively through parallel services, such as subsidised taxis. The first approach emphasises accessible public transport, arguing that parallel services restrict freedom of choice and lead to segregation of people with disabilities.

This definitional problem is an important issue for this inquiry. The way in which outcomes are defined affects any assessment of the DDA's effectiveness in eliminating discrimination (see chapter 5).

2.3 Disability rights

The social approach to disability emphasises the human rights of people with disabilities. Under this approach, the term 'disability rights' does not imply any special rights, but rather an entitlement to the same rights as those of the rest of society, as stated by Degener and Quinn:

> The disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, without discrimination, by people with disabilities. (Degener and Quinn 2002c, p. 5)

Although a rights-based, social approach to disability is generally accepted, there is less agreement on what this approach implies for disability policy. Two particular areas of potential disagreement are:

- what rights should be protected?
- what are the appropriate policy instruments to protect those rights?

What rights should be protected?

As with human rights more generally, there is broad agreement that the rights of people with disabilities should be protected, but there are different views on the nature of those rights. One of the most fundamental distinctions is between 'equality of opportunity' and 'equality of outcome'. 'Equality of opportunity' can be further divided into notions of 'formal equality', in which no distinction between people other than merit is allowed, and 'substantive equality', in which some allowance or adjustment may be made for disadvantaged groups to give them equal access to opportunities.

Equality of opportunity

Equality of opportunity requires that individuals should be treated on merit. That is, irrelevant characteristics should not be taken into account when making decisions about employment, provision of services or social participation. Equality of opportunity does allow discrimination on the basis of relevant characteristics that indicate merit. An employer is thus permitted to discriminate on the basis of qualifications and experience, but not on the basis of characteristics that are irrelevant to the employment decision.

Formal equality—the most extreme type of equality of opportunity—rules out favourable treatment for people with disabilities because this approach could discriminate against those who do not receive preferential treatment. Formal equality has been criticised because its focus on individual merit only is insufficient to address systemic or structural barriers to participation.

At the other end of the scale, substantive equality of opportunity allows some measures to be taken to ensure that disadvantaged groups have equal access to the opportunities that are available to others. However, once equality of opportunity is achieved, the outcome achieved by each individual still depends on merit.

The distinction between formal equality of opportunity and substantive equality of opportunity is significant for people with disabilities, who often must overcome systemic barriers before they can take advantage of opportunities. Like the *Sex Discrimination Act 1984* and the *Race Discrimination Act 1975*, the DDA allows for discrimination in favour of a disadvantaged group to promote equality of opportunity (s.45). But unlike these other Acts, a combination of provisions in the DDA require employers and service providers to make adjustments to place a person with a disability in the same circumstances as a person without the disability. (In most instances, the extent of these adjustments is limited by an 'unjustifiable hardship' defence.)

Some commentators argue that the DDA does not go far enough. The Anti-Discrimination Board of New South Wales, for example, argued:

> … there continue to be structural barriers that impact upon equality of opportunity for people with disabilities. Disability discrimination does not only result from the actions of individuals but is a result of structural and systemic inequalities. …
>
> In the board's view a more proactive DDA would clearly require positive steps to be taken to ensure that people with disabilities are able to participate in employment and education and enjoy access to goods and services, public places and accommodation. (sub. 101, pp. 11–12)

Equality of outcome

Equality of outcome goes beyond equality of opportunity. It takes account of disadvantage and systemic discrimination, and requires positive differential treatment. The following is a simplified argument in favour of seeking equality of outcome (Moens 1985).

- Talents and skills can be assumed to be distributed uniformly throughout the population.
- Equality of opportunity should thus result in the proportional representation of different groups (for example, in employment).
- Any large disparities in outcome must be due, therefore, to some form of discrimination.
- If the precise source of that discrimination cannot be identified and removed, then equal outcomes can still be achieved by introducing positive differential measures.

Some people argue that equality of outcome requires enforceable rights to receive support, assistance or services required for effective participation. The extent to which the DDA should focus on equality of outcome, rather than equality of opportunity, is a recurring issue for this inquiry. The scope of the DDA, including the extent to which anti-discrimination legislation could or should incorporate measures to achieve equality of outcome, is discussed in chapter 13.

Positive measures

Positive measures can take many forms. Colker, for example, identified a spectrum of measures ranging from ensuring formal equality of opportunity to achieving substantive equality of opportunity, to reversing discrimination measures aimed at achieving equality of outcomes. The distinctions among these categories can be subtle, and the same set of circumstances can be characterised in different terms.

- 'Non-discrimination' (or formal equality) requires the removal of blatant stereotypes and prejudices so individuals can have an opportunity to be treated according to their merit.
- 'Reasonable accommodation' requires the removal of barriers created by society so qualified individuals can demonstrate their merit.
- 'Affirmative action', 'preferential treatment' and 'positive action' require the re-definition of merit to give greater value to the traits and abilities of members of disadvantaged groups.
- 'Reverse discrimination' requires the awarding of an automatic 'plus' to a member of a disadvantaged group, so that individual has a better opportunity of being selected for the desired outcome (Colker 1998, pp. 35–36).

Policy instruments

Once the difficult issue of defining the nature of disability rights is decided, governments must choose how to implement those rights. Jason Gray, for example, stated:

> Non-discrimination … does not spring full blown from the bare declaration of the right. (sub. 27, p. 210)

Governments have a range of policy instruments from which to choose. These include education and moral suasion, the provision of resources and services, and legislation that creates enforceable rights. These instruments are not mutually exclusive, but they can be characterised along a spectrum from least interventionist to most interventionist.

At one end of the spectrum, governments can use moral suasion and public education to change attitudes and behaviours. This was the position in Australia between the passing of the *Human Rights Commission Act 1981* and the passing of the DDA in 1992. The Human Rights Commission Act did not create any legally enforceable rights, only a power for the Human Rights Commission to investigate complaints, seek to resolve them by conciliation, and report to Parliament on matters that could not be resolved. There was no recourse to the courts if conciliation was not effective.[1]

Further along the spectrum, rather than just encouraging participation, governments can provide resources and services to support the participation of people with disabilities. Governments provide income support and various disability services.

[1] The *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) replaced the Human Rights Commission Act, but did not create any enforceable rights.

They can target specific areas of participation—for example, targeting employment through wage subsidies or 'sheltered workshop' type business services. To support participation in other areas, Governments can provide vouchers for accessible taxis and companion card schemes to facilitate participation by people who require a carer. They can also fund disability organisations and advocacy services for people with disabilities.

Further along the spectrum, governments can legislate to create legally enforceable rights for people with disabilities. These rights can take different forms and be enforced in different ways. Governments can legislate to create positive rights (as in a Bill of Rights, discussed below), but most approaches to anti-discrimination have actually taken the form of negative prohibitions, setting out the circumstances in which discrimination is not allowed. These prohibitions can be expressed generally—for example, a statement that discrimination is unlawful in employment. In this situation, case law will create precedents over time and build up more detailed rules. All State and Territory anti-discrimination legislation has adopted this approach and, for all practical purposes, which was also generally the approach of the DDA until recently.

A more interventionist approach is to establish detailed rules about how discrimination is to be prevented. This approach lies somewhere between the 'rights' and 'prohibition' approaches. Detailed regulation can describe how to meet the requirements of the right or prohibition. The DDA includes the facility to introduce detailed regulation, as demonstrated by the recent promulgation of the public transport disability standard. Future standards for public premises and education will add to the body of prescriptive regulation.

Once rights or prohibitions are established, an enforcement mechanism is necessary. The simplest and least interventionist mechanism is to rely on individual complaints. Compliance with the DDA is largely based on individual complaints, but also includes other more interventionist elements such as the Human Rights and Equal Opportunity Commission's (HREOC) power to inquire into systemic discrimination. The original DDA also allowed for HREOC to initiate complaints. (This power has since been abolished—see chapter 4). Still more interventionist options, which have not been part of the DDA, include 'policing' powers similar to those in occupational health and safety legislation.

Enforcement can also involve different remedies or sanctions. The choice of remedy often reflects the object of the Act and the degree of social acceptance of that object. Where the object is to change attitudes, and where a relatively large segment of the population is being targeted, a 'soft' approach emphasising education and conciliation might be appropriate. Where an action is generally accepted to be

wrong, 'harder' approaches (including penalties and criminal sanctions) might be appropriate to target a recalcitrant minority.

The DDA emphasises conciliation, although it includes penalties for not complying with certain (mostly procedural) aspects of the Act. If a complaint is successfully taken to court, then the court may order the payment of damages, but this payment is more about compensating the loss incurred by the complainant than penalising the respondent. More authoritarian approaches could impose financial or criminal penalties for discrimination, as is the case for some occupational health and safety breaches.

At the other end of the spectrum from 'moral suasion' is the concept of a Bill of Rights. Several commentators have called for a bill of rights to give constitutional protection to a range of human rights, as in the United States and Canada. Ozdowski, for example, has stated:

> I would like to see a renewal of debate about the possibility of a Bill of Rights for Australia, which could translate the major international human rights standards into a form that has meaning and effect here in Australia. I think we need more public and political debate about the human rights we value as a nation and as individuals and about what we might do to ensure that these rights are sufficiently protected. (Ozdowski 2002a, pp. 1-2)

This is not an inquiry into a Bill of Rights for Australia, and discussion of the pros and cons of such a Bill would fall outside the terms of reference (see chapter 1). The focus of this inquiry is on the desirable characteristics of anti-discrimination legislation. Even if Australia had a Bill of Rights, it is likely that separate anti-discrimination legislation would be likely to still be necessary. Other countries with a Bill of Rights, including the United States and Canada, also have anti-discrimination legislation (see appendix F).

2.4 Economic perspectives

Discrimination is largely viewed as a social issue, and the main impetus for the DDA was to protect human rights and create a more inclusive society. However, giving effect to human rights can involve difficult tradeoffs. These tradeoffs require an assessment of the broad benefits and costs of different approaches. Some economic concepts can help define different approaches to measuring 'social welfare'.

In addition, there have been various attempts to describe discrimination in economic terms, and these can provide useful insights into how discrimination could be

addressed. These theories are most developed in relation to discrimination in the labour market.

The rights of people with disabilities can also be considered within a framework that emphasises the concept of social capital—that is, the relationship between discrimination and the social norms, networks and trust that underpin a society.

Social welfare

The primary goal of any public policy is to make society as a whole better off—in economic terms, to 'maximise social welfare'. However, there is no commonly accepted definition of social welfare. Almost all social objectives conflict to some extent with individual freedom or rights, creating 'winners' and 'losers'. A way of comparing the winners' gains with the losers' losses is thus needed to estimate whether there is an improvement in social welfare. Different approaches to measuring social welfare are summarised in box 2.4.

The DDA recognises that the objective of eliminating discrimination involves tradeoffs between benefits and costs. The object includes the words 'as far as possible' (s.3(a)), recognising that no Act can completely eliminate discrimination. The need to balance benefits and costs is reflected in other provisions of the DDA. The unjustifiable hardship provision (which applies to both complaints and disability standards), for example, requires an assessment of the benefits or detriments to any persons concerned. However, less clear are how those benefits or detriments are to be measured or weighted, and what view of 'social welfare' should be pursued. The competition and economic effects of the DDA are discussed in chapter 8.

Box 2.4 **Measuring social welfare**

Different ways of assessing social welfare have been developed. Each embodies slightly different views on what is equitable or welfare enhancing.

Utilitarians (such as Jeremy Bentham) argue for the maximisation of total utility (that is, 'happiness' or 'welfare') in society. Policies should aim to maximise the sum of all individual utilities. This approach implies that redistributing resources is justified if it leads to an increase in total utility. Taxing the rich to assist the poor, for example, is justified if the loss in utility felt by the rich is more than offset by the increase in utility felt by the poor. A problem with this approach is that it is impossible to measure or compare individual utilities.

The Pareto principle (named after Vilfredo Pareto) holds, because individual utilities cannot be measured, that society can be regarded as better off only if one member is made better off without taking anything away from other members. The Pareto principle is very restrictive: it makes no comment on the initial distribution of resources, and argues against any policy that would lead to a redistribution of resources.

The Kaldor-Hicks compensation principle (argued separately by Nicholas Kaldor and John Hicks) seeks to balance the needs of society and those of individuals. It argues that society is better off when it pursues policies that generate sufficiently large benefits for the winners, so the winners could compensate the losers and still remain better off. It is argued that approach this does not violate the Pareto principle because one person's gain does not have to take something away from someone else. The issue remains, however, as to how the losers are to be compensated, particularly if the they cannot be individually identified or their losses cannot be quantified.

The Rawlsian challenge (named after John Rawls) proposes different criteria for judging social welfare. To deduce the 'fairest' distribution, distributive issues should be decided behind 'a veil of ignorance'—that is, which distribution would a rational person choose if they did not know what part of the distribution they would receive? Rawls argues that a rational person would choose the option that protects the share of the most unfortunate group, to minimise their potential loss. Social welfare is maximised, therefore, by improving the position of the least fortunate. A drawback of this approach is that it throws its entire weight behind the wellbeing of the worst off and disregards the welfare of others.

Source: adapted from Gupta 2001, pp. 75–79.

Labour market discrimination

Employers often must choose from among potential employees. To do so, they 'discriminate' on some basis, usually their estimate of the applicants' likely skills and productivity. This process might lead to a group of individuals who share a particular characteristic (such as a disability) experiencing poorer labour market

outcomes than those of the general population. These differences in outcomes might not reflect 'discrimination' in the pejorative sense of bias or prejudice, however.

Employment outcomes are influenced by the value that an individual places on work (compared with leisure and other activities) and the value of their labour to a potential employer (influenced by factors such as education and experience). In economic terms, outcomes of the labour market are influenced by the supply and demand for labour.

At least part of the difference in outcomes across groups might be due to the normal functioning of the marketplace. One group may:

- have different education, skills and abilities (often called human capital)
- be more or less productive
- place a different value on work and other activities.

Some differences in outcomes, however, might not be the result of rational supply and demand decisions. If 'irrelevant' characteristics influence labour supply and demand decisions, then 'irrational' discrimination can result. It is also true that differences in education, productivity and the value placed on work might be the result of previous discrimination.

Such discrimination might discourage people from looking for work (pre-market discrimination) or act to reduce wages and occupational choices once people are in the labour market (post-market discrimination). Discrimination on the ground of disability can have compounding effects—that is, if wages and choices are likely to be limited, then individuals may be discouraged from building up their human capital or from entering the labour market in the first place.

Economists have set forth three major theories of labour market discrimination (Schwochau and Blanck 2000):

- the 'taste for discrimination'
- the market power of employers
- statistical discrimination.

In the 'taste for discrimination' theory, Becker (1971) argued, assuming that individuals in the 'majority' and 'minority' are perfect substitutes for each other (for example, they are equally productive), that employers might still display 'tastes for discrimination' by refusing to hire members of the minority or by offering them lower wages. Fellow employees and customers might also display 'tastes for discrimination'. This theory is based on 'irrational' antagonism to explain the 'distaste' for the minority (Phelps 1972, p. 659). It does not explain why

discrimination exists; it merely describes its effects. The theory suggests that if discrimination is not widespread, then market forces will drive out discrimination (as non-discriminators bid up the wages of the minority). However, if discrimination is endemic, particularly among fellow employees and consumers, then discrimination might become self-perpetuating.

In 'the market power of employers' theory, Madden (1973) argued that employers with market power act rationally by distinguishing among employee groups that differ in their willingness to supply labour at particular wage rates. This behaviour may be the case if some employee groups are less mobile than others (geographically or occupationally). Unlike Becker's theory, this theory recognises a rational basis for the discrimination. People with disabilities might be willing to work for lower wages because they have fewer employment options. However, as in 'the taste for discrimination' theory, this theory does not explain persistent discrimination over time. Employers who do not discriminate would benefit from hiring the group demanding lower wages and over time, the discrimination would disappear.

The theory of statistical discrimination (Phelps (1972)) is perhaps the most useful. It is based on employer decision making under imperfect information. Where it is difficult or expensive to gather full information about an individual's productivity, it is in the employer's interests to identify relatively 'cheap' indicators of productivity that may be used to predict future performance, before hiring new employees. Common indicators in employment decisions include years of schooling and relevant experience. Statistical discrimination results when employers use a general indicator, such as a disability, to predict an individual's performance. That is, perceptions of the average person with a disability are used to predict an individual's performance.

If these perceptions about the productivity of the average person with a disability are inaccurate, then a whole group of potentially productive employees will be overlooked. On the other hand, if the employer is correct in their perceptions, then their decisions on average will be efficient. The employer might not hire the best applicant every time (if the best applicant happens to be an 'above average' member of the overlooked group), but the employer will save on search costs over time. However, this might not be the best outcome for society as a whole. By employers judging groups rather than individuals, potentially productive employees are not employed. This discrimination can lead individuals to change their labour supply decisions—for example, they might not bother to enter the labour market or might pursue vocational education and training.

Constant rejections can also lead to 'scarring', where a potentially productive employee becomes less attractive (even to non-discriminating employers) as a result

of an apparent poor employment history or lack of references, regardless of the individual's actual skills and productivity.

Statistical discrimination can endure over time, by creating a self-perpetuating cycle. The lack of role models can discourage other people with disabilities from pursuing certain types of employment. If employers do not give people with disabilities opportunities, given perceptions about the potential employees' abilities, then there is no way to disprove the perceptions. Lack of contrary evidence enhances the probability that stereotypes are perceived as accurate.

Social capital

Social capital is a relatively new way of thinking about how people interact. It relates to the social norms, networks and trust that facilitate cooperation within or among groups in society. The World Bank developed the following definition:

> The social capital of a society includes the institutions, the relationships, the attitudes and values that govern interactions among people and contribute to economic and social development. (World Bank 1998, in PC 2003b p. IX)

Social capital can interact with disability discrimination in a number of ways. Some aspects of social capital can have adverse effects, such as when strong internal group cohesion is associated with intolerance of others. Anti-discrimination legislation can be perceived as an attempt to influence social norms to incorporate tolerance for difference within society's shared values and rules for social conduct. Degener and Quinn, for example, stated:

> [Progressive disability legislation] acts as a 'civilising factor' in any society that respects difference and aims to create societies that are truly open to all. (2002c, p. 41)

On the other hand, social capital can generate benefits to society by reducing transaction costs, promoting cooperative behaviour, diffusing knowledge and innovations and enhancing personal wellbeing. Governments undertake many functions that implicitly aim to support or enhance social capital. Anti-discrimination legislation, for example, aims to create a more inclusive, tolerant society, with corresponding benefits to the community as a whole. In the second reading speech, the then Minister for Health, Housing and Community Services, the Hon. B. Howe, stated:

> People with disabilities are entitled to the same rights and the same opportunities as all other Australian citizens. However, our society currently falls well short of realising this ideal. People are still subjected to discrimination purely on the basis of disability—discrimination which, I am sure all honourable members would agree, is socially damaging, morally unacceptable and a cost to the whole community. …

> It is therefore essential that there is a legislative basis to enable people with disabilities to participate in the economic, social and political spheres of the community and subsequently to determine the direction of their own lives. This legislation would be a vital element in removing the attitudinal, physical, structural and institutional barriers that people with disabilities currently face. The realisation of this Government's social justice goals for people with disabilities will benefit not only people with disabilities, but society as a whole. (Australia 1992a, p. 2751)

It would be counter-productive, therefore, if anti-discrimination legislation had the effect of eroding social capital. The DDA could affect existing beneficial social capital, for example, if the cost of providing access to people with disabilities meant some community organisations or volunteer services could no longer operate. There is a potential risk that people with disabilities enforcing their rights could be viewed as 'troublemakers' or as the source of social disharmony. This could be one reason that the DDA emphasises community awareness and conciliation of complaints, rather than a punitive enforcement system.

Cox and Caldwell (2000) proposed a checklist to assist policy analysts to account for social capital considerations.

- Does the policy increase people's skills to engage in social activities with people they do not know—their sociability?
- Does the policy target some groups at the expense of others, or create feelings of scapegoating or exclusion?
- Does the proposed form of service delivery allow the building of informal relationships and trust with all stakeholders?
- Does the project help extend networks, confidence and optimism among participants?
- Do participants increase their capacity to deal with conflict and diversity?
- Does the program evaluation include the social as well as financial and individual aspects of outputs and outcomes?
- Does the auspice [the body or mechanism delivering the program] itself affect the way people see the program?
- What messages does the program offer to people about their own values and roles?
- What impact does the program have on attitudes to formal institutions of governance? (Cox and Caldwell 2000, in PC 2003b, p. 65).

Many (if not all) of these considerations are directly applicable to the DDA, and any proposals to reform the DDA have significant implications for social capital.

2.5 Summing up

This chapter has raised fundamental issues that will arise throughout this report. The most significant issues include:

- integrating the medical approach (defining impairments and identifying people with disabilities) with the social approach (describing how discrimination takes place and how it should be addressed)
- defining discrimination on the ground of disability in terms of formal or substantive equality of opportunity, or equality of outcome
- valuing human rights and dealing with conflicts and tradeoffs among different rights
- articulating disability rights and determining appropriate policy instruments.

Many of these issues do not have 'right' or 'wrong' answers, but require a careful balancing of views. The Productivity Commission does not seek to impose any social or cultural values of its own, but some economic perspectives can provide useful guides to assist the balancing of views presented by inquiry participants.

3 Disability in Australia

This chapter presents a picture of people with disabilities in Australia and of the barriers that they face in their everyday lives. It draws heavily on survey data. The most recent substantial survey about people with disabilities, the Survey of Disability, Ageing and Carers (SDAC), was conducted by the ABS in 1998. A survey for 2003 is underway, but the results will not be available until May 2004. A more recent source of information is the survey of Household, Income and Labour Dynamics Australia (HILDA), which was run in 2001. HILDA identifies people with disabilities, but it contains only limited information about the nature of their disabilities and their implications. Although an imperfect match to the SDAC, HILDA enables more recent observations of a range of disabilities and, with careful qualifications, trends.

3.1 Disability

The results of the SDAC show that 3.6 million people in Australia had a disability in 1998, or 19.3 per cent of the total population (ABS 1999b, p. 13). However, the proportion of the Australian population covered by the *Disability Discrimination Act 1992* (DDA) is larger than these figures suggest because the definition of disability adopted in the Act is broader than that used for the SDAC (box 3.1).

The 1998 SDAC collected information about the cause, nature and severity of disabilities. The relationships between these characteristics of disability, and the terms used to describe them by the ABS, are illustrated in figure 3.1.

Types of disability

People with disabilities differ in the type of their disability, the manner in which it affects them and its implications for their everyday lives. The following views from inquiry participants reflect this diversity of experiences:

> … every disability is unique … (Jason Gray, sub. 27, p. 9)

> … people with disabilities are living in the same world as the rest of us, however, the nature of this world can be a vastly different one. The most obvious reason for this is the disability itself — its type, severity, implications and so on. But there is also a wide

range of other influences impacting on the experience of disability. (Disability Services Victoria, in Andrew Van Diesen, sub. 93, pp. 9–10).

People with disabilities are not a homogenous group. They are people of different ages, languages, races and cultures; different genders, experiences, lifestyles and choices. They have a diverse range of incomes, histories, and political and social commitments. They may understand, describe and identify with disability in different ways. (Joe Harrison, sub. 55, p. 2)

Box 3.1 **Different definitions of disability**

The definition of disability used by the ABS in the 1998 SDAC was narrower than that in the DDA (see chapter 4), which means the survey underestimated the number of people to whom the DDA might apply.

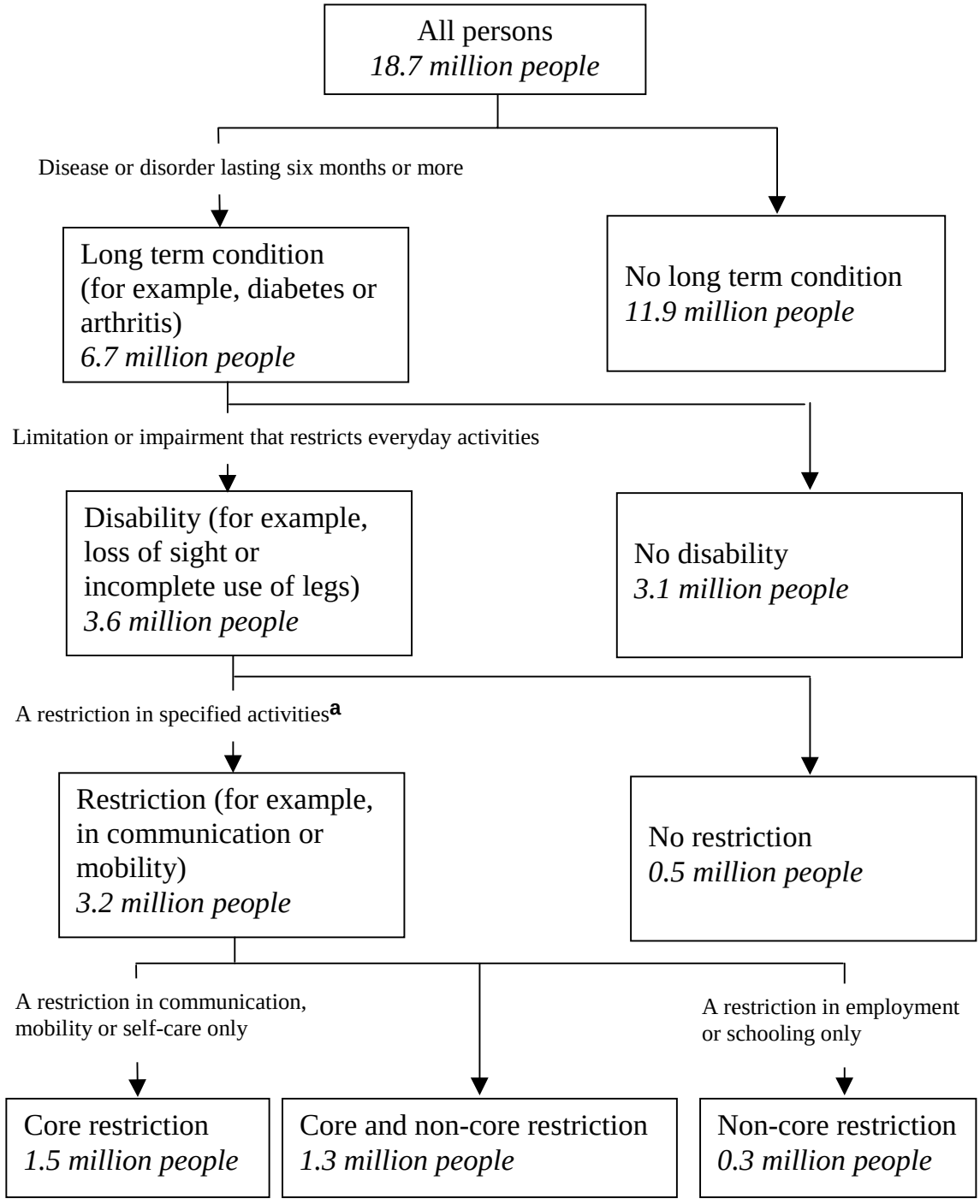
In the SDAC, a person was deemed to have a disability if they answered 'yes' to a screening question. Respondents were asked whether they had specific health conditions, such as limited use of feet or long term effects resulting from brain damage. By contrast, the DDA lists broad health conditions, such as total or partial loss of bodily or mental functions.

The ABS screening question also required the disability to be current, last for six months or more and affect everyday activities. The DDA, however, has no duration or effect requirements and states that the disability can occur in the past, the present or the future.

SDAC used self-identification of disability, based on individual responses to the questions asked (unless the respondent was incapable of participating in the survey, in which case a third party responded on that person's behalf). However, self-identification does not allow for the possibility that the disability is simply a perception by other people, which is provided for in the DDA

The definition of disability in the DDA covers four broad types of disability: physical (including sensory), disease related, intellectual and mental. The incidence of these broad types of disability is shown in figure 3.2. Disabilities are grouped according to medical diagnosis (or main long term condition), instead of symptoms (or disabilities). This creates clear-cut distinctions between types and removes the possibility of double-counting. However, it should be noted that physical and disease-related disabilities are likely to overlap because the main long term condition affecting a person, even if a disease, might result in physical symptoms. Further, the statistics presented in table 3.1 illustrate one method of grouping different types of disability. Other methods that are no less valid or useful could be explored using the SDAC data—for example, grouping disabilities according to whether they are multiple or whether they affect communication (Wilkins 2003).

Figure 3.1 **Relationships among ABS terminology for disability, 1998**

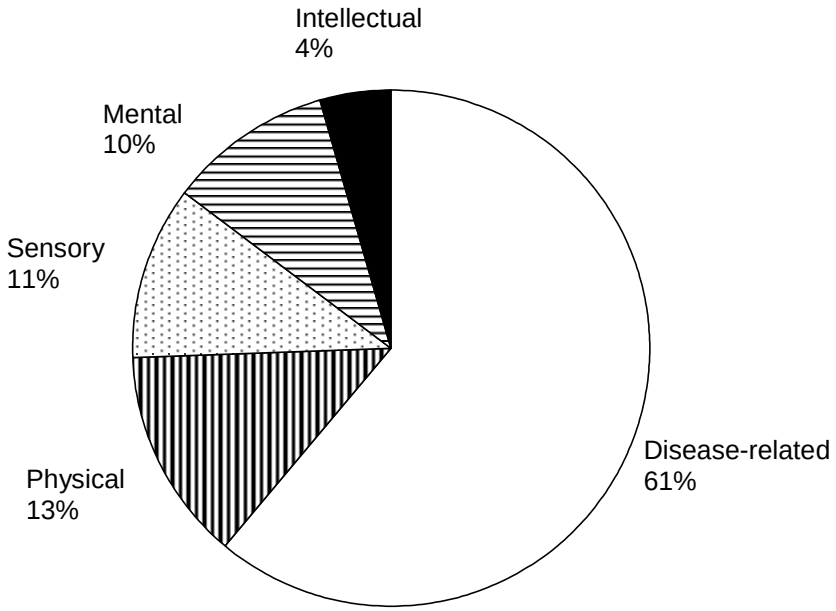


a The specified activities are: communication, mobility and self care ('core' activities) as well as employment and schooling ('non-core' activities).

Data sources: ABS 1999b, cat. no. 4430.0., p. 4; Wilkins 2003, p. 68; Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

In 1998, the most common of the broad types of disability was disease related. Disease-related conditions affected 2.2 million people—that is, 61.0 per cent of people with disabilities (figure 3.2).

Figure 3.2 **People with disabilities, by main condition,[a,b] 1998**



[a] **Disease related**: cancer/lymphomas/leukaemias, endocrine/nutritional/metabolic disorders, diseases of the nervous system, diseases of the circulatory system, diseases of the respiratory system, diseases of the digestive system and diseases of the musculo-skeletal system/connective tissue; **sensory**: diseases of the eye and adnexa and diseases of the ear and mastoid process; **physical**: congenital/perinatal disorders, injury/poisoning/other external causes and other physical conditions; **mental**: psychoses/mood affective disorders, neurotic/stress-related/somatoform disorders and other mental and behavioural disorders; **intellectual**: intellectual and development disorders. See appendix G for more detail. [b] Percentages may not add up to 100 due to rounding.

Data source: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

Types of restrictions and their severity

In 1998, 3.2 million people with disabilities were restricted in one or more specific activities (table 3.1). Of this total, 2.8 million people were restricted in communication, mobility and/or self-care (known as core restrictions) and 1.7 million were restricted in schooling or employment (known as non-core restrictions), with 1.3 million restricted in both core and non-core activities. Thus, 0.3 million were restricted in non-core activities only. [1] People with restrictions represented 16.9 per cent of the Australian population and 87.4 per cent of people with disabilities.

[1] Rounding errors create a discrepancy between these subtotals and the total.

Table 3.1 **Types of disability, by restriction, 1998**

Restrictions	Disability					All people with disabilities	
	Disease related	*Physical*	*Sensory*	*Mental*	*Intellectual*		
	%	%	%	%	%	%	'000
Core[a]							
Profound	13.2	11.4	8.5	29.7	30.4	14.9	537.8
Severe	17.6	16.9	9.3	17.5	16.9	16.6	598.7
Moderate	22.2	18.0	7.9	10.6	8.1	18.3	659.4
Mild	28.4	28.7	44.3	18.2	15.8	28.6	1030.6
Total core	*81.4*	*75.0*	*70.0*	*76.1*	*71.1*	*78.3*	*2826.5*
Total non-core[b]	*45.6*	*49.1*	*24.1*	*53.0*	*81.2*	*46.0*	*1661.6*
Core and non-core[c]	38.1	38.7	16.5	40.3	57.4	36.9	1333.2
One or more restrictions[d]	88.8	85.3	77.6	88.7	94.9	87.4	3155.0
No restrictions	11.2	14.7	22.4	11.3	5.1	12.6	455.1
Total	*100*	*100*	*100*	*100*	*100*	*100*	*3610.0*

[a] Core restrictions relate to communication, mobility and/or self care. [b] Non-core restrictions relate to schooling or employment. [c] This category is a subset of the two preceding rows—for example, some people in the total core category also have a non-core restriction (and vice versa). [d] This category contains people with core or non-core restrictions.

Source: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

The core restrictions tend to overlap, with 39.1 per cent of people with a core restriction in two or more of the relevant activities. The most common type of core restriction related to mobility: it affected 2.5 million people, which represented 13.6 per cent of the Australian population. Approximately 1.5 million people were restricted in employment—which was 11.8 per cent of the working-age population of Australia in 1998—and 0.2 million were restricted in schooling—which was 5.8 per cent of the school-age population.

The relationship between different disability types and restriction is illustrated in table 3.1, which shows restrictions by the main condition affecting people with disabilities. People with intellectual disabilities are particularly restricted in the activities (core and non-core) included in the ABS survey. The high degree of difficulty faced by people with intellectual disabilities in their everyday lives prompted some inquiry participants to argue that a different approach is needed for these people. Robert and Pauline Atkins said:

> We have strong views on the matter of distinguishing between intellectual and other forms of disabilities. We believe that they should be handled differently … (sub. 26, p. 1)

Ninety-five per cent of people with an intellectual disability had a specific restriction of some kind, which was a greater percentage than for any other type of

disability. People with an intellectual disability also had the greatest amount of overlap between the two broad types of restriction, with 57.4 per cent having restrictions in schooling or employment as well as in communication, mobility and/or self-care. People with an intellectual disability had the greatest proportion with restrictions in schooling or employment (81.2 per cent), while people with a disease-related disability had the greatest proportion with core restrictions (81.4 per cent).

These restrictions were also measured by their severity—that is, the degree of difficulty experienced, or assistance required, by a person to perform activities. A far greater proportion of people with a mental or intellectual disability required constant help (profound restriction) or frequent help (severe restriction) to carry out communication, mobility and/or self-care, compared with people with a physical or disease-related disability. That is, 47.2 per cent of people with a mental disability and 47.3 per cent of people with an intellectual disability had a profound or severe core restriction, compared with 28.3 per cent of people with a physical disability and 30.8 per cent of people with a disease-related disability.

In contrast, people with sensory disabilities seemed the least restricted in the activities surveyed by the ABS. This group that had the largest proportion with either no restrictions (22.4 per cent) or only mild core restrictions (44.3 per cent). In addition, people with sensory disabilities tended be far less restricted in schooling and employment alone (24.1 per cent), relative to people with other types of disability.

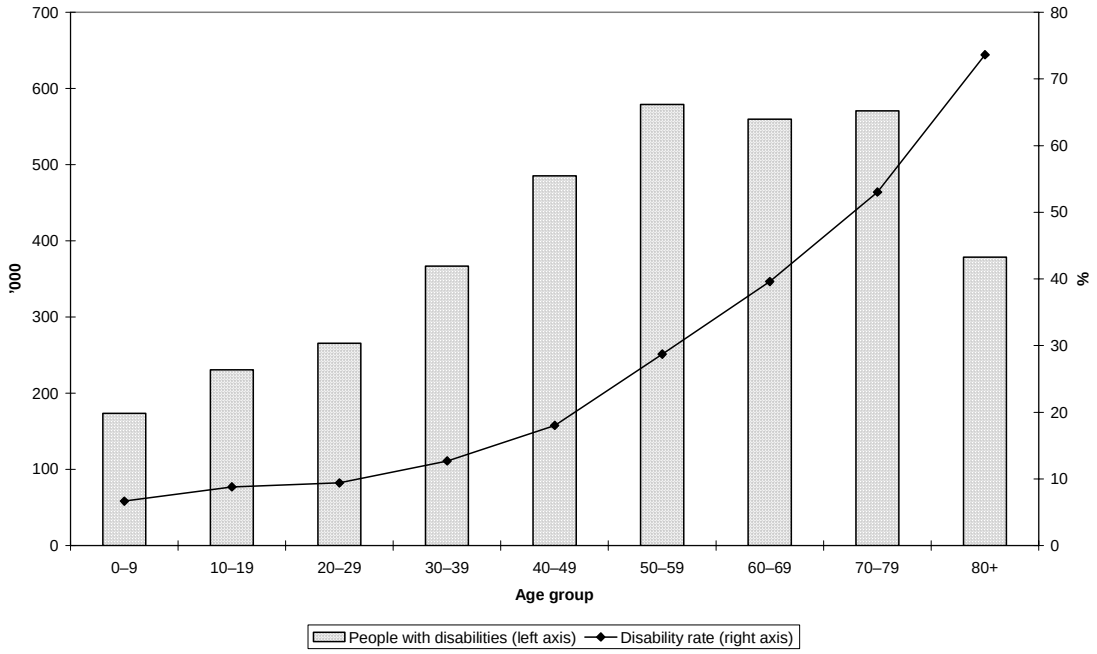
Incidence of disability

The incidence of disability refers to the proportion of people in a group—whether an age group or Australia wide—that have a disability. The incidence of disability varies with age, gender and State or Territory of residence.

Age and gender

The incidence of disability increases with age. In 1998, it ranged from 6.7 per cent of people aged 0–9 years, to 73.6 per cent of people aged 80 or more years (figure 3.3).

Figure 3.3 **People with disabilities, by age, 1998**



Data source: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

The incidence of disability also varies by gender (table 3.2). In 1998, men had a slightly higher overall rate of disability than that of women (19.6 per cent compared with 19.1 per cent), and the disability rate for men was higher or similar to that of women across most age categories, the main exception being the eldest category. Reflecting differences in longevity, approximately twice as many women as men aged 80 years or more, although the disability rates were similar.

Table 3.2 **Disability by age and gender, 1998**

Age	*Male*		*Female*	
	'000	%	'000	%
0–9	108.3	8.1	65.0	5.1
10–19	146.7	10.9	84.0	6.6
20–29	144.4	10.1	121.2	8.7
30–39	196.7	13.6	170.3	11.7
40–49	238.2	17.7	247.2	18.4
50–59	295.5	28.8	283.6	28.7
60–69	299.0	42.8	260.7	36.4
70–79	264.7	55.0	305.8	51.5
80+	127.6	71.5	251.1	74.8
Total	**1821.1**	**19.6**	**1788.9**	**19.1**

Source: Productivity Commission estimates derived from unpublished data from ABS 1999b, cat. no. 4430.0.

State or Territory of residence

In 1998, the disability rate varied by 9 percentage points across the States and Territories, from 13.3 per cent in the Northern Territory to 22.4 per cent in South Australia (table 3.3). However, the disability rate for the Northern Territory is probably underestimated because the SDAC did not survey people living in remote areas of Australia. The largely Indigenous population in remote areas accounts for 20 per cent of the Northern Territory population and can be presumed to have higher rates of disability than those of the rest of the population.

Table 3.3 **Disability and restriction rates across the States and Territories, 1998**

States	*Disability*		*Restriction*[a]	
	Actual	*Standardised*[b]	*Actual*	*Standardised*[b]
	%	%	%	%
New South Wales	19.3	19.0	16.9	16.6
Victoria	18.0	17.8	15.9	15.7
Queensland	19.9	20.4	17.3	17.8
South Australia	22.4	21.4	19.9	18.9
Western Australia	19.5	20.4	16.8	17.6
Tasmania	22.3	21.7	19.2	18.7
Northern Territory[c]	13.3	18.3	11.2	16.1
ACT	17.2	19.8	14.2	16.7
Total	**19.3**	**19.3**	**16.9**	**16.9**

[a] Restriction in communication, mobility, self-care, education and/or employment. [b] Age distributions in the different States and Territories standardised to that of the Australian population.

Source: ABS 1999b, cat. no. 4430.0.

The variation in disability rates is partly attributable to the differences in the age structure of the people living in the different States and Territories. If the same distribution as those of the Australian population were to apply in the States and Territories, then the variation in the disability rate would fall to 3.9 percentage points, with the lowest rate in Victoria (17.8 per cent) and the highest rate in Tasmania (21.7 per cent). A similar contraction occurs for restriction rates. Standardisation to the average Australian age structure would reduce the difference in the restriction rate across the States and Territories from 8.7 percentage points to 2.8 percentage points. (South Australia had the highest and the Northern Territory the lowest in both actual and standardised rates.)

Characteristics of people with disabilities

On average, people with disabilities are socially and economically disadvantaged relative to people without a disability. In particular, in the areas of employment, income, education, housing and welfare, they have less favourable outcomes than those of people without a disability (table 3.4). Relative to people without a disability, people with disabilities are:

- less likely to be in the labour force and, if in the labour force, more likely to be unemployed (see appendix A)
- less likely to be in the top 40 per cent of the income distribution
- more likely to have a government pension or allowance as a principal source of cash income
- less likely to have a post-school qualification or to have completed year 12, and are more likely to have left school before 15 years old or to have never attended school (see appendix B)
- more likely to live in a non-private dwelling (which, in this context, is mainly institutional accommodation) and, if in private accommodation, more likely to rent public housing (see appendix D).

Table 3.4 **Selected characteristics of people with disabilities, 1998**

Characteristic	*People with disabilities*		*People without a disability*	
	'000	%	'000	%
In the labour force	1100.2	53.2	8316	80.1
Unemployed	126.8	11.5	652.7	7.8
Top 40 per cent of income distribution	595.2	28.8	4592.9	44.2
Post-school qualification	897.6	43.4	4863.2	46.8
Completed year 12	561.1	27.1	4556.4	43.9
Left school before age 15	394.5	19.1	710.6	6.8
Never attended school	8.4	0.4	11.5	0.1
Lived in a non-private dwelling	33.4	1.6	111.6	1.1
Public housing tenant	170.7	8.3	270.2	2.6
Principal source of cash income was government pension or allowance	1767.2	48.9	2545.2	16.9

Sources: ABS 1999b, cat. no. 4430.0 and Productivity Commission estimates derived from unpublished data from ABS 1999b, cat. no. 4430.0.

3.2 Trends in the incidence of disability

The number of people with disabilities, and as a proportion of the Australian population, is increasing.

Past trends

Historical information about people with disabilities is available from the SDAC and the HILDA survey.

SDAC

Information about the incidence of disability over time is available from the SDAC for 1981, 1988, 1993 and 1998. These data suggest that the disability rate rose by 6.1 percentage points from 13.2 per cent in 1981 to 19.3 per cent in 1998 (table 3.5). The growth is still significant even when the data are standardised for population and other factors, up 4.2 percentage points from 14.6 per cent in 1981 to 18.8 per cent in 1998. This increase could reflect a change in the likelihood both of a person having a disability and of the disability being detected. The following factors might have contributed to a rise in the likelihood of a person having a disability:

- better diagnosis and awareness of disabilities
- better healthcare and treatment, meaning that events that were likely to result in death in the past are now more likely to result in disability
- an ageing Australian population.

Table 3.5 **Incidence of disability, 1981–2001**

	1981		*1988*		*1993*		*1998*		*2001 (HILDA)*	
	'000	%	'000	%	'000	%	'000	%	'000	%
Original	1942.2	13.2	2543.1	15.6	3176.7	18	3610.3	19.3	*3525.3*	*23.3*
Population adjusted[a]	..	..	..	..	..	..	..	..	*3916.2*	*20.9*
Criteria adjusted[b]	..	..	..	..	2930.5	16.6	3503.8	18.8	*na*	*na*
Age adjusted[c]	2140.9	14.6	2695.9	16.5	3283.6	18.6	..	..	*3558.2*	*23.5*
Total adjusted	2140.9	14.6	2695.9	16.5	3031.9	17.2	3503.8	18.8	*3957.2*	*21.1*

a The population coverage of the 2001 HILDA survey has been adjusted to approximate that of the SDAC surveys (1981, 1988, 1993, 1998). **b** 1993 and 1998 SDAC figures have been adjusted to match the disability definition used in 1981 and 1988 SDAC. **c** The 1981, 1988 ,1993 and 2001 figures have been adjusted to mirror the age profile found in the 1998 SDAC. **..** Not applicable. **na** Not available.

Sources: ABS 1999b, cat. no. 4430.0; Productivity Commission estimates based on unpublished data from the 2001 HILDA survey.

Part of the increase in the measured incidence of disability between 1981 and 1998 may be also due to better surveying methods and other factors, including:

- the wider scope of the survey screening questions identifying people with disabilities
- improved survey methods (such as wording changes in the disability identification questions and the use of computer assisted interviewing) resulting in the greater 'capture' of people with disabilities
- possibly greater willingness of people to self-identify as having a disability, given:
  - greater acceptance of and openness about people with disabilities in society
  - government policy that provides people with disabilities with extra resources, such as the Disability Support Pension or special assistance in education, making them more willing to volunteer information about their disability in general.

The increase in the number of people with disabilities between 1993 and 1998 is reflected in the greater number of responses to every type of disability identified in the SDAC screening question in 1998 than in 1993 (figure 3.4). There were particularly large increases among people with:

- 'hearing' loss
- difficulty 'learning' or understanding
- a need for help or supervision due to 'mental illness'
- difficulty 'gripping' or holding things
- a restriction on their ability to engage in 'physical activities' or work.

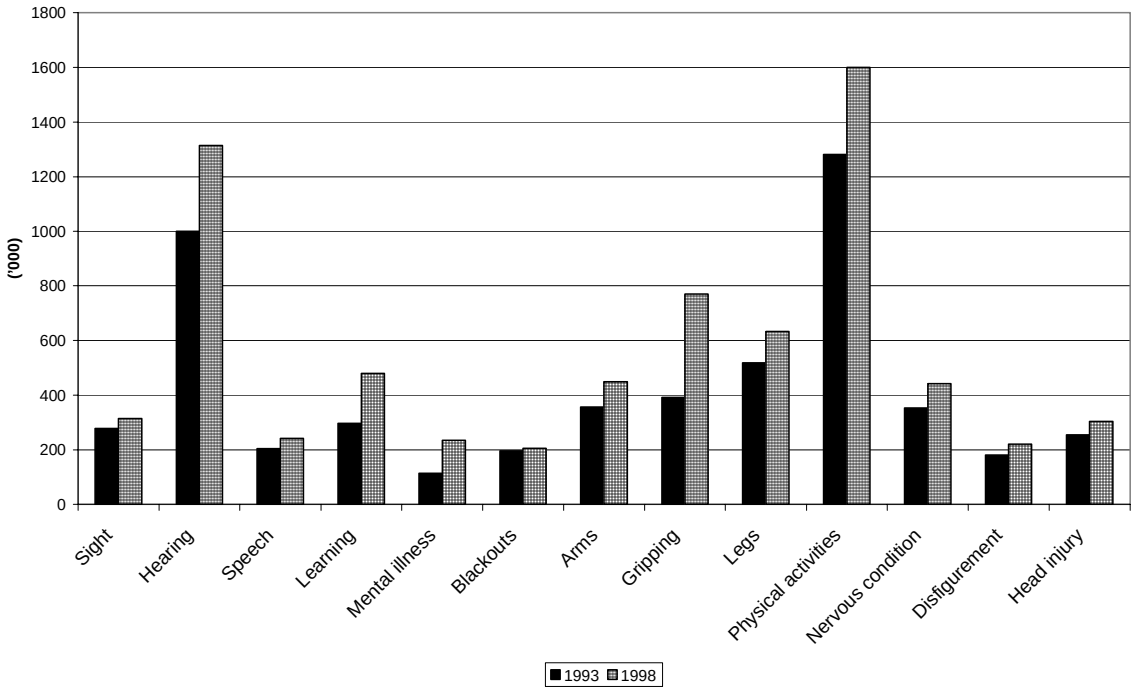
The relative incidence of different conditions has also changed over time (table 3.6). People with mental or intellectual disability as their main long term condition formed a greater proportion of people with disabilities in 1998 than in 1993, whereas the proportion of people with sensory and physical disabilities fell.

HILDA

The HILDA survey is a more recent source of disability information than the SDAC. A comparison of the HILDA and SDAC survey methods is presented in box 3.2. Different populations and screening questions mean that HILDA is not directly comparable to the SDAC. The HILDA survey suggests that the disability rate in 2001 was 23.3 per cent. If HILDA is adjusted to reflect the SDAC's population and age structure, it yields a disability rate of 21.1 per cent in 2001 (table 3.5). These

rates are greater than those based on the SDAC for 1998 (19.3 per cent using the original data and 18.8 per cent using the standardised data) suggesting that the increase in the disability rate witnessed in Australia between 1981 and 1998 continued between 1998 and 2001 (figure 3.5).

Figure 3.4 **People with disabilities, by disability, 1998[a,b]**



a The disability rates between 1998 and 1993 have been standardised for changes in the definition of disability over time (see appendix G). **b** Sight = sight loss, hearing = hearing loss, speech = speech difficulty, learning = difficulty with learning or understanding, mental illness = a need for help or supervision due to mental illness, blackouts = blackouts, fits or loss of consciousness, arms = incomplete use of arms or fingers, gripping = difficulty gripping or holding things, legs = incomplete use of legs or feet, physical activities = restriction on ability to engage in physical activities or work, nervous condition = need for treatment for nervous or emotional condition, disfigurement = disfigurement or deformity, and head injury = long term effects from head injury, stroke or other brain damage.

Data source: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

Future trends

Australians are living longer than ever before, on average, and this trend has implications for the overall disability rate. Older people tend to have a higher rate of disability than that of younger people, so a greater proportion of older people in the population is associated with a higher overall disability rate (figure 3.3).

Table 3.6 **People with disabilities, by main condition,[a] 1993 and 1998[b]**

Year	*Disease related*		*Sensory*		*Physical*		*Mental*		*Intellectual*		***Total***	
	'000	%	'000	%	'000	%	'000	%	'000	%	**'000**	**%**
1993	1768.7	*55.7*	571.9	*18.0*	458.8	*14.4*	317.8	*10.0*	59.4	*1.9*	**3176.7**	***100.0***
1998	2117.8	*56.0*	578.5	*15.3*	474.7	*12.5*	453.3	*12.0*	158.4	*4.2*	**3782.7**	***100.0***

a The types of main condition have been made comparable between 1993 and 1998 using information in the 'Concordances' appendix in ABS 1999d (pp. 42–65) (see appendix G). **b** The disability rates between 1998 and 1993 have been standardised for changes in the definition of disability over time (appendix G).

Source: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

The Productivity Commission has projected the disability rate and number of people with disabilities in 2021, 40 years after the initial SDAC in 1981, based on ABS forecasts of the changes in population and age profile in Australia between 1998 and 2021 (table 3.7). Three different assumptions about the disability rates in 2021 were used.

Box 3.2 **HILDA and SDAC comparability**

HILDA is a longitudinal survey managed by the Melbourne Institute of Applied Social and Economic Research and funded by the Department of Family and Community Services. The first round of this survey was conducted in 2001. The differences between the survey methods of HILDA and the SDAC include:

- a similar but not identical definition of disability
- the following groups being interviewed for SDAC but not HILDA:
  - children younger than 15 years old
  - people living in non-private (that is, institutional) dwellings
- different age profiles, partly due to population ageing, but also due to HILDA being based on the Census population while SDAC is based on the Labour Force Survey population).

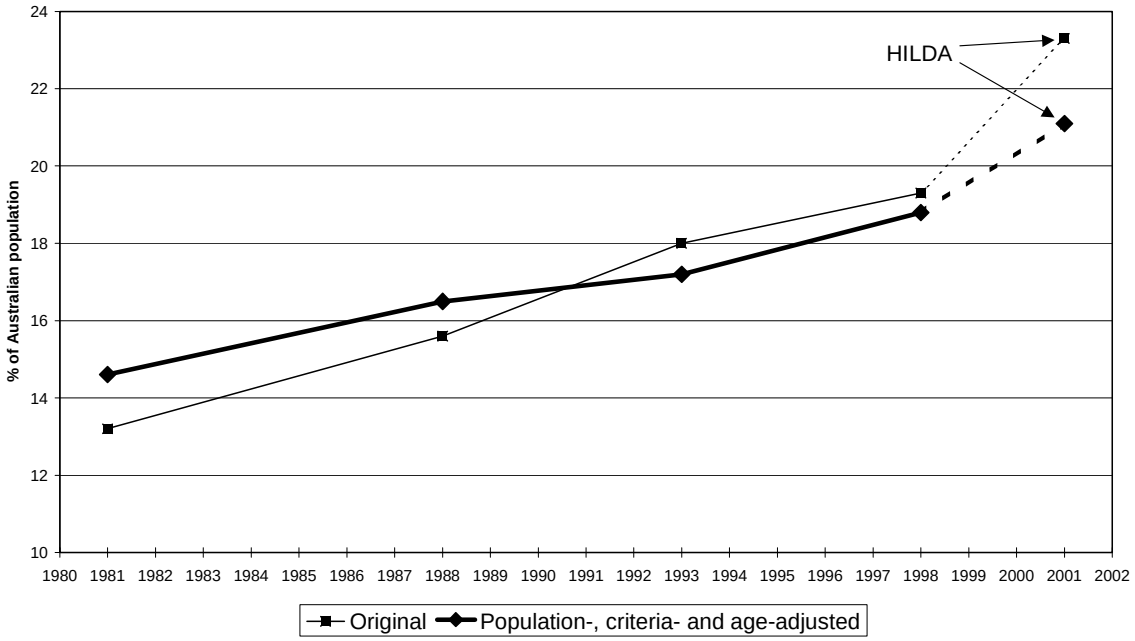
Imputing the 'missing' groups into HILDA creates a net 2.4 percentage point decrease in the HILDA 2001 disability rate, from 23.3 per cent to 20.9 per cent (table 3.5). Imputing children younger than 15 years old results in a 3.3 percentage point decrease in the HILDA disability rate (not shown), while imputing people living in non-private dwellings results in a 0.9 percentage point increase in the HILDA disability rate (not shown).

Adjusting the age profile of HILDA to match that of the SDAC results in a 0.2 percentage point increase in the HILDA disability rate, from 23.3 per cent to 23.5 per cent (table 3.5).

The compression of morbidity approach assumes that as people live longer the number of disability affected years remains constant but is shifted to later years.

This projection provides the most conservative estimate of the proportion of people with disabilities (22.4 per cent).

Figure 3.5 **Disability rate, 1981–2001**



Data sources: ABS 1999b, cat. no. 4430.0; Productivity Commission estimates based on unpublished data from the 2001 HILDA.

The static projection keeps the disability rate for each age group constant at 1998 levels and only accounts for population ageing. It estimates 23.3 per cent of the population will have a disability.

Table 3.7 **Disability rate projections, 2021**

Method	*People with disabilities*	
	'000	%
1998 levels (SDAC)	3610.3	19.3
Compression of morbidity projection[a]	5138.4	22.4
Static projection	5350.7	23.3
Historical growth projection[b]	7690.5	33.5

a The disability rate for the compression of morbidity projection is based on the same assumptions used by PC (2003). **b** The disability rate for the historical growth projection is calculated by adopting the methodology used by OECD (1998).

Sources: ABS 1999b, cat. no. 4430.0; Series II from ABS 2000, cat. no. 3222.0; PC 2003; Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0.

The historical growth projection estimates that if historical trends (from 1981 to 1998) continue, the proportion of people with a disability will be 33.5 per cent. This

simplistic approach is likely to be inaccurate because it forecasts implausibly large disability rates for some age groups; for example, 90.1 per cent for people aged 75 and older.

Disability rates for older Australians have risen over time, which contrasts with results from overseas, such as the United States (Manton and Gu 2001). These differences may be explained by definitional differences between Australia and the United States. Further, changes in the definition of disability used in Australia over time could have obscured the compression of morbidity, even after attempts to standardise the data. The ABS has indicated that the definition of disability for its forthcoming 2003 SDAC will be the same as that used in 1998 and hence it might be expected to reveal that the disability rates of older Australians have begun to fall. This would provide support for the compression of morbidity projection.

All the projections indicate that there will be a higher disability rate in 2021 than there is now. This suggests that an increasing proportion of the Australian population might be vulnerable to disability discrimination in the future.

4 Disability discrimination legislation

The *Disability Discrimination Act 1992* (DDA) makes discrimination and harassment on the ground of disability unlawful in specified areas of activity. These activities are: employment; education; access to public premises (including public transport); the provision of goods, services and facilities; accommodation; the purchase of land; clubs and associations; sport; and the administration of Commonwealth laws and programs. The DDA permits disability discrimination in these areas of activity in some circumstances only (sections 4.2 and 4.3).

Being complaints based, the DDA is largely a reactive mechanism for addressing disability discrimination (section 4.5). It relies heavily on conciliation. However, it also includes some positive and proactive measures, such as disability standards, voluntary action plans and a public inquiries function (sections 4.3 and 4.5).

4.1 The introduction of the DDA

The DDA was enacted during a period of growing international action to promote human rights and equality for people with disabilities. Key events included the United Nation (UN) International Year of the Disabled (1981) and the UN Decade of Disabled Persons (1983–92). Various UN and International Labour Organisation (ILO) conventions and declarations made over several decades apply in Australia and help to underpin the constitutional validity of the DDA (box 4.1).

By the time the DDA was introduced in 1992, all States and Territories in Australia except Tasmania and the Northern Territory had legislation prohibiting discrimination against at least some people with disabilities, in at least some contexts. Tasmania and the Northern Territory enacted discrimination legislation shortly afterwards (see appendix F).

All Australian States and Territories have ‘omnibus’ Acts that cover people with disabilities or impairments, among other characteristics (see appendix F). The presence of the Commonwealth DDA from 1992 does not appear to have lessened the enthusiasm for the States and Territories to enact or amend legislation in this area. None has chosen to vacate the field in favour of the DDA. Rather, some State and Territory Acts, via amendments, have converged on the DDA, particularly with regard to the disabilities (or ‘impairments’) that they include and the areas of

activity to which they apply. Other Acts have retained different terminology (such as 'impairment' instead of disability in the ACT Act) and different mechanisms (such as in tests for indirect discrimination and the application of unjustifiable hardship) from those in the DDA (see appendix F).

Box 4.1 **International conventions and declarations**

The United Nations and International Labour Organisation (ILO) have several long-standing conventions and declarations that promote human rights and equality for people with disabilities and help to underpin discrimination legislation in Australia. The more significant of these for discrimination legislation are:

- the ILO Declaration of Philadelphia (1944)
- the UN Universal Declaration of Human Rights (1948)
- the ILO Discrimination (Employment and Occupation) Convention (1958)
- the UN Declaration on the Rights of Mentally Retarded Persons (1971)
- the UN Declaration on the Rights of Disabled Persons (1975).

In Australia, the Commonwealth Government, not the States and Territories, carries responsibility for external affairs, The external affairs power in the Australian Constitution (s.51(29)) gives authority to the Commonwealth Government to legislate on human rights and discrimination, with reference to international declarations, including those listed above. These Declarations and Conventions can be attached to Commonwealth legislation, as they are for example, to the *Human Rights and Equal Opportunity Commission Act 1986*.

Sources: Tyler 1993; Durack 1994; UN ESCAP 1997.

Reasons for enacting the DDA

By the end of the influential International Decade of Disabled Persons in 1992, coverage for people with disabilities by anti-discrimination legislation in Australia was still patchy. Even in States that had enacted disability discrimination legislation, not all types of disability were covered. Further, for constitutional reasons, State and Territory legislation could not address alleged discrimination by Commonwealth Government departments and agencies.

The DDA was also intended to go further than the existing State and Territory Acts, by including positive features such as action plans and standards that would encourage systemic change and reduce the need to rely on individual complaints.

In addition to these pragmatic considerations, the Government recognised that a national Act to remove discrimination for people with disabilities would have great

symbolic importance. The Act clearly demonstrated the Government's commitment to disability rights, just as previous Commonwealth discrimination Acts had done for equality of sex and race. As noted by Ronalds:

> Legislation is a manifestation in statutory form of the recognition that these [disability] inequalities require the attention and response of Government. It confirms that they are major public concerns which need to be addressed in a systematic and planned way. (Ronalds, 1990, p. 100)

The DDA also complemented existing trends towards integrating the social model of disability into other areas of government policy (see chapter 2), as demonstrated in the *Disability Services Act 1986* and in State and Territory discrimination legislation.

Public consultation and debate on the Disability Discrimination Bill

In the early 1990s, public consultation reports were commissioned to examine options for national disability discrimination legislation. Notable among these were the Ronalds discussion paper on employment opportunities for people with disabilities (Ronalds 1990) and the Ronalds national consultation report (Ronalds 1991)[1], and the Disability Advisory Council of Australia's national consultation report (Shelley 1991). These generated much public debate and excitement about the potential benefits of a discrimination Act for people with disabilities. Many people hoped the proposed DDA would make a real difference to disability discrimination and access problems.

In consultations for the Ronalds reports, 95 per cent of surveyed people with disabilities said they supported national disability discrimination legislation (Ronalds 1991, p. 29). In other consultations, people were similarly enthusiastic:

> I support the proposal … [for a disability discrimination Act]. There is goodwill within the community towards those who are differently abled, but good will alone does not provide enforceable protection against discrimination. (McInroy, Australian National University, in Shelley 1991, p. 9)

Summarising public consultations held in 1990 and 1991, Shelley concluded that the existing system of separate State Acts was popular, but not sufficiently effective:

> … the State [Acts] and federal provisions [the HREOC Act], although supported and encouraged by a majority of commentators, are not considered to have been sufficient, by themselves, to eliminate discrimination, nor are they seen to provide complainants with complete redress. (Shelley 1991, n. 19, 8–9 in Tyler 1993, p. 217)

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[1] The two Ronalds reports (1990 and 1991) were commissioned by the then Minister for Health, Housing and Community Services, The Hon. B. Howe.

Based on public consultations, Ronalds (1990 and 1991) recommended that the future DDA cover discrimination in employment, education, transport and mobility. This greatly widened the scope of the proposed Disability Discrimination Bill, which had originally arisen as a 'fairly limited proposal to improve the employment opportunities of people with disabilities' (Tyler 1993, p. 218). The Government took these and other recommendations on board, and drafted the DDA to cover discrimination in a wide range of activities.

In further public consultations following the release of the Disability Discrimination Bill in 1992, public support for the legislation was very high but not unanimous. Employer groups and others expressed doubts about the broad scope of the Bill, especially the areas of activity covered and the broad definition of disability. The medical community raised concerns about the broad definition of 'disability' and about the potential application and effects of the DDA in a medical context. One participant recounted of this period:

> … that broad definition of disability at the beginning of the Act caused immediate fear and trembling in the souls of almost everybody we were negotiating with and tended to provoke sort of resentment as well, because people were still thinking in terms … of making some special allowance, some special move, rather than removing barriers. (Margaret Kilcullen, sub. 165, p. 18)

A further concern was that the main objective—to eliminate, rather than simply reduce, discrimination (box 4.1)—was impossibly high. Soon after the DDA's enactment, some commentators were already pessimistic about its ability to ever fulfil this objective (Conway 1992; Tyler 1993). Tyler stated:

> … while the DDA is likely to have some beneficial impact upon the incidence of discrimination in Australia, it is extremely unlikely in itself to meet the great expectations placed upon it by its drafters. (Tyler 1993, p. 212)

The effectiveness of the DDA in eliminating discrimination and addressing related objectives since its enactment is discussed in part II of this report.

Parliamentary debate on the Disability Discrimination Bill

In the second reading speech for the Disability Discrimination Bill, the then Minister for Health, Housing and Community Services, the Hon. B. Howe, emphasised the necessity of the DDA in the wider context of the Government's commitment to human rights and social justice reform, which already included the sex and racial discrimination Acts:

> The Disability Discrimination Bill will be instrumental in continuing social change and will have far-reaching and long-awaited effects for people with disabilities. I do not

> believe there is any better example of social justice than this legislation. (Australia 1992a, p. 2751)

The then Minister also promoted the DDA as an essential and overdue response to Australia's international legal and moral obligations (box 4.1):

> The Bill recognises that discrimination against people with disabilities is a matter of international concern. It is another significant step in fulfilling Australia's international obligations. (Australia 1992a, p. 2751)

In lengthy Parliamentary debates, all speakers agreed that the intentions of the Bill were 'highly commendable' and 'worthwhile', but some questioned the Bill's broad scope, potential effectiveness and implementation costs. Concerns raised included: the Bill's definition of disability (and especially its inclusion of communicable diseases such as HIV and AIDS); its potential effects on medical practice and treatment; exemptions for the Australian Defence Force; a temporary exemption for the telecommunications industry; the meaning of 'unjustifiable hardship'; and the definition of *de facto* spouses, which included same-sex partners (apparently for the first time in Commonwealth legislation) (Australia 1992a; Australia 1992b; Australia 1992c).

On the other hand, some Parliamentarians—and, in community consultations, many people with disabilities—perceived the Bill as a compromise. Senator M. Lees said:

> The Bill does not go far enough in protecting and advancing the rights of people with disabilities … [but is] better than nothing. (Australia 1992c, p. 1316)

Following these Parliamentary debates, some sections of the Bill did not survive to become part of the DDA—for example:

> … the Bill contained an equivalent of section 10 of the Racial Discrimination Act, which equalises otherwise unequal laws. But that was taken out because it was realised that to just have the DDA go through with that provision as it stood—or in precisely the same terms as the RDA provision—would risk knocking over all of the guardianship laws and all of the mental health laws and a number of other things, without having had any process of what should happen after that. … That provision just dropped off the table. (HREOC, trans. p. 1148)

After much debate, the Bill was enacted in 1992. Despite the compromises, the Act was hailed by many people with disabilities as a significant step towards gaining complete equality and participation in the community. It was, and is, regarded by many in the community as an important commitment to disability rights.

Amendments to the DDA, 1992–2003

When the DDA was introduced in 1993, the Human Rights and Equal Opportunity Commission (HREOC) had the power to conduct hearings and make determinations under it. Determinations were required to be registered with the Federal Court of Australia, at which stage they became, an order of the Court. In the case of *Brandy v HREOC (1995) 127 ALR1*, the High Court of Australia found that the parallel provision of the *Racial Discrimination Act 1975* was inconsistent with the requirement under chapter III of the Commonwealth Constitution that there be a separation of powers between the administrative and judicial arms of Government.

The determination making provisions in all three Commonwealth anti-discrimination Acts (the race, sex and disability discrimination Acts) were deemed unconstitutional because they attempted to vest in HREOC judicial powers that could be exercised only by the courts.[2]

The Government first attempted to address this problem by repealing the registration and enforcement provisions of the three discrimination Acts. This meant that, in order to enforce a HREOC determination, the case had to be reheard by the Federal Court. This process proved cumbersome and was subsequently addressed by further amendments, introduced with the *Human Rights Legislation Amendment Act 1999*, which came into force in April 2000 (HREOC 2002f, p. 4). From that time, determinations could be made only by the Federal Court or, from 2000, the Federal Magistrates Service. HREOC could only conciliate complaints (section 4.5).

The 1999 amendment Act also made key changes to the complaints procedures of HREOC (HREOC 2002f, p. 4):

- the complaint handling provisions in the DDA (and also the race and sex discrimination acts) were replaced with a uniform process in the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act)
- the President instead of the Commissioners of HREOC was given responsibility for handling complaints
- procedures for presidential review of declined decisions were removed
- Commissioners were provided with an *amicus curiae* function in proceedings before the Federal Court.

[2] The High Court of Australia made a similar ruling in 1956 in relation to the then Commonwealth Court of Conciliation and Arbitration (known as the Boilermakers Case). As with HREOC in 1999, the latter court's powers were subsequently limited to conciliating disputes.

Prior to these amendments, the Disability Commissioner also had the power to initiate inquiries about individual disability discrimination incidences without first receiving a complaint from an 'aggrieved person' (section 4.5). HREOC said of this power:

> … the 'self-start' power as originally drafted had some technical defects which meant that in practice it went unused. It was removed when the machinery provisions of the DDA and other federal anti-discrimination legislation were revised. (sub. 143, p. 54)

This independent inquiry function was removed in the 1999 amendment Act.

4.2 Key features of the DDA

The DDA is broad in scope and application. It outlaws direct and indirect discrimination and harassment in certain contexts, but makes broad exemptions in others. Although largely a reactive, complaints-based Act, it also includes some positive and proactive measures.

Objects of the DDA

The DDA has three stated objects (box 4.2). These objects focus on the human rights of people with disabilities and place the Act within a social context—that is, they focus on the removal of discriminatory social barriers (see chapter 2).

Box 4.2 Objects of the Disability Discrimination Act

The objects of the DDA are:

(a) to eliminate, as far as possible, discrimination against persons on the grounds 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.

The objects seek to address discrimination in both behaviour and attitude. The first and second objects address the elimination of acts of discrimination (that is,

behaviour) on the ground of disability in key areas of life, including employment, education, Commonwealth laws and programs, and equality before the law. The third object complements these objects by aiming to change community attitudes.

Objects (a) and (b), which address discriminatory behaviour, are qualified by the phrases 'as far as possible' and 'as far as practicable'. These qualifications are reflected throughout the DDA, through devices such as the requirement to meet the 'inherent requirements' of a job in employment and the 'unjustifiable hardship' limit on the provision of adjustments. Most participants did not raise concerns about the objects of the DDA (see chapter 9).

Definition of disability in the Disability Discrimination Act

The definition of disability in the DDA is broad. It covers:

- physical, intellectual, psychiatric, sensory, neurological or learning disabilities, physical disfigurement or the presence of a disease-causing organism
- disabilities that people have now, have had in the past, might have in the future or are believed to have
- association with people with disabilities including partners, relatives, carers and people in business, sporting or recreational relationships
- the need to use a palliative or therapeutic device
- the need to be accompanied by a guide dog, hearing assistance dog or other trained animal, or an interpreter, reader, assistant and/or carer (ss.4, 7–9).

This definition of disability applies only for the purposes of the DDA. It is not the same as the definitions of disability used to assess eligibility for benefits or services under other legislation, such as the *Disability Services Act 1986*, the *Social Security Act 1991* or workers compensation legislation. It also differs from definitions of disability or impairment found in some State and Territory anti-discrimination Acts, although definitions have tended to converge over time (section 4.1).

The definition was intended to ensure the DDA covers all potential sources of discrimination based on disability, thus placing the focus of the DDA (and the focus of DDA complaints) on the nature and degree of the alleged discrimination rather than on the nature and degree of a person's disability (see chapter 9).

Areas of activity covered by the Disability Discrimination Act

The DDA contains no blanket prohibition on disability discrimination or harassment. It is only unlawful to discriminate in specified areas of activity:

- employment
- education
- access to premises used by the public (including public transport)
- the provision of goods, services and facilities
- accommodation
- the purchase of land
- the activities of clubs and associations
- sport
- the administration of Commonwealth Government laws and programs.

Within these areas of activity, the DDA exempts few situations from discrimination complaints. In employment, for example, the DDA renders unlawful all discrimination against employees, except against employees performing domestic duties in an employer's residence (s.15(3)). In the sections of the DDA that cover education, accommodation and clubs, services that cater specially for people with particular disabilities are exempt in terms of discriminating against people who do not have that disability (ss.22(3), 25(3), 27(4)).

Elsewhere in the DDA, specific areas of activity are exempt, including 'special measures' undertaken to benefit people with disabilities (s.45), combat duties (s.53) and a partial exemption for insurance and superannuation (s.46) (section 4.3 and see chapter 10).

Actions made unlawful by the Disability Discrimination Act

In the areas of activity to which it applies, the DDA makes discrimination, harassment and some requests for information unlawful.[3] It applies to actions by Commonwealth, State, Territory and local governments and the private sector. Actions can constitute discrimination or harassment even if there was no intention to discriminate or harass.

[3] Unlawful is not the same as illegal. Unlawful acts are not necessarily a criminal offence.

Direct discrimination

Direct discrimination exists where a person is treated less favourably as a result of their disability, than a person without that disability would be treated in the same or similar circumstances. This definition requires a direct comparison of the treatment of the person with a disability (the 'aggrieved person') to that of someone without that particular disability, in 'circumstances that are the same or are not materially different' (s.5).

In most areas of activity to which the DDA applies, direct discrimination may be permitted in limited circumstances—namely, if the adjustments required to accommodate a person with a disability would constitute an 'unjustifiable hardship' for the individual employer, educator or business (see below).

Indirect discrimination

Under the DDA, indirect discrimination occurs when a person with a disability is faced with an action, rule, condition or requirement that:

(a) a substantially higher proportion of persons without a disability comply or are able to comply with; and

(b) is not reasonable, having regard to the circumstances of the case; and

(c) the aggrieved person does not or is not able to comply. (s.6)

A condition of employment that all employees hold a driver's licence, for example, might indirectly discriminate against people with a disability who cannot drive, if driving is not an 'inherent requirement' of the job (see below) or if it is not reasonable to require every employee to be able to drive (see chapter 10).

The DDA does not define 'reasonable' for the purposes of indirect discrimination. HREOC advises that in determining whether a (potentially discriminatory) rule is 'reasonable', all relevant circumstances should be considered. These circumstances include: the purpose of the rule; the importance of the purpose; whether there are other means of achieving the purpose; the nature and extent of the disadvantage flowing from the rule; any relationship of the rule to previous discrimination; and whether removal or modification of the rule would impose 'unjustifiable hardship' on anyone (HREOC 2003f).

Harassment

Harassment consists of humiliating comments, actions or insults about a person's disability that create a hostile environment. There is no general prohibition of

harassment. Under division 3 of the DDA, it is unlawful for a person to harass another person who has a disability or who is an associate of a person with a disability in employment, education or the provision of goods and services. The harassment provisions of the DDA in education relate only to harassment by education staff, not to harassment by other students (although, institutions may be liable for the actions of students as part of an indirect discrimination complaint). The term 'harassment' is not defined in the Act.

Vilification consists of 'offensive, insulting, humiliating or intimidating behaviour' (for example, in the *Racial Discrimination Act 1975* and the *Racial Hatred Act 1995*). Vilification of people with disabilities is not unlawful under the DDA.

Requests for information

In the areas of activity specified by the DDA, it is unlawful to request a person with a disability to provide information that a person without a disability would not be asked to provide in the same situation (s.30). It is unlawful, for example, to ask job applicants about a history of mental illness or a physical limitation if it is not relevant to the job and if other applicants would not be asked similar questions.

HREOC advises that discussion, questions and examinations regarding a person's disability and its effects are lawful where needed to help to determine whether a person can perform the 'inherent requirements' of a job, to meet education course entry criteria or to determine what 'reasonable adjustments' or aids might be required (see below). The lawfulness of such questions depends on whether they are being asked for a legitimate purpose and whether they are a reasonable means of achieving that purpose (HREOC 2003f).

Inherent requirements

Inherent requirements in employment

The DDA makes disability discrimination in employment unlawful. However, regardless of their disability, employees must be able to carry out the 'inherent requirements of the particular employment', having regard to their past training, qualifications, experience, performance and other relevant and reasonable factors (s.15(4)). Similar clauses exist for commission agents (s.16(3), contract workers (s.17(2)) partnerships (s.18(4)) and employment agencies (s.21(2)). 'Inherent requirements' are not defined in the DDA.

In a practical sense, inherent requirements vary considerably across occupations and positions. An inherent requirement of one job may be to have the ability to drive a car (for example, a job as a courier or truck driver), while another may require the employee only to be reasonably mobile by taxi or public transport (for example, a job as a teacher with occasional off-campus lecturing or conference duties).

Inherent requirements in sport

In sports activities, the DDA applies a concept similar to that of 'inherent requirements'. It is not discriminatory to exclude a person with a disability from a sport 'if the person is not reasonably capable of performing actions reasonably required in relation to the sporting activity', or to apply 'reasonable' selection methods on the basis of a persons skills and abilities (s.28(3)). This clause allows sports clubs to select team members for their athletic ability and sporting prowess.

Inherent requirements in education

While there is no equivalent 'inherent requirements' clause in education, it is unlawful for an education provider to discriminate 'in the terms or conditions on which it is prepared to admit' a student (s.22(1)). HREOC advised that academic entry and assessment criteria are part of the 'reasonable requirements' that all students must meet:

> [The] DDA does not require education providers to make changes to course entry conditions which would undermine the academic integrity of the course… genuine academic standards are likely to be accepted as reasonable requirements and thus are likely to be accepted as lawful, notwithstanding that they disadvantage some people with disabilities (HREOC 2002c, pp. 8-9).

HREOC confirmed this approach in *W v Flinders University South Australia (1998) HREOCA 19*. In practice, this is of greater relevance in tertiary education institutions than in schools. The current draft of the disability standards in education clarify that inherent academic requirements must be maintained for all students in enrolment and assessments.

Unjustifiable hardship

The DDA requires more than just non-discrimination from employers, educators and other providers. HREOC and others have interpreted s.5(2) to mean that the DDA requires employers or others to provide 'different accommodation or services' (including premises, facilities, equipment or procedures) to enable a person with a disability to meet the inherent requirements of a job, participate in a course of study,

or to access particular goods, services or facilities. The provision of different accommodation or services for people with disabilities is sometimes referred to as making 'reasonable adjustment' (for example, in HREOC advisory materials). However, the term 'reasonable adjustment' does not appear anywhere in the DDA.

Different accommodation or services are provided in a reactive rather than proactive manner—that is, in response to the needs of a particular person with a disability who wishes to do the job or course of study or use the goods or services. Failure to respond adequately to a request for an adjustment might result in a formal complaint of discrimination to HREOC by the person with a disability.

The provision of different accommodation or services is not required under the DDA if no-one needs them. The introduction of disability standards for public transport (and potentially in other areas of activity) and revisions to the Building Code of Australia will place greater emphasis on the proactive removal of potential sources of discrimination (that is, addressing them before a complaint is made).

In most areas, the DDA sets limits on the different accommodation or services that must be provided. The DDA sets this limit at the level at which such provision would impose an 'unjustifiable hardship' on the provider. The DDA does not define unjustifiable hardship, but provides guidance on the factors to be considered:

> For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:
>
> (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
>
> (b) the effect of the disability of a person concerned; and
>
> (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
>
> (d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64. (s.11).

The disability standards for public transport list further criteria for assessing 'unjustifiable hardship' for transport operators in great detail (see chapter 10).

The unjustifiable hardship limit on providing different accommodation or services applies in some areas of activity but not others. It applies in all cases for employment (s.15(4)), access to premises (s.23(2)), goods, services and facilities (s.24(2)), accommodation (s.25(3)) and clubs (s.27(3)). It does not apply to sport and the administration of Commonwealth laws and programs. In education, unjustifiable hardship applies only to different accommodation or services that are known before enrolment to be required by a student with a disability, but apparently not to those required after enrolment (s.22(4). see chapter 10).

4.3 Exemptions under the Disability Discrimination Act

The two types of exemption in the DDA are statutory exemptions for specified groups or circumstances and temporary exemptions that HREOC can grant for up to five years.

Statutory exemptions

Some activities are fully or partially exempt from the DDA, including: membership and the terms and conditions of superannuation and insurance products, where the decision is based on actuarial or statistical data of other relevant factors; actions taken under prescribed Acts (section 4.4); infectious diseases; charities; eligibility and payment conditions for pensions and allowances; all actions under the *Migration Act 1958*; combat duties by the defence forces; and peace keeping services by the Australian Federal Police.

The DDA also exempts 'special measures' for people with disabilities. This means it is not 'unlawful to do an act that is reasonably intended' to provide people with disabilities with 'goods or access to facilities, services or opportunities' or 'grants, benefits or programs, whether direct or indirect, to meet their special needs' (s.45).

Within the list of activities where discrimination on the ground of disability is unlawful, there are other small exemptions. These include exemptions for domestic employees and partners of very small partnerships in employment. Further clauses in the activity areas of education, accommodation and clubs allow schools, accommodation services and clubs that cater wholly or partly for people with particular types of disability to discriminate against people who do not have that disability. A school for students with hearing impairments is allowed to enroll only students with hearing impairments. Similarly, an accommodation service for people with intellectual disabilities can deny services to people without an intellectual disability. The application of these exemptions are discussed in chapter 10.

Discretionary exemptions

Under section 55 of the DDA, HREOC may grant temporary exemptions from the parts of the DDA that deal with discrimination. A temporary exemption means that any discrimination that occurs is considered lawful, without the need to demonstrate 'unjustifiable hardship'. Temporary exemptions may specify particular terms and conditions and cannot be granted for more than five years.

An amendment to the DDA made at the same time as the enactment of the disability standards for accessible public transport (the only disability standards to be enacted to date) enabled HREOC to make exemptions in relation to these standards (see chapter 11).

HREOC has produced guidelines for making temporary exemptions. These guidelines state that exemptions may be used in two circumstances: first, to exempt reasonable measures that might be caught by a mechanical or literal reading of anti-discrimination law; and, second, to facilitate a transition from discrimination to equality (for example, by allowing for staged implementation of improvements. HREOC 2003a).

4.4 Disability discrimination regulations

The DDA enables several forms of regulation and quasi-regulation.

- Section 132 allows regulations to be made that are 'required or permitted by the Act' or 'necessary or convenient to be prescribed'.
- Section 31 allows the Minister to formulate compulsory disability standards in some (but not all) areas of activity covered by the DDA.
- Section 67(k) allows HREOC to produce guidelines.
- Part 3 of the DDA enables voluntary action plans to be made and registered.

The DDA does not specifically allow for co-regulation, although HREOC has used its inquiry and temporary exemption functions to encourage industries (such as banking, telecommunications and insurance) to adopt codes of conduct. The relative advantages and disadvantages of such regulation and possible alternatives to them are discussed in chapter 11.

Disability Discrimination Regulations 1996

Only one set of regulations has been made under section 132 of the DDA: the Disability Discrimination Regulations 1996. These Regulations list the 'prescribed laws' referred to in section 47(2) of the DDA, which states that it is not unlawful under the DDA for persons to do something in compliance with a prescribed law. The Regulations also define combat duties and combat-related duties for the purpose of exempting these duties from complaints made under the DDA (s.53(2)).

Prescribed laws

A small number of Acts and regulations are prescribed under the 1996 Regulations. All are from South Australia and New South Wales, and were prescribed in 1999 (table 4.1). With the exception of the New South Wales *Mental Health Act 1990* and Regulations, only sections of these Acts are prescribed.

No Commonwealth Acts or Regulations are prescribed by the Disability Discrimination Regulations, although all actions under the Migration Act are exempt under s.52 of the DDA.

Table 4.1 **Prescribed laws, Disability Discrimination Regulations 1996**

Jurisdiction	*Act or Regulation*
New South Wales	*Mental Health Act 1990*
New South Wales	Mental Health Regulations 1995
New South Wales	Motor Traffic Regulations 1935
South Australia	*Firearms Act 1977*
South Australia	*Motor Vehicles Act 1959*
South Australia	*Education Act 1972*
South Australia	Industrial and Employee Relations (General) Regulations 1995
South Australia	*Workers Rehabilitation and Compensation Act 1996*

Source: Disability Discrimination Regulations 1996, Schedule 1 (regulation 2A).

Disability standards

The DDA contains a facility to introduce disability standards in some areas. The DDA allows the Attorney General to formulate standards in employment, education, public transport, accommodation, access to premises and the administration of Commonwealth laws and programs (s.31). Although it is also unlawful to discriminate in the purchase of land, access to clubs, sport, and the provision of goods and services, disability standards cannot be made in these areas (see chapter 11).

Disability standards are a form of subordinate regulation that provide greater detail on how compliance can be achieved in the areas covered by the DDA. The DDA explanatory memorandum explains how standards are intended to operate:

> Disability standards are intended to be a standard which if abided by would protect a person from any other action under this Bill relating to action covered by those standards.

HREOC says disability standards have two other purposes as well:

> … to set legislative deadlines for achieving equal access for people with disabilities in the areas covered by the DDA; and to provide more definite and certain benchmarks for accessibility and equality than is provided by the general anti-discrimination model. (HREOC 2003e, p. 1)

Section 32 of the DDA makes it unlawful to contravene a disability standard. As with the DDA, individual complaints are the main compliance mechanism for disability standards. A major exception to this general rule will be the disability standards for access to premises, which will be able to be enforced proactively (if introduced as currently drafted), through the approvals process for new buildings.

Only one disability standard—that for public transport—has become law. Drafts for two others—concerning access to premises and education—are well advanced. In the area of Commonwealth laws and programs, the Commonwealth Government implemented the Commonwealth Disability Strategy in 1994 (revised in 2000), which operates as a *de facto* standard for Government departments and agencies. The Strategy is administered by the Office of Disability within the Department of Family and Community Services (see chapter 14 and appendix E).

Voluntary action plans

Any organisation can submit a voluntary action plan to HREOC under the DDA. If a discrimination complaint is subsequently made against the organisation, then its voluntary action plan may be taken into account in the assessment of 'unjustifiable hardship' (s.11(d)). However, an action plan does not confer immunity from liability or guarantee a successful defence against a discrimination complaint (Innes 2000a, p. 6).

The DDA does not specify the content of action plans. HREOC provides guidelines on what such plans should contain, but does not check them individually upon registration, or check their implementation later. Although not explicitly required by the DDA, HREOC may link the granting of temporary exemptions to an organisation having a satisfactory action plan, so as to achieve compliance over time. HREOC had registered 277 action plans at August 2003. Most of these were submitted by government agencies (see chapter 12).

HREOC guidelines and advice

The DDA allows HREOC to develop guidelines for the avoidance of discrimination on the ground of disability (s.67(1)(k)). These do not have binding force; they are intended to be a source of information on how to give effect to the DDA.

In practice, HREOC issues advice on the DDA and disability discrimination in several different formats, including

- guidelines
- advisory notes
- frequently asked questions (see chapter 12).

4.5 The complaints process

Following the amendments made in the Human Rights Legislation Amendments Act in 2000, the complaint process was set out in the HREOC Act rather than the DDA itself. A person must be directly 'aggrieved' to make a complaint, and not just have a moral or 'in principle' objection. A representative complaint can be made to HREOC on behalf of an aggrieved person or by a class or group of people who are discriminated against in a similar way. Organisations may not make complaints, although they may assist or represent an aggrieved person.

Stage 1: HREOC investigation and conciliation

HREOC's complaint handling process involves a number of steps (figure 4.1). The process is documented in HREOC's *Complaint Procedures Manual*, following the requirements of the HREOC Act. A person who considers that they have been unlawfully discriminated against on the ground of disability can obtain advice from HREOC and then lodge a formal, written complaint under section 46P of the HREOC Act (steps A and B in figure 4.1). HREOC is obliged to assist to people to formulate their complaint or put it in writing if needed. The complaint must be lodged by or on behalf of the aggrieved person (HREOC, sub. 235, p. 2).

Following initial investigation by HREOC staff (step C in figure 4.1), the complaint may be terminated or proceed to conciliation. HREOC will terminate a complaint at this stage if:

- it is not unlawful
- it is more than 12 months old
- it is trivial, vexatious, frivolous, misconceived or lacking in substance
- it has been adequately dealt with by another body
- a more appropriate remedy is available (for example, it would be better dealt with by another jurisdiction), or

- the subject matter is ‘of public importance’ and should be taken to the Federal Court or Federal Magistrates Service rather than be conciliated (HREOC 2003c).

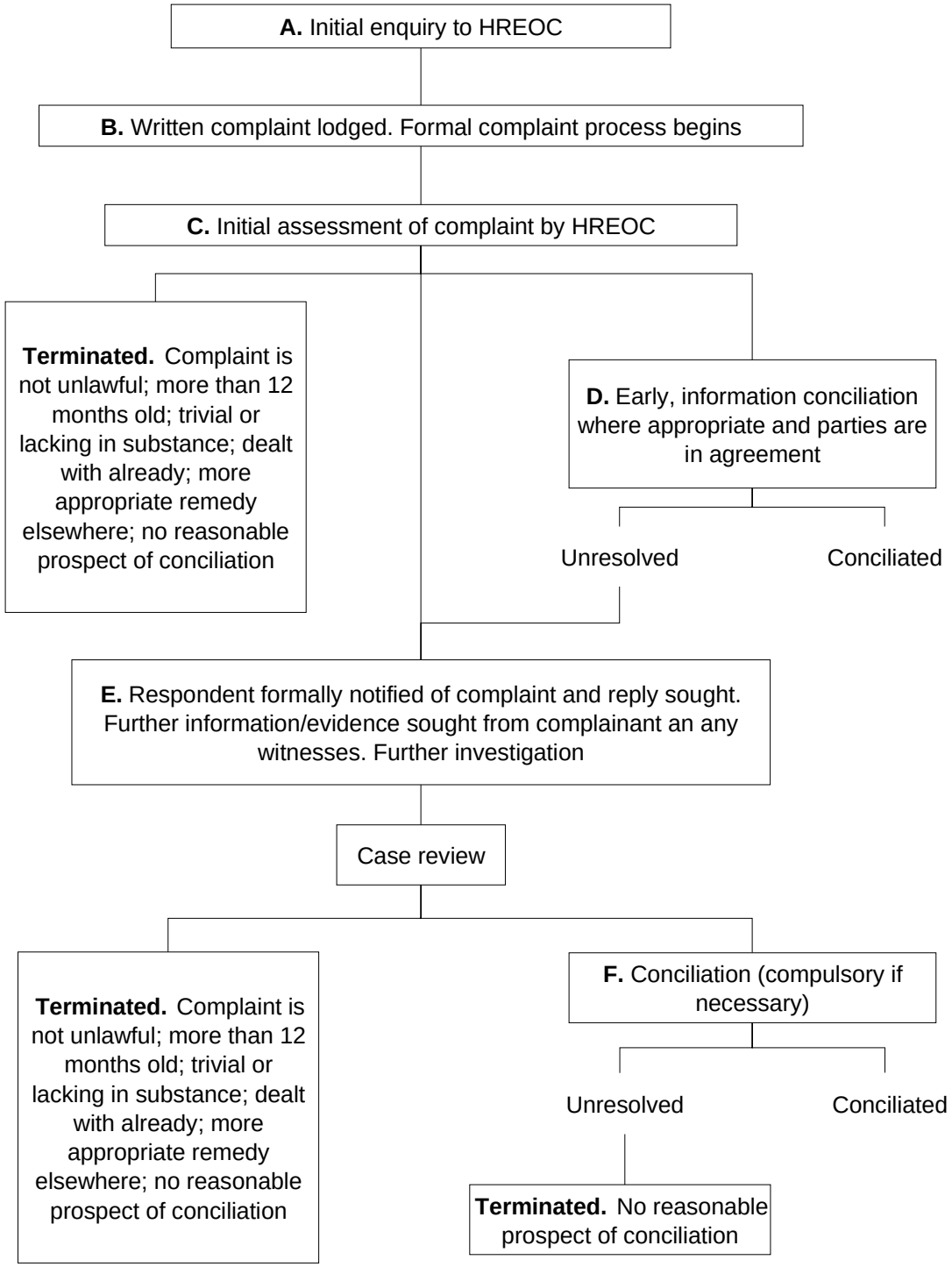
If the complaint is not terminated, then HREOC will attempt to conciliate it. Conciliation involves correspondence between HREOC and both the complainant and the respondent, to inquire into the complaint and negotiate an agreement. In less complex cases, HREOC will attempt to resolve the complaint in a less formal way through early conciliation (step D in figure 4.1). This would typically occur where there is little disagreement between the parties about the facts, or the discrimination was caused by a misunderstanding or ignorance of the law (HREOC, sub. 235, p. 3).

In more complex or disputed cases, HREOC will seek a written response from the respondent and from any witnesses, and conduct further investigations if necessary (step E in figure 4.1). HREOC may hold a conciliation conference at any time during the investigation (step F in figure 4.1). Conciliation can take many forms and is not necessarily conducted face to face. Penalties may apply for failure to attend a conciliation if directed or to provide information when requested by HREOC (see below). There is no charge for HREOC investigation or conciliation. Complainants and defendants may employ legal representation, but are not required to do so.

If conciliation is successful and an agreement is reached, then that is the end of the process. Conciliated outcomes can include agreements to apologise, rectify an ongoing barrier or problem or (more rarely) pay compensation. Conciliation outcomes can take the form of a contract between the parties and become enforceable like other contracts, but the parties would need to take further legal action to address any breaches (for example, if one party did not subsequently do what they had agreed to do in the conciliation). Parties generally pay their own costs. Costs are not awarded in conciliation like they are in court.

If conciliation is not successful (that is, if the parties do not reach agreement), then the complaint is terminated and the complainant may take their complaint to the Federal Court or the Federal Magistrates Service. HREOC may also terminate a complaint if it thinks conciliation is not appropriate in the circumstances, including if it thinks conciliation is unlikely to be successful. Complainants may withdraw their complaint at any time if they do not wish to pursue it, or if they wish to proceed directly to the Court. Conciliation conferences are confidential.

Figure 4.1 HREOC's complaint handling process



[a] When a complaint is terminated at any stage process, the complainant may apply to have the allegations heard by the Federal Court or the Federal Magistrates Service. Complainants may withdraw their complaint at any stage.

Data source: Productivity Commission based on HREOC 2002a, p. 169; HREOC 2003c.

Stage 2: the Federal Court and the Federal Magistrates Service

If complaints are not resolved through conciliation by HREOC, complainants can apply to the Federal Court to have their case heard in the Federal Court or, since July 2000, the Federal Magistrates Service (also called the Federal Magistrates Court, box 4.3). If the application to hear the case is successful, then the Court decides which of the two is used. There is a $50 filing fee to lodge a complaint at either the Federal Court or the Federal Magistrates Service. This fee may be waived if a case of financial hardship is made or if the complainant has been granted legal aid or holds a pensioner concession card or other benefit card.

Box 4.3 **Federal Magistrates Service**

The Federal Magistrates Service was established by the *Federal Magistrates Act 1999*, as an independent federal court. It is Australia's first lower level federal court. Previously, federal law work was done in State and Territory courts of summary jurisdiction under the provisions of the Judiciary Act. The first sittings of the service were on 3 July 2000.

Its jurisdiction includes family law and child support, administrative law, bankruptcy, unlawful discrimination, consumer protection law and privacy law. The Court shares those jurisdictions with the Family Court of Australia and the Federal Court of Australia.

The purpose of the Court is to provide a simple and accessible service for litigants and to ease the workload of the Family Court and the Federal Court. It focuses on less complex matters. While there is no strict indicator of complexity, a general guide is that less complex matters require less than two days of court hearing time.

The Court encourages people to resolve disputes through primary dispute resolution. There is no automatic assumption that every matter will end in a contested hearing. It uses community based counselling and mediation services as well as the existing counselling and mediation services of the Family Court and the Federal Court. There is a fee of $50 to lodge a complaint with the Court.

Sources: Federal Magistrates Service 2003; HREOC 2003c, p. 111.

With the permission of the Federal Court, HREOC can intervene in court cases involving issues of discrimination, or act as an *amicus curiae* (friend of the court). The process of taking a DDA complaint to the Court, along with the relative roles of HREOC, the Federal Court and alternative complaints processes is discussed in chapter 11.

If the Federal Court or the Federal Magistrates Service decides that unlawful discrimination has occurred, then it may order the respondent to rectify the discriminatory situation and/or pay compensation to the complainant, or it may decide to settle costs in some other way (HREOC 2003b). It may also order the

losing side to pay the other side's legal costs. Legal costs vary depending on the type of legal representation employed and the length of the case. Many inquiry participants were concerned that the risk of having costs awarded against the complainant discourages applications for Federal Court or Federal Magistrates Service determinations (see chapter 11).

Offences and penalties

The DDA and the HREOC Act list offences and penalties. These relate mainly to actions that might interfere in the complaint process (box 4.4). Some penalties are expressed in penalty units and some are expressed in dollar amounts.

Box 4.4 **Offences and penalties in the DDA and the HREOC Act**

Disability Discrimination Act 1992 (DDA) offences and penalties include:

- victimisation of a person attempting or intending to make a complaint under the DDA or the *Human Rights and Equal Opportunity Act 1986* (HREOC Act)—penalty: six months imprisonment (s.42)
- inciting or assisting a person to do an act that is unlawful discrimination under the DDA—penalty: six months imprisonment (s.43)
- failing to provide HREOC with actuarial or statistical data in relation to a discrimination complaint—penalty: $1000 (s.107).

HREOC Act offences and penalties relate mainly to the complaint and conciliation process. They include:

- refusing to give information or produce documents when required to do so—penalty: $1000 for a person and $5000 for a corporation (s.24(1))
- hindering, molesting or interfering with people who are participating in a HREOC inquiry—penalty: $1000 for a person and $5000 for a corporation (s.26(1))
- threatening (including threats to dismiss an employee), coercing or prejudicing people who are participating in a HREOC inquiry—penalty: $2500 or 3 months imprisonment for a person and $10 000 for a corporation (s.27(2))
- failing to attend a compulsory conference or to give information or documents without a reasonable excuse—penalty: 10 penalty units (s.46PL(1) and 46PM(1)).

Sources: Disability Discrimination Act 1992; Human Rights and Equal Opportunity Commission Act 1986.

The DDA and the HREOC Act do not contain penalties for proven cases of discrimination. In discrimination complaints that are resolved through conciliation, the outcome is decided by agreement between the parties. As noted above, conciliated outcomes may include an agreement to pay compensation. However, there are no penalties as such and no formal admission of guilt. In discrimination

cases that proceed to court, the court may order either or both parties to undertake appropriate remedies, such as remedial action or compensation. The Federal Court and the Federal Magistrates Service may also award legal costs to one or both parties (see chapter 11).

4.6 Administration of other Disability Discrimination Act functions

In addition to responding to individual discrimination complaints, HREOC has the following functions under the DDA (s.67):

- undertaking inquiries functions
- administering exemptions to the DDA
- reporting to the Minister on the development and monitoring of standards
- receiving voluntary action plans from organisations
- promoting an understanding and acceptance of, and compliance with, the DDA
- undertaking research and education programs
- advising the Minister on the consistency of other legislation with the DDA, and on the development of legislation relating to disability discrimination
- publishing guidelines
- intervening in court cases involving issues of discrimination.

The Attorney General and the Attorney-General's Department also have administrative and policy roles. HREOC's inquiries functions are discussed below. Its other functions are discussed in chapters 7 (community acceptance), 11 (the complaints process) and 12 (regulatory arrangements).

HREOC inquiries into disability discrimination

Under the HREOC Act, HREOC can conduct public inquiries. Public inquiries do not identify individuals unless they consent in writing, and they do not identify other parties except where the president of HREOC is satisfied that it is appropriate and necessary to investigate the complaint. These inquiries may arise in three ways.

First, the Attorney General may give HREOC a reference to undertake an inquiry, resulting in a report tabled in Parliament. These referrals are rare. An example is the inquiry into access to e-commerce and related matters for people with disabilities and older people. This inquiry resulted in the Australian Bankers Association

developing voluntary industry standards covering automatic teller machines, EFTPOS, Internet banking and telephone banking (appendix D).

Second, HREOC can use an individual complaint to inquire into systemic issues. Once a complaint has been made, HREOC can conduct an inquiry into the broad subject matter of the complaint. These inquiries aim to achieve conciliation or a consensus resolution—for example inquiries on captioning in cinemas and on access to telecommunications, both of which resulted in the adoption of industry codes of conduct. Such inquiries have occurred for a small number of complaints where the complaint had broad significance.

Third, HREOC can initiate an inquiry, which may result in a report but also aims to resolve a specific issue. There is no set process for such inquiries, but they usually involve public, government and business consultation. Although HREOC cannot force a resolution businesses such as banks and cinemas have participated in inquiries and agreed to resolutions.

The Attorney General's portfolio

HREOC is part of the Attorney General's portfolio. HREOC can advise the Attorney General on the consistency of other legislation with the DDA, and on the development of legislation relating to disability discrimination (s.67).

Disability discrimination responsibilities of the Attorney General and the Attorney-General's Department include:

- the structure and functions of HREOC
- matters arising under the HREOC Act and the DDA, including giving HREOC references to undertake inquiries
- legal and policy advice on legislative proposals, including, for example, the current Australian Human Rights Commission Legislation Bill 2003 and the proposed UN convention on human rights for people with disabilities (section 4.7)
- the development and enactment of disability standards for access to premises, education and public transport (see chapter 11)
- the prevention of unauthorised sterilisation of girls with intellectual disabilities (see chapter 6)
- the accessibility of information technology and e-commerce.

The Attorney-General's Department is also responsible for the Federal Court and Federal Magistrates Service (box 4.4) and funds Australia's network of legal aid

services, including dedicated disability legal aid services. Legal aid services mainly assist people with legal representation in the Federal Court and especially in criminal matters. They may sometimes provide advice and representation for DDA cases that proceed to court.

4.7 Reviews and future developments in discrimination legislation

A number of reviews in progress may be of relevance to the DDA.

Australian Human Rights Commission Legislation Bill 2003

The Senate Legal and Constitutional Legislation Committee is considering the Australian Human Rights Commission Legislation Bill 2003. This Bill is a re-drafted version of a 2002 Bill that the Senate rejected.

Among other objects, the current draft of this Bill proposes to:

- re-name and re-structure HREOC as the Australian Human Rights Commission
- replace the current sex, race, disability and other specific Commissioner roles with generic Commissioner roles that cover all areas of discrimination
- amend the powers and responsibilities of HREOC, including its power to intervene in federal unlawful discrimination cases before the courts
- highlight the public education and information dissemination roles of HREOC (see chapter 7)

This Bill is outside the terms of reference for this inquiry into the DDA. However, some changes that it proposes to the structure and operation of HREOC may affect the administration of the DDA.

Proposed Age Discrimination Bill 2003

Consultations are being held for the development of a Commonwealth Age Discrimination Bill, to complement the existing suite of Commonwealth discrimination Acts. Public hearings to consider the Bill were held in Canberra in September 2003. Around 10 submissions regarding the Bill had been made to the Senate Legal and Constitutional Committee by September 2003.

The Age Discrimination Bill 2003 proposes to make discrimination on the ground of age unlawful in much the same areas of activity as covered by the DDA—

employment, education, premises, the provision of goods and services, accommodation, the purchase of land and the administration of Commonwealth laws and programs. It uses very similar, but not identical, definitions and tests for direct and indirect discrimination. It also contains exemptions similar to those of the DDA, including superannuation, insurance, social security and migration laws. It exempts positive discrimination on the basis of age in much the same manner as 'special measures' for people with disabilities are exempt in the DDA.

The Age Discrimination Bill expressly states that 'age discrimination [is] not to include disability discrimination' (s.6). This provision is intended to minimise potential 'overlap between the operation of this Act and the DDA' and ensure:

> … the Act does not create a second or alternative avenue for complaints of disability discrimination where such complaints are properly covered by the DDA. Complaints of age discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act [the DDA] (Age Discrimination Bill 2003 Explanatory Memorandum, pp. 38–9)

Where a person has been discriminated against on the grounds of both age and disability, they may initiate complaints under both Acts, much as they can with the DDA and the sex and racial discrimination Acts. The proposed age discrimination Act will be administered by HREOC using the same complaint procedures that apply to the existing three Acts.

Proposed UN convention on human rights for people with disabilities

The United Nations has begun developing a new international convention on the human rights of people with disabilities. This work is being done by the UN's Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which held its first session in July–August 2002 and a second session in June 2003.

At the second session, a working group was established to commence drafting the convention. A large number of international government and non-government organisations are represented on the Ad Hoc Committee. The smaller working group consists of 27 government and 12 non-government representatives. It is scheduled to present a draft convention at a third session in early 2004 (UN 2003).

The Commonwealth of Australia is represented on the Ad Hoc Committee by officers of HREOC, the Attorney-General's Department and the Office of Disability. These representatives are consulting Australian disability organisations and other interested parties about the Convention.

5 Eliminating discrimination

The first object of the *Disability Discrimination Act 1992* (DDA) is to eliminate, as far as possible, discrimination against persons on the ground of disability in specific areas of activity. This chapter examines the effectiveness of the DDA in achieving this object. As noted in chapter 9, the DDA aims to achieve substantive equality (that is, to remove barriers to equality of opportunity), rather than equality of outcome. This must be borne in mind in assessing its effectiveness. Progress in eliminating discrimination also contributes to the other objects of the DDA: 'equality before the law' and 'promoting community recognition and acceptance of the rights of people with disabilities'.

Section 5.1 analyses disability discrimination complaints data. Sections 5.2–5.5 examine the effectiveness of the DDA in specific areas of activity. This chapter does not address the effectiveness of the DDA in eliminating discrimination in the administration of Commonwealth laws and programs. Inquiry participants made relatively few comments on this area of activity, and the role of the DDA in this area appears to have been largely superseded by the Commonwealth Disability Strategy (see appendix E). Unfortunately, the Productivity Commission has not received any information from the Office of Disability on the effectiveness of the Commonwealth Disability Strategy.

Section 5.6 looks at the effectiveness of the DDA in eliminating discrimination for different groups of people and section 5.7 assesses the DDA's effectiveness overall in eliminating discrimination.

It is not easy to measure intangible concepts such as the level of discrimination. Because there is no single direct measure of discrimination, this chapter draws on a mix of quantitative (measurable in numbers) and qualitative (opinion-based) information. It is also difficult to distinguish the effects of the DDA from other influences on these measures. Other influences include:

- the protective framework provided by State and Territory anti-discrimination legislation, much of which pre-dated the DDA (see chapter 4)
- changes over time in the provision of disability services and the Disability Support Pension, which could have affected the ability or willingness of people with disabilities to participate in various activities

- policies of de-institutionalising and 'mainstreaming' many people with disabilities (see chapter 6)
- changes in the proportion of the population identified as having a disability
- technological developments over the past 10 years that have helped reduce the barriers faced by many people with disabilities.

5.1 Complaints data

Complaints data compiled by the Human Rights and Equal Opportunity Commission (HREOC) can indicate effectiveness of the DDA. However, these data should be interpreted with caution. First, only a small number of DDA complaints are made each year. Although the Australian Bureau of Statistics (ABS) estimates that 20 per cent of the population has a disability, and there is anecdotal evidence of ongoing discrimination, only 493 DDA complaints were made to HREOC in 2002-03. These complaints might not be representative of the experiences of people with disabilities who did not complain to HREOC.[1]

Second, complaints data measure how many people believe they have experienced discrimination and are willing and able to make a formal complaint. Complaints do not indicate whether discrimination has occurred. In addition, aggregate complaint numbers do not reveal the nature of complaints: one complaint might concern widespread systemic discrimination, while another concerns a specific instance of discrimination.

Third, factors other than the level of discrimination might affect the number of complaints. An increase in complaints, for example, could mean increased discrimination or increased use of the system in response to its success in tackling discrimination. A decrease in complaints might reflect less discrimination or disenchantment with an ineffective system.

Fourth, statistical issues about how complaints have been counted over time and in different jurisdictions mean only indicative comparisons can be made.

Complaint outcomes

As noted above, HREOC received 493 complaints about discrimination on the ground of disability in 2002-03. The number of formal complaints made to HREOC

[1] In 2001-02 (2000-01 for South Australia and Tasmania), State and Territory anti-discrimination bodies received a total of 1599 disability- or impairment-related complaints. Different definitions and counting rules make it difficult to compare data across jurisdictions.

is a relatively crude guide to the level and nature of discrimination in the community, but the outcomes of the complaint process might give some insight into the likely presence of discrimination.

HREOC finalised 463 complaints in 2002-03 (noting that the number of complaints finalised does not match the number received in any given period). It terminated 21.6 per cent of complaints for being 'trivial, vexatious, misconceived, or lacking in substance' and 5.4 per cent for being 'not unlawful'. That is, HREOC regarded 27 per cent of complaints as not involving unlawful discrimination (table 5.1).

A total of 256 complaints (55.3 per cent) passed HREOC's initial screening, implying that they were not 'lacking in substance'. (These were made up of 40.2 per cent of complaints that were successfully conciliated and 15.1 per cent that had 'no reasonable prospect of conciliation'). It is not possible to draw any inferences about the remaining 17.7 per cent of complaints.

Table 5.1 **Outcomes of finalised Disability Discrimination Act complaints, 2002-2003**

Outcome	*Number*	*%l*
Terminated	**219**	**47.3**
Not unlawful	25	5.4
More than 12 months old	5	1.1
Trivial, vexatious, misconceived, lacking in substance	100	21.6
Adequately dealt with already	11	2.4
Had more appropriate remedy available	8	1.7
Had no reasonable prospect of conciliation	70	15.1
Withdrawn	**43**	**9.3**
Conciliated	**186**	**40.2**
Administrative closure (e.g. because complainant was not an aggrieved party)	**15**	**3.2**
Total	**463**	**100**

Source: HREOC, sub. 235, appendix C.

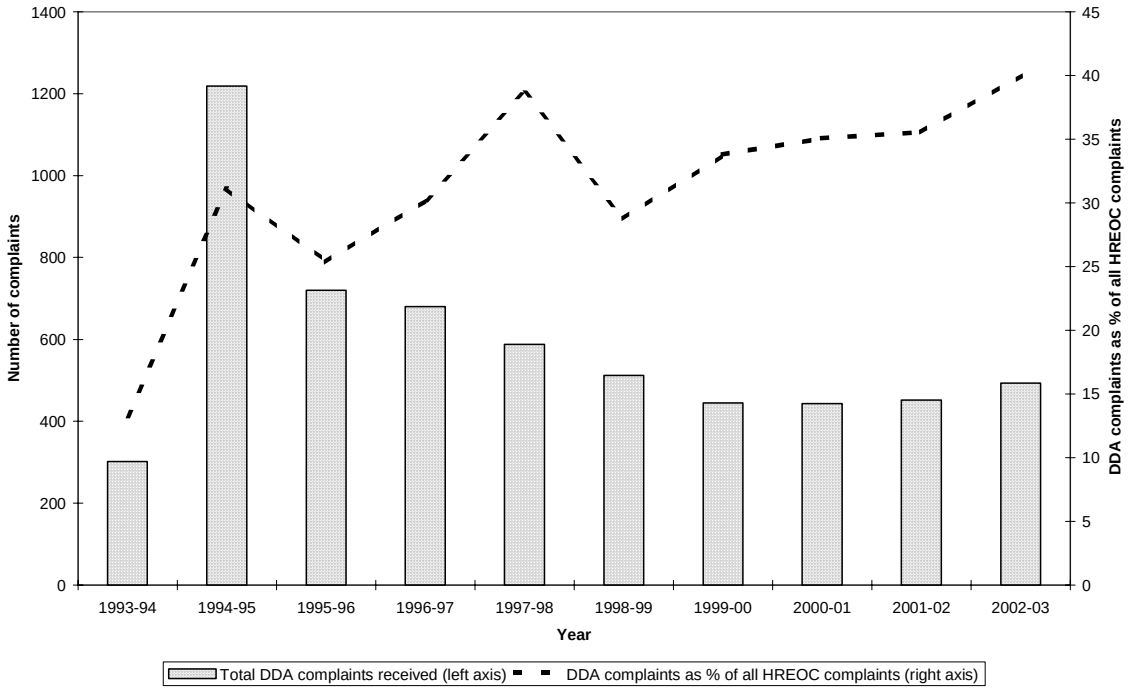
Complaints over time

Changes over time in the number of DDA complaints to HREOC might indicate changes in discrimination and indirectly the effectiveness of the DDA (although the possible influence of other factors must be considered). The number of DDA complaints has generally declined since the DDA was introduced in March 1993 (figure 5.1). This decline would be more marked if the increase in the number of people declaring a disability over the same period (see chapter 3) were taken into account. Within this general decline, three phases appear to be present: an initial

'honeymoon' period when complaints peaked in 1994-95; a gradual year-on-year decline running from 1995-96 to 1998-99; and relative stability around the mid to high 400 complaints per year since 1999-2000.

The 1994-95 spike in DDA complaints appears to have been influenced by pent-up demand to use the new Act and its vigorous promotion by HREOC. The reasons for the gradual decline in the number of DDA complaints since 1995-96 and the stabilisation of this number since 1999-2000 are difficult to determine. It is possible that disability discrimination might have decreased over this period, reflecting the success of the DDA in addressing systemic discrimination in areas such as telecommunications (section 5.5). Existence of the DDA might also have encouraged parties to reach informal solutions without the need for formal complaints. Or the decline in complaints could indicate that the complaints process became less effective or less accessible over time, discouraging people from making complaints.

Figure 5.1 **Disability discrimination complaints to HREOC, 1993-94 to 2002-03**



Data sources: HREOC annual reports and HREOC, sub. 235.

The general decline in the number of DDA complaints must be set against two other observations. First, the number of complaints successfully conciliated remained constant over this period (HREOC, sub. 235). In combination with the decline in the number of complaints, this stability meant that the proportion of complaints

successfully conciliated increased over time. This trend could reflect several factors unrelated to the level of discrimination:

- more selective use of the complaints process
- improvements in HREOC processes
- resource constraints that capped the number of conciliations in any year
- the transfer of the determinations power to the federal courts in 2000.

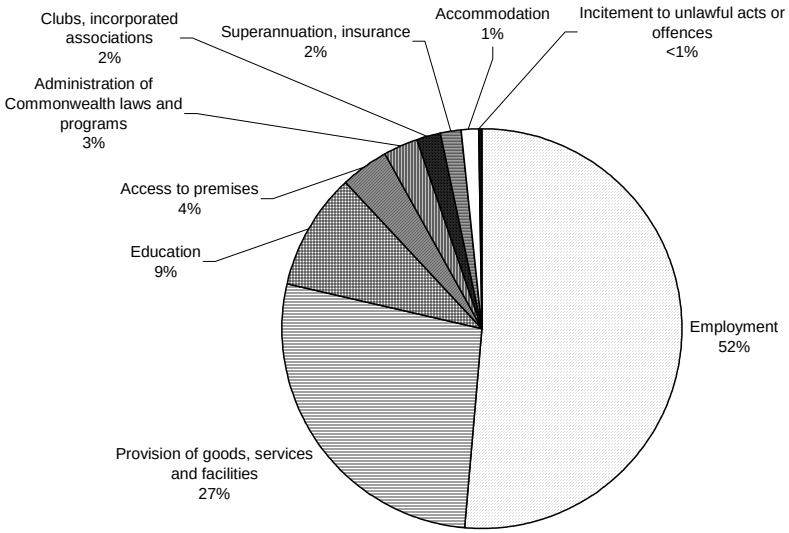
Second, despite declining in number since 1994-95, DDA complaints have generally increased as a proportion of all HREOC complaints (with some fluctuations). The Productivity Commission considers that the number of DDA complaints, although small, indicates that disability discrimination remains an issue.

Complaints by area of activity

DDA complaints can be divided by area of activity (figure 5.2). In 2001-02, the most recent year for which disaggregated data are available, 52 per cent of DDA complaints were in the area of employment. The second largest area of complaint concerned the provision of goods, services and facilities (27 per cent). Relatively few complaints were made about access to premises (4 per cent)— a category that includes complaints about access to public transport.

Employment has consistently accounted for most DDA complaints over time (figure 5.3). Access to goods and services has consistently made up the second largest area of complaints, but appears to have decreased slightly in importance since 1994-95. The proportion of complaints about education, access to premises (including public transport) and 'other' have remained relatively constant over time.

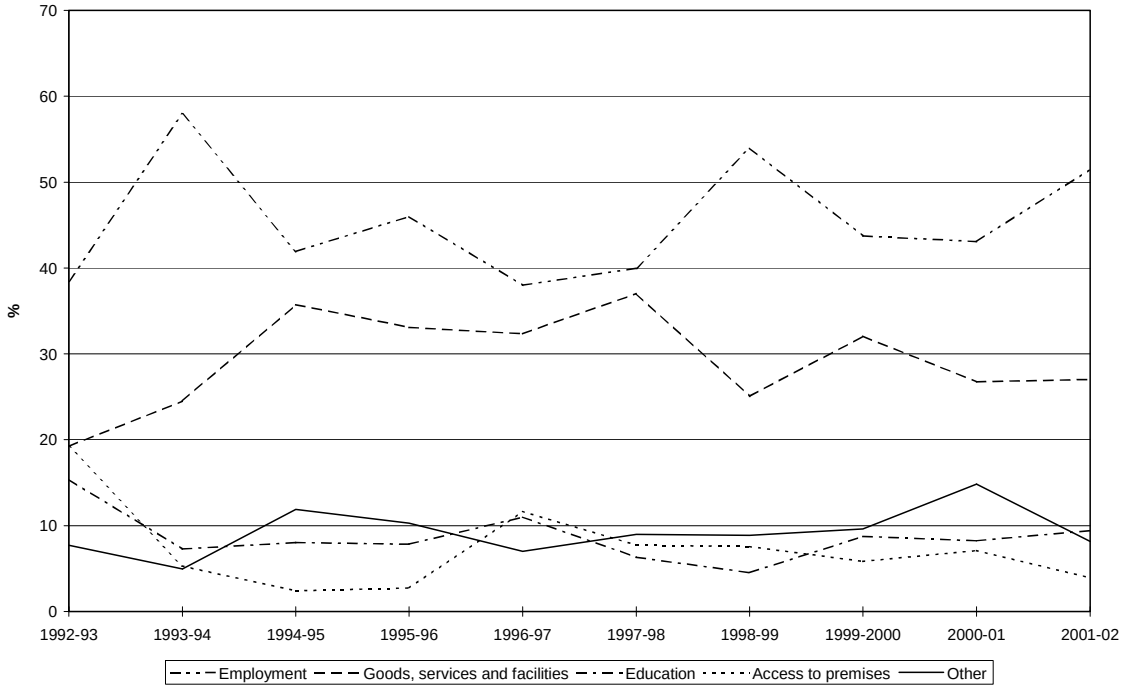
Figure 5.2 **DDA complaints received by area[a], 2001-02**



a An area is recorded for each ground of discrimination, so there may be double counting of some complaints (such as the provision of goods and services and access to premises) where the complaint was applicable on both grounds.

Data source: HREOC annual reports, various years.

Figure 5.3 **Proportion of DDA complaints received, by area of activity, 1992-93 to 2001-02**



Data source: HREOC annual reports, various years.

5.2 Eliminating discrimination in employment

Discrimination on the ground of disability in employment remains a major issue. As noted, employment consistently attracts the most complaints under the DDA and currently accounts for around 50 per cent of all DDA complaints. The Productivity Commission notes the practical limits on the ability of the DDA to improve employment opportunities for some people with disabilities. While in areas such as access to premises it is unlawful to discriminate against any person with a disability (subject to a requirement that any adjustments necessary to accommodate a person with a disability do not impose an 'unjustifiable hardship'), discrimination in employment is only unlawful where a person with a disability meets the inherent requirements of a position (and is also subject to the 'unjustifiable hardship' requirement). It might be difficult for many people with disabilities to meet these inherent requirements.

Inquiry participants' views on employment discrimination

A number of inquiry participants gave examples of personal experience or knowledge of discrimination in employment (Maxine Singer, sub. 8; Victor Camp, sub. 20; Debbie-Lee McAullay, sub. 25; Terry Humphries, sub. 66; Physical Disability Council of NSW, sub. 78; David W. Norton, sub. 111; Advocacy Tasmania, sub. 130). Box 5.1 summarises some problems identified by inquiry participants.

Employment outcomes

The DDA aims to achieve substantive equality, rather than equality of outcome. However, outcomes data can provide an indirect indication of possible discrimination, although the influence of factors other than discrimination must be borne in mind.

Employment outcomes for people with disabilities provide circumstantial evidence of discrimination. People with disabilities are less likely than people without disabilities to be in the labour force (that is, employed or actively looking for work). The ABS estimated the labour force participation rate of people with disabilities in 1998 at 53.2 per cent, compared with 80.1 per cent of people without a disability (table 5.2). Although people with disabilities made up 16.6 per cent of the working age population in that year, they made up only 11.7 per cent of the labour force.

Box 5.1 **Inquiry participants' views on employment discrimination**

Many inquiry participants conveyed their personal experience or knowledge of disability discrimination in employment.

> He has learnt in his job applications not to mention that he was educated at Deafness Units, but the fact that he wears two obvious hearing aids (this because of his severe hearing loss, although the aids enable him to hear quite well) he is turned down at every interview. He has even been told the reason for this is because his aids are a give-away to his hearing loss. (Deafness Association of Northern Territory, sub. 89, p. 3)
>
> … for me this has meant well over 200 job interviews I did not succeed at in spite of qualifications in excess of those required as the interviewers had the concept of my disability in the front of their mind, allowing their second-guessing and pre-judging of me as valid assessment protocol. Disability is not a prescriptive medical condition but a societal belief system to explain difference. (Andrew Van Diesen, sub. 93, p. 2)
>
> … discrimination in employment is very hard to prove. Employers of course do not actually say that these are the reasons the person did not get the job. They need only say that 'another person was better qualified' and under State and federal legislation, which was designed to eliminate these practices, the deaf person has nothing on which to appeal. In addition with the vast number of employers using recruitment agencies, they are able to hide behind an additional smokescreen to escape being called to account under these laws. (Australian Association of the Deaf, sub. 229, p. 4)
>
> I have even heard the opinion expressed by different levels of management that 'the person has a disability why don't they just go on DSP [Disability Support Pension] and not even worry about trying to get employment'. (Peter Simpson, sub. 192, p. 2)
>
> … people with mental illness who are seeking employment are still experiencing direct discrimination because of their disability. … up to 90 per cent of [member organisations'] clients do not disclose their history of mental illness to a prospective employer as they have learned from past experience that if they do, they will not get the job. (Mental Health Coordinating Council, sub. 84, p. 3)
>
> … discrimination in employment is a major running sore … (National Council for Intellectual Disabilities, sub. 112, p. 15)

Between 1988 and 1993, the labour force participation rate for people with disabilities rose proportionately more than that for people without a disability. However, from 1993 (the first full year of application of the DDA) to 1998, the participation rate for people with disabilities fell slightly, while that for people without disabilities continued to rise.

The Productivity Commission estimated the labour force participation rate of people with disabilities in 2001 at 54.6 per cent, based on the Household Income and Labour Dynamics Australia (HILDA) survey. This estimate suggests a slight increase from the 1998 ABS value of 53.2 per cent. However, the two estimates are based on different surveys which are not strictly comparable. The Productivity Commission estimate is only indicative (see chapter 3).

Table 5.2 **Labour force participation and unemployment rates of people[a] with a disability, 1988, 1993, 1998, 2001**

	People with disabilities				*People without a disability*			
	1988	*1993*	*1998*	*2001*[b]	*1988*	*1993*	*1998*	*2001*[b]
	%	%	%	%	%	%	%	%
Labour force participation rate	51.5	54.9	53.2	54.6	75.3	76.9	80.1	79.8
Unemployment rate	11.5	17.8	11.5	10.6	8.1	12.0	7.8	6.1

a Persons aged 15–64 years living in households. **b** Productivity Commission estimate based on the 2001 Household Income and Labour Dynamics Australia (HILDA) survey.

Source: ABS 1999b, cat. no. 4430.0; 2001 HILDA survey.

When in the labour force, people with disabilities are more likely to be unemployed than those without a disability (table 5.2). Between 1988 and 1998, the unemployment rate differential between the two groups was 3.4–5.8 percentage points. The combination of lower labour force participation and higher unemployment mean that people with disabilities were 23 per cent less likely to be employed in 1993, and 26 per cent less likely to be employed in 1998. (These rates are based on raw figures. Quantitative analysis can be used to adjust these figures for other characteristics—see next section).

Other labour market outcomes for people with disabilities are summarised below (and discussed in more detail in appendix A). Compared with people without disabilities, people with disabilities:

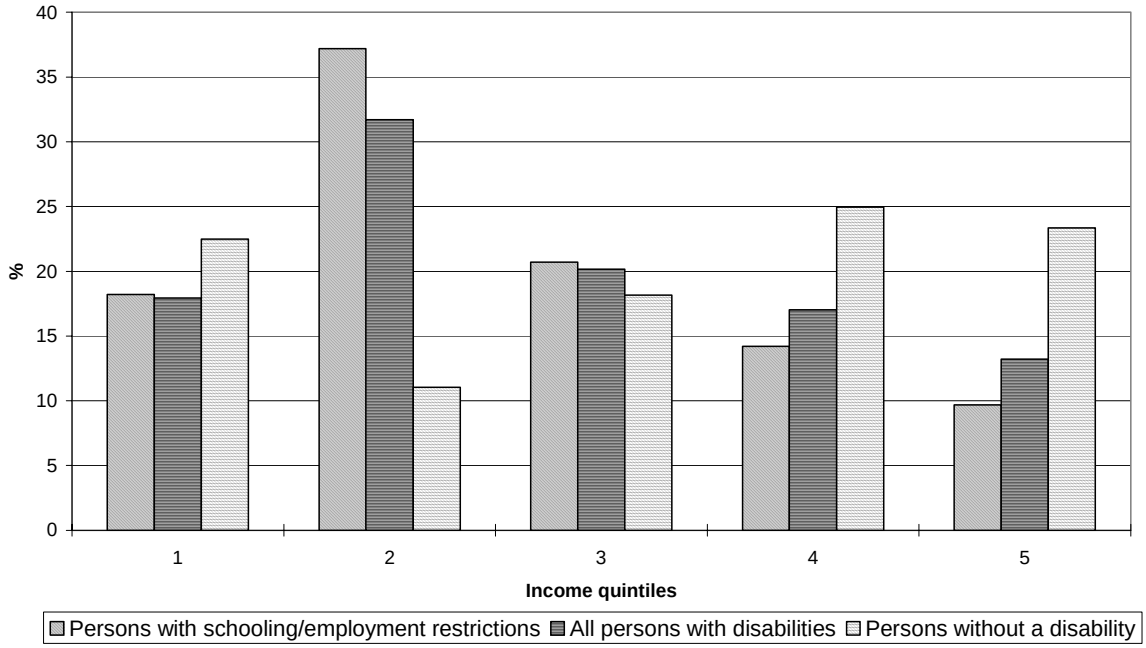
- experience longer unemployment spells, on average
- are less likely to be employed full time
- tend to be clustered at opposite ends of the occupational spectrum, in the categories 'managers and administrators' or 'labourers and related workers'
- are overrepresented in the second and third lowest income quintiles for working age Australians (figure 5**Error! Not a valid link.**.4).[2] People with a schooling or employment restriction are even more likely to be found in the second and third income quintile. This pattern reflects the impact of these restrictions on wage earning ability.

The Productivity Commission estimated the impact of disability on wages, using the HILDA dataset for 2001. On average, women with disabilities earned 7 per cent less per hour than women without disabilities. Males with disabilities earned 6 per cent less per hour than men without disabilities. This result must be treated with some

[2] People without a disability may be overrepresented in the first quintile because that quintile includes people with nil income and people who reported no source of income.

caution, because it does not account for other characteristics (such as age and educational attainment) that can influence wages. In addition, it measures only the wages of people in employment; it provides no information about pre-employment discrimination.

Figure 5.4 **Income distribution for persons with a schooling/employment restriction, with any disability, and with no disability,[a, b] 1998**



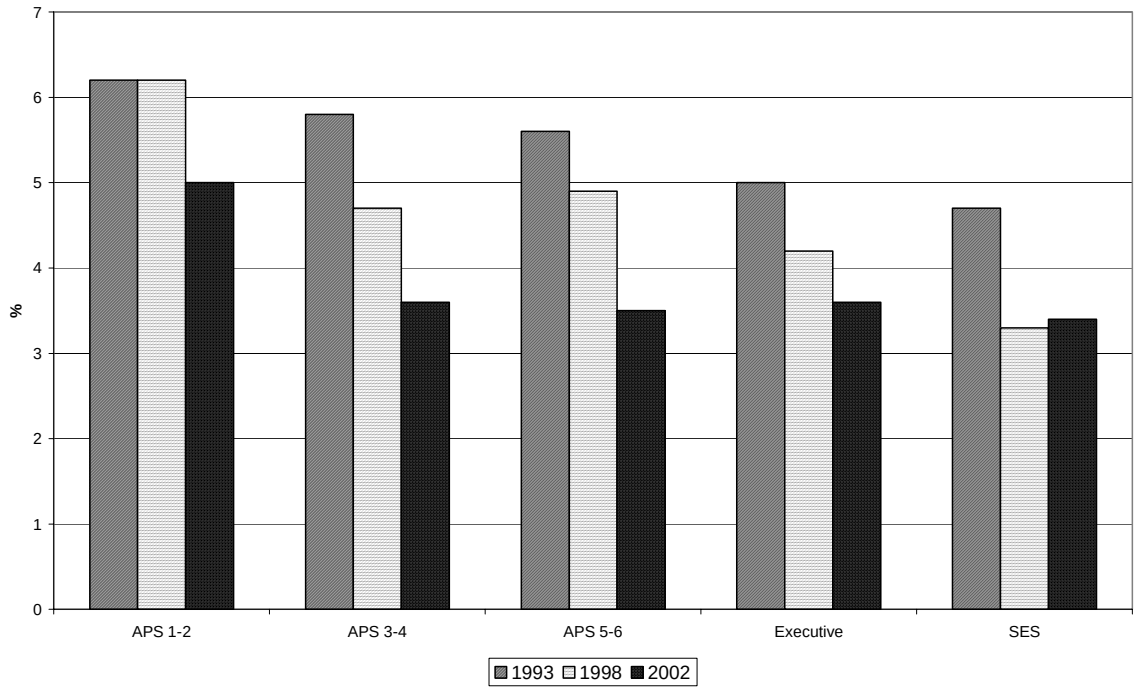
a Persons aged 15–64 years living in households. **b** Total cash income by quintiles. Quintiles exclude 'income not stated'. First quintile includes people with nil income and people who reported no source of income, but excludes refusals.

Data source: ABS 1999b, cat. no. 4430.0.

There has also been a decline in the employment of people with disabilities in the Commonwealth public sector between 1993 and 2002 (appendix E). The overall decline might be explained in part by the effects of downsizing and contracting out of lower level administrative positions. But this does not explain why the employment rates of people with disabilities in the Australian public service decreased at all staff levels (figure 5.5).

Currently, people with disabilities have poorer labour market outcomes overall than people without disabilities. However, poorer outcomes might be caused by many reasons other than discrimination, including differences in education and experience between people with and without disabilities. Quantitative analysis attempts to allow for these other reasons in order to isolate the effect of discrimination.

Figure 5.5 **Ongoing staff with a disability by Australian Public Service (APS) classification group, 1993, 1998, 2002**



Data source: APSC 2002a.

Quantitative analysis of employment discrimination

Economists have attempted to measure discrimination in labour markets using two approaches: direct testing and indirect testing. Little direct testing research is directly relevant to this inquiry (box 5.2). Indirect testing techniques have been used in two ways: first, to examine the experiences of people with disabilities in obtaining employment and, second, to quantify discrimination in wages.

Obtaining employment

Many inquiry participants were concerned about discrimination at the stage of obtaining employment, arguing that employment discrimination is relatively easy to conceal (particularly in the recruitment process) and that indirect discrimination is an issue in the way in which jobs are designed and advertised. Wilkins (2003) estimated the effect of having a disability on a person's probability of being employed and on the number of hours worked. Using 1998 ABS data and holding other characteristics such as age and education constant, he estimated that having any kind of disability decreased the probability of being employed by 29.2 per cent for men and 22.6 per cent for women. He also estimated that having a disability

reduced the number of hours worked per week by 2.2 hours for employed men and 2.0 hours for employed women.

Disability discrimination is one possible source of these differentials. However, the effects of disability on employment might also be due to other factors, such as differences in ability or desire to work, and differences in non-work opportunities.

Box 5.2 **Direct testing for discrimination**

Direct testing involves controlled field experiments that compare the degree of success by testers with and without a particular attribute in various markets. An example would be two candidates—one male, one female—applying for the same advertised position, in person, by phone or in writing. After this experiment is repeated a number of times, a statistical measure of sex discrimination (in this case) can be obtained. Direct testing has been used extensively in measuring sex and race discrimination (see Riach and Rich 2002 for a survey of results in Australia and overseas). It has been used less frequently to measure disability discrimination. Riach and Rich (2002) cite the results of three overseas studies that found statistically significant labour market discrimination (at the written job application stage) on the basis of disability.

Direct testing is most suited to measuring discrimination at the job application stage (that is, pre-interview). It is not so suited to measuring discrimination in job offers (post-interview) or wages. Moreover, direct testing cannot account for employment discrimination occurring when jobs are advertised by 'word of mouth' to persons already in the labour market.

To the Productivity Commission's knowledge, there has been no direct testing of disability discrimination in Australia.

Wage discrimination

Indirect testing has also been used to test for wage discrimination, by analysing the wages earned by workers with disabilities and those without disabilities.[3] The analysis attempts to measure the extent to which characteristics such as age, education or experience explain each group's average earnings. (Although disability discrimination can contribute to lower levels of education or experience, this analysis focuses on discrimination in employment). Any 'gap' (difference in wages between the two groups) that remains after accounting for these characteristics is interpreted as employer discrimination towards people with disabilities. The gap demonstrates that the two groups are rewarded differently even though they have the same characteristics (except for disability).

[3] The technique is known as an Oaxaca–Blinder decomposition (Oaxaca 1973; Blinder 1973)—see appendices A and G.

The Productivity Commission applied this approach to the most recent and detailed data for Australia: the HILDA survey of 2001. The analysis is discussed in appendix A and detailed in appendix G. It suggests that different characteristics cannot explain approximately 44 per cent of the difference in the wages of women with disabilities and women without disabilities, and 27 per cent of the difference in wages for men. These gaps could be interpreted as discrimination on the ground of disability. (As noted, on average, women with disabilities earn 7 per cent less per hour than do women without disabilities. On average, the difference for men is 6.4 per cent less per hour.)

This analysis has a technically low explanatory power. This is common in this type of work, where many unobservable influences are at work simultaneously. Therefore, these results are very tentative. The Productivity Commission has endeavoured to include all relevant characteristics in its calculations, but some of the unexplained gap may stem from omitted characteristics or from differences in unobservable characteristics, such as motivation.

These results show a relatively small unexplained difference in hourly wages between people with and without disabilities in the labour force. This might suggest that other industrial relations mechanisms provide significant protection from wage discrimination for people with disabilities who are employed, and that disability discrimination is more of an issue in obtaining employment.

Effectiveness of the Disability Discrimination Act employment provisions

Given the poorer labour market outcomes of people with disabilities and their significantly lower probability of being employed, the question arises of whether the DDA has been effective in the employment area. Many participants argued that the DDA has had only limited effect (box 5.3).

Some inquiry participants raised DDA-specific factors for a lack of effectiveness, including:

- the difficulty in proving discrimination (Australian Association of the Deaf, sub. 229; Blind Citizens Australia, trans., p. 1685)
- the deterrent effect of complainants being branded ‘troublemakers’ (Australian Association of the Deaf, sub. 229; Darwin Community Legal Service, trans., pp. 31–2)

Box 5.3 **Inquiry participants' views on the effectiveness of the Disability Discrimination Act in employment**

The views expressed by inquiry participants were generally negative.

> Comprehensive evidence on the effectiveness of achievement of the objective of elimination of discrimination in employment is not available but such evidence as HREOC is aware of is not encouraging. (HREOC sub. 143, p. 59)
>
> … significant discrimination still exists and historical attitudes remain entrenched in many areas. In particular very little improvement can be seen in the areas of employment … (Disability Services Commission, sub. 44, p. 4)
>
> Australia does not have comprehensive evidence on the effectiveness of the DDA in achieving the objective of elimination of discrimination in employment. Nonetheless, a frank assessment requires saying that such evidence as exists is not encouraging. Can we say that there is evidence that employment discrimination laws have at least made things better than they might otherwise have been, in the face of difficult and changing labor market conditions, even if they haven't produced absolute improvements in representation of people with disabilities? No. (Jason Gray, sub. 27, p. 12)

Other negative factors mentioned were the increasing requirement to hold a driver's licence (Mental Health Coordinating Council of Australia, sub. 84), the resistance of small business to the DDA's objectives (Equal Opportunity Commission of South Australia, sub. 178) and the lack of an Australian equivalent of the US Job Accommodation Network, which offers free advice to employers on possible adjustments (Jason Gray, sub. 27, p. 58).

- the fact that complainants did not often get their job back (Disability Action Inc., trans., p. 934; Larry Laikind, sub. 70)
- the absence of employment standards (Disability Action Inc., trans; NSW Office of Employment Diversity, sub. 172)
- inconsistencies with occupational health and safety legislation (Maxine Singer, sub. 8; Debbie McAullay, sub. 25; Job Watch , sub. 90; Equal Opportunity Commission of South Australia, sub. 178).

Anti-discrimination legislation can have conflicting effects on the demand for workers with disabilities. It might increase demand for their labour, because employers are under threat of a complaint if they discriminate. Alternatively, employers might consider that anti-discrimination legislation makes hiring workers with a disability more expensive (for example, the cost of making adjustments or paying equal wages), and cost-sensitive employers might prefer to hire less expensive workers without disabilities (even though, without the anti-discrimination legislation, they might have hired a worker with a disability). This effect could lead to reduced demand for workers with disabilities.

Some US researchers have argued that the *Americans With Disabilities Act* has reduced the employment of people with disabilities, by increasing the costs of 'hiring and firing'. This analysis is controversial and has been criticised by other researchers (box 5.4).

Box 5.4 **Impact of the Americans With Disabilities Act on employment**

There has been much debate among researchers about the impact of the Americans with Disabilities Act in the United States. Acemoglu and Angrist (1998) and DeLeire (2000) found that the introduction of the Act had had an overall detrimental impact on the employment of people (especially men) with disabilities in the United States. They also found that the detrimental employment effects had occurred through reductions in hiring rather than increases in firing, suggesting that accommodation costs concern employers more than do the costs of litigation. None of these researchers found that the Act had affected the relative wages of workers with disabilities.

Other authors, however, have challenged these conclusions (Bound and Waidmann 2002; Kruse and Schur 2003; Schwochau and Blanck 2000) with the following arguments:

- the fall in the employment of people with disabilities might have been caused by changes to social security benefits, particularly disability pensions
- definitions of disability used by Acemoglu and Angrist (1998) and DeLeire (2000) are narrower than the definition used in the Americans with Disabilities Act, leading to problems in categorising people as 'not disabled'
- the introduction of the Act might have encouraged more people to classify themselves as having a disability, thus introducing bias into the time series
- the fall in employment of people with disabilities might have been the continuation of a pre-Act trend or linked to business cycles.

The most recent research, by Kruse and Schur (2003), showed that the results were influenced by the choice of data and definition of disability. The authors concluded that:

> These results do not permit a clear overall answer to the question of whether the ADA [Americans with Disabilities Act] has helped or hurt the employment of people with disabilities, since both positive and negative signs can be found. Rather, the main conclusion is that there is reason to be cautious about findings of either positive or negative effects … (Kruse and Schur 2003, p. 62)

Sources: Acemoglu and Angrist (1998); DeLeire (2000); Bound and Waidmann (2002); Kruse and Schur (2003); Schwochau and Blanck (2000).

Although the DDA has employment provisions similar to those of the Americans with Disabilities Act, the Productivity Commission has found little evidence that the DDA has had any adverse impact on the employment of people with disabilities.

Other influences on employment

Other influences beside the DDA are likely to have affected the employment situation of people with disabilities. As well as general influences noted above, some influences are specific to employment.

An individual's decision to work or not to work rests on a comparison of labour income, non-work income and the value of time not spent at work. The existence of the Disability Support Pension would influence the labour force participation decisions of those eligible. In the United States, the decline in labour force participation of people with disabilities has mirrored—and, some say, been caused by—the rise in the proportion of people receiving the disability pension (see appendix A). In Australia during the 1990s, the number of persons receiving the Disability Support Pension increased faster than anywhere else in the OECD, almost doubling between 1990 and 2000. In June 2000, more than 3 per cent of Australians received that pension.

A number of studies (ACOSS 2002; Argyrous and Neale 2001, 2003; Healy 2002; Cai 2001) have highlighted the role that labour market conditions and government policies have played in this increase in the number of disability pensioners (see appendix A). It is argued that older males left the labour force, as the labour market deteriorated, and went onto the Disability Support Pension. At the time, this movement was facilitated by government policies that tightened eligibility criteria for unemployment benefits and relaxed eligibility criteria for the pension.

People with disabilities appear to be particularly susceptible to the tightening of the labour market for older workers. This pattern suggests that the observed decline in the labour force participation of people with disabilities in the older age groups might be due to a combination of age and disability discrimination (see appendix A).

In addition, Blind Citizens Australia highlighted the influence of recent changes affecting the Australian economy and labour market on the employment of people with disabilities, such as expansion of the retail sector, the visual emphasis of many new jobs, a reduction in entry-level jobs, an increased emphasis on multi-skilling, the expansion of the small business sector, a reduction in employment in the public sector, and the expansion in the use of recruitment and labour hire agencies (sub. 72, pp. 17–18).

Conclusion

The DDA appears to have been relatively ineffective overall in eliminating disability discrimination in employment. On average, people with disabilities have poorer employment outcomes than those of people without disabilities, and this appears to have persisted over time, although this might be caused partly by factors other than discrimination. Quantitative analysis indicates some discrimination in obtaining employment.

DRAFT FINDING 5.1

The number of complaints under the Disability Discrimination Act 1992 *and 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.*

5.3 Eliminating discrimination in education

Participation by people with disabilities in education changed over the past decade (see appendix B). More students with disabilities are now attending mainstream schools, and more people with disabilities are participating in higher education. The average education attainment of people with disabilities has improved, but remains lower than the education attainment of people without disabilities. Anecdotal evidence indicates that the DDA has been at least partly responsible for these changes.

Complaints in education

Education accounted for the third highest number of DDA complaints in 2001-02 (9 per cent of all complaints) (figure 5.2). Available data cover only a short period, but DDA complaints increased in all education sectors except TAFE colleges—part of the vocational education and training (VET) sector—between 1998-99 and 2002-03 (table 5.3). However, these numbers are very small in absolute terms and should be interpreted with caution.

Table 5.3 **DDA complaints received in education by institution type, 1998-99 to 2002-03**

Institution type	*1998-99*	*1999-2000*	*2000-01*	*2001-02*	*2002-03*
	no.	no.	no.	no.	no.
Primary school	5	9	10	13	11
Secondary school	4	11	10	10	15
TAFE	6	6	4	3	4
University	5	9	10	14	17
Other	3	9	0	1	4
Total	**23**	**35**	**34**	**41**	**51**

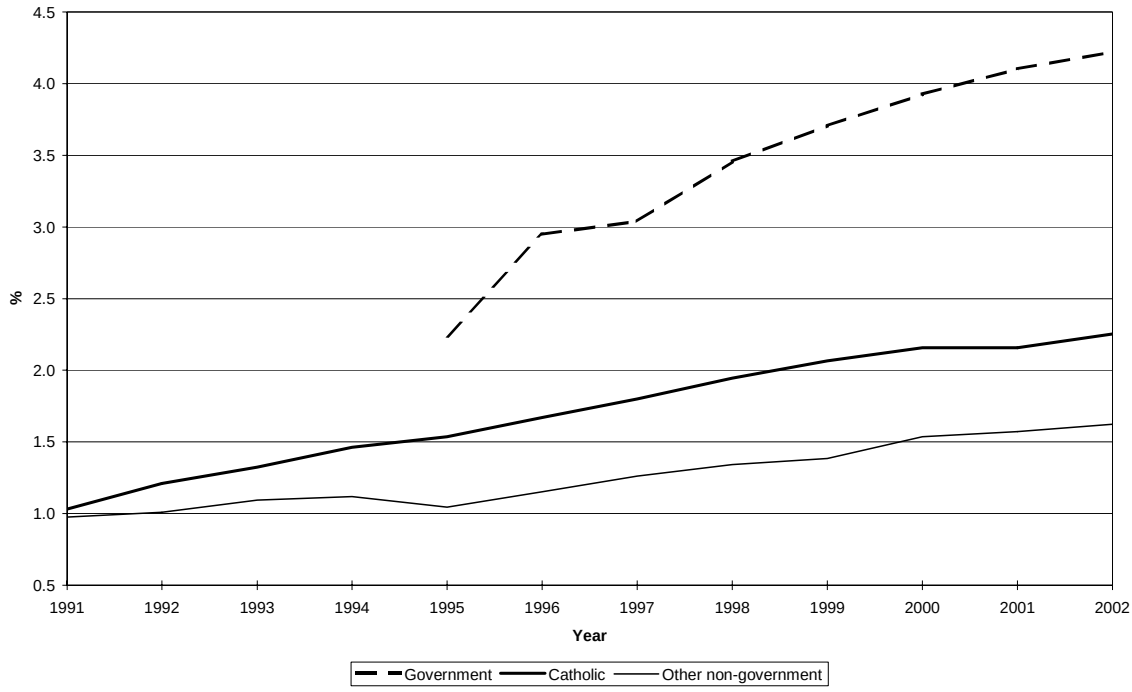
Source: HREOC, sub. 235, appendix H.

Participation in school education

The main source of data on primary and secondary school students with disabilities is the number of students eligible for government funded disability programs. The number of full-time equivalent (FTE) school students identified as having a disability for government program purposes almost doubled between 1995 and 2002—up from 62 802 (2 per cent of FTE students) to 117 808 (3.5 per cent of FTE students) (see appendix B). The reasons for this increase include more frequent and earlier diagnoses, and a wider range of conditions that are recognised as qualifying for disability programs.

The increase in the proportion of FTE students identified as having a disability was evident across government, Catholic and other non-government schools. Although the large majority of students identified as having disabilities attend government schools (figure 5.6). For the period 1991 to 2002, the number of FTE students identified as having a disability increased by 240 per cent in Catholic schools and 250 per cent in other non-government schools, albeit from low bases. Data for the number of students identified as having disabilities in government schools is not available pre-1995. Available data show that the number of students with disabilities attending government schools increased by 88 per cent between 1995 and 2002.

Figure 5.6 **Students with a disability as a proportion of all full-time equivalent students, by school sector, 1991–2002[a]**



a To be an eligible student with disabilities, the student must satisfy (among other things) the criteria for enrolment in special education services or special education programs provided by the government of the State or Territory in which the student resides. Eligibility criteria vary across States and Territories. Data for FTE students with disabilities in government schools before 1995 are not available. Data for FTE students with disabilities in government schools in South Australia in 1995 are not available.

Data source: Productivity Commission estimates based on DEST data (unpublished).

In all three school sectors, virtually all of the increase during 1991–2002 in FTE students identified as having a disability occurred in mainstream rather than special schools (see appendix B). Enrolments in government and non-government special schools remained relatively stable over the same period. This implies that the main cause for the increase in FTE students identified as having a disability was better diagnosis and a broadening of eligibility for disability programs, rather than the integration of students previously enrolled in special schools into mainstream schools. Many State and Territory governments were pursuing policies of integrating or 'mainstreaming' school students with disabilities before the introduction of the DDA.

Only a small proportion of students with disabilities are now enrolled in special schools (16 per cent in 2001-02), almost all in government schools. These students are likely to be those with more severe disabilities or special education requirements.

Participation in tertiary education

Data on the participation of students with disabilities in tertiary education are limited. The number of VET and university students who identified themselves as having a disability increased between 1995 and 2000 (table 5.4). The proportion of university students reporting a disability grew slightly between 1996 and 2000— up from 1.9 per cent to 3 per cent. Although consistent data for VET are not available, the National Centre for Vocational Education Research stated VET enrolments of people with a disability appear to have only kept pace with total enrolments (NCVER 2002a).

Within the VET sector, students who identified themselves as having a disability were more likely than other students to be studying generic or 'multi-field' course modules, and less likely to be studying at higher certificate levels. They were also slightly less likely than other students to complete their course modules successfully (NCVER 2002a).

In universities, students who identified themselves as having a disability were less likely than other students to be studying at postgraduate level (15.7 per cent compared with 20.5 per cent). They also studied a slightly different mix of fields, being more likely than other students to be studying arts, humanities and social sciences, and less likely to be studying business, economics and engineering (see appendix B).

In both VET and university courses, students who identified themselves as having a disability were likely to be older than other students and more likely to be studying part time. In VET courses, they were far less likely than other students to be working while studying (see appendix B).

Table 5.4 **Students enrolled in VET and university courses reporting a disability, 1995–2000[a]**

Year	*VET students with a disability*		*University students with a disability*[b]	
	%	no.	%	no.
1995	na	37 601	na	na
1996	na	47 311	1.9	11 572
1997	na	48 236	2.4	14 903
1998	na	53 870	2.8	17 436
1999	na	63 178	2.9	17 941
2000	na	62 082	3.0	18 775

a High proportions of students do not report their disability status on enrolment. In 2000, 20.3 per cent of VET students did not answer the disability question on their enrolment form. **b** Domestic students not including overseas students. **na** not available.

Sources: NCVER 2002a, p. 3; NCVER 2002b, table 41; DEST 2002a, p. 22.

Education attainment

Education attainment for people with disabilities appeared to improve during the 1990s, but was still lower, on average, than for people without disabilities. The proportion of people with disabilities who had completed a bachelor or postgraduate degree increased, while the proportion whose highest qualification was year 11 or lower decreased (table 5.5).

Table 5.5 **Highest qualification completed, 1993, 1998 and 2001[a, b, c]**

	People with a disability			*People without a disability*		
Highest qualification	*1993*	*1998*	*2001*	*1993*	*1998*	*2001*
	%	%	%	%	%	%
Postgraduate degree	2.0	2.3	3.8	2.7	5.2	7.1
Bachelor degree	3.6	5.6	8.1	8.4	16.7	13.9
Undergraduate, associate or other diploma	3.5	7.1	7.0	5.2	11.7	8.4
Trade or other certificate (level I–IV)	29.4	25.7	26.3	27.4	33.7	25.3
Year 12 or Higher School Certificate	0.7	8.5	8.79	0.6	24.3	12.7
Still at school	0.7	1.6	na	5.1	8.3	na
Year 11 or less/unknown[d]	59.3	49.3	46.1	50.6	32.4	32.7

a Education attainment data do not indicate whether a person had a disability while studying for a qualification. **b** Data are for persons aged 15 years and over who were living in households. Data include people who are still at school or studying at post-school level. Data exclude people who live in cared accommodation, such as supported accommodation, nursing homes and hospitals. **c** Data for 2001 are from a different survey from that of the 1993 and 1998 data. Population sample and education attainment categories may not be exactly comparable. **d** Includes people who did not answer or who answered 'none of the above' or who completed year 11 or less. **na** Not available.

Sources: Productivity Commission estimates based on unpublished data from ABS 1999b, cat. no. 4430.0; Productivity Commission estimates based on unpublished data from the 2001 HILDA survey.

DDA effectiveness in education

Several inquiry participants gave examples of beneficial effects of the DDA and the DDA complaints process on the education participation and attainment for people with disabilities (box 5.5). However, in its review of 10 years of the DDA, HREOC noted that 'what has been achieved through the DDA is probably more sharply disputed regarding education than any other area' (HREOC 2003d, p. 47).

Box 5.5 **Inquiry participants' views on the effectiveness of the Disability Discrimination Act in education**

Many inquiry participants commented on the effectiveness of the DDA in education:

> … schools and other educational settings are safer and there is less likelihood of harassment because of this preparedness to deal with it as it arises. One hopes that harassment is diminishing both as students progress through school and in terms of the overall levels. (Australian Education Union, sub. 39, p. 8)

> Its direct impact can be seen in … ensuring access to private education as a result of the outcomes of complaints. Enrolments in non-government schools has increased dramatically in the past 15 years and this is in part attributable to the requirements of the DDA. … the DDA significantly influenced the … Review of the Western Australian Education Act in 1999 which provided for more choice and inclusive education and resulted in greater integration of students with an intellectual disability; and [the] current Review of Educational Services for Students with a Disability in Western Australia was specifically undertaken to assess the compliance of services and the Western Australian Education Act with the provisions of the DDA. As a result, all students with an intellectual disability who requested fully inclusive education in 2003 were granted it. (Disability Services Commission WA, sub. 44, pp. 3-4)

> A range of factors are likely to account for the growing enrolments of students with disabilities in the independent school sector … While the DDA has undoubtedly played a role, it is not possible to quantify the magnitude of its effect. ... schools have sought to adjust processes and better meet the needs of students with disabilities in line with their obligations under the Act. This learning and adjustment process is continuing. (National Council of Independent Schools Associations, sub. 126, pp. 3, 15)

> … a number of decided cases have established precedents and contributed to policy change … policy and systemic change is occurring [in education]. (Innes 2000a, p. 3)

Despite some progress in this area, many inquiry participants argued that more work is needed to support students with disabilities. They often highlighted access to funding and resources for people with disabilities in education, rather than discrimination *per se*, as the main issue facing people with disabilities in education. Funding for disability services in education is discussed in chapter 14.

Overall, the relatively small number of students in specialist schools has not changed greatly. However, the proportion of students in mainstream schools who are identified as having a disability for funding purposes has increased substantially in government and non-government schools, suggesting improved educational opportunities for many students with disabilities. Data on participation rates in higher education are inconclusive, but the educational attainment by people with disabilities appears to have improved over time. The influence of the DDA on these achievements is unclear. The DDA appears to have influenced State and Territory education policies, and encouraged greater participation of students with disabilities in non-government schools. The DDA also has been effective in resolving individual complaints of discrimination, with some flow-on 'systemic' effects.

DRAFT FINDING 5.2

Identification of students with disabilities and access to disability programs in mainstream schools have grown substantially since the Disability Discrimination Act 1992 *was enacted. Although it is difficult to distinguish the effects of the Act from the effects of government policies of integration in education, the Act appears to have had some effect in improving educational opportunities for school students with disabilities.*

5.4 Eliminating discrimination in access to public premises

There has been some progress in recent years towards a more accessible built environment. Many more new buildings are being built with access features that do not discriminate against people with disabilities, and most public transport providers are making progress in introducing accessible vehicles and practices.

Complaints data

Access to premises has not attracted many DDA complaints. HREOC received 34 complaints about access to public premises (which include public buildings and public transport) in 2001-02 (4 per cent of all DDA complaints in that year). The number of complaints and the share of total complaints varied between 1992-93 and 2001-02, although the data suggest a decline since 1996-97.

Some individual DDA complaints have had systemic effects in this area. As a direct result of complaints under the DDA, State and federal transport departments began developing integrated accessible transport systems. In 1994, transport Ministers established a national taskforce.

Access to premises

There are no national data on the extent to which public premises are accessible, or the significance of that extent for discrimination against people with disabilities. Some inquiry participants claimed that the DDA has had a substantial impact on accessibility, while others argued that while small changes have been made, much more needs to be done (box 5.6).

Box 5.6 **Inquiry participants' views on the effectiveness of the Disability Discrimination Act in access to premises**

Some inquiry participants argued that the DDA had had a substantial impact:

> It is undeniable that the DDA has improved access to public premises. The proposed revision of the [Building Code of Australia] to meet DDA requirements is welcomed, as there are presently many inconsistencies. (Leichhardt Council Disability Access Committee, sub. 75, p. 5)
>
> The effect … can be seen in the significant improvements in access to public premises and facilities with 97 per cent of State Government agencies and local government authorities in Western Australia reporting they have made improvements to the level of access to their premises and facilities … (Disability Services Commission, sub. 44, p. 3)
>
> Access to premises is an example of an area of discrimination where the DDA has been of great value. (Disability Action Inc., sub. 43, p. 2)
>
> … access to premises was one of the major barriers to participation. With the adoption of the DDA and further refinement of Australian Standards codes, the building industry and architects have become much more aware of planning and building to eliminate barriers. The local government sector have been key players in lodging disability action plans and raising awareness of their planning and certification processes. We are spoiled for choice when we go to town today for which toilet to use. That change is tremendous. (Becky Llewellyn, sub. 9, pp. 3–4)

Other inquiry participants argued that much more was needed:

> Whilst the accessibility to public places has improved there still remains some difficulties. The current provision of access to premises is focused on the provision of the minimum standards. In some areas this does not allow for independently functional access for people with disabilities. (Northern Territory Disability Advisory Board, sub. 121, p. 5)
>
> The DDA has improved access to public premises to some extent, but not as much as we would have expected in the 10 years of its life span. (Robin and Sheila King, sub. 56, p. 11)
>
> The DDA has improved access to public premises. … In the last five years much has improved, but only because we use the provisions of the DDA and assert that compliance is required. The Building Code of Australia, and the relevant Australian Standards that it calls up, are insufficient in themselves to provide compliance with the DDA. … The Act has served the community well in drawing attention to the issues, but more needs to be done to ensure compliance. (Independent Living Centre New South Wales, sub. 92, pp. 5-6)

The DDA applies to existing public premises and the design and construction of new public premises. The Building Code of Australia (BCA) also regulates the design and construction of buildings. Although the BCA includes some access requirements, compliance with the BCA does not necessarily mean that a building complies with the DDA. This has created considerable confusion for developers and difficulty for planning authorities. Despite the best of intentions, therefore, new buildings might still be approved that do not fully comply with the DDA.

To address this problem, the DDA was amended in 2000 to allow the formulation of disability standards for access to public premises and work was begun on revising

the BCA to meet the requirements of the DDA. The revised BCA will be adopted as a disability standard on access to public premises, creating consistency between the BCA and the DDA (at least for new buildings and renovations covered by the BCA). State and Territory planning processes will enforce the new standard.

These arrangements mean that the stock of accessible buildings will steadily increase, as new buildings replace old buildings. HREOC stated:

> Improved access provisions which are coordinated between revised building law requirements and a DDA disability standard should result in significant reduction over time in the proportion of Australia's building stock which is inaccessible, as new accessible buildings are constructed and as new work on existing buildings is required more reliably to provide for accessibility. (sub. 143, pp. 70–71)

However, less attention has been paid to the accessibility of existing buildings. The revised BCA will not address existing buildings, some public space around buildings, and some elements of building fit-out. Several inquiry participants commented on the access implications of public services provided from heritage buildings, particularly in regional areas (DDA Inquiry regional forum notes).

DRAFT FINDING 5.3

The Disability Discrimination Act 1992 *appears to have had some impact on making new public buildings more accessible. However, inconsistencies between the Building Code of Australia and the Act limit the effectiveness of the Act. Formally linking the building code to a DDA standard on access to premises will address these inconsistencies.*

The Disability Discrimination Act 1992 *has been less effective in improving the accessibility of existing buildings, and the proposed disability standard will not address this.*

Access to public transport

The introduction of disability standards for public transport in October 2002 greatly increased the influence of the DDA on the accessibility of public transport. The disability standards (and associated guidelines) establish minimum accessibility requirements that providers and operators of public transport conveyances, infrastructure and premises must meet. A timetable for compliance has been agreed, with targets set at 5, 10, 15 and 20 years from the date of commencement.

Negotiation on introducing the standards took many years, during which time some operators made significant improvements in the accessibility of their services, in anticipation of the standards. It is generally accepted that improving accessibility

reduces the level of discrimination. However, this view assumes that people with disabilities wish to take advantage of that access. The degree to which people with disabilities will take up the use of more accessible transport is uncertain. Many people with disabilities state that they can use existing public transport (87 per cent in 1998) but only about half report using it (47 per cent in 1998) (box 5.7).

Box 5.7 **Use of public transport by people with disabilities**

ABS data on the use of public transport by people with disabilities suggest that approximately 1.6 million people with a disability used public transport in 1998 (the latest available statistics), but that almost three million people with disabilities (or 87.3 per cent of all people with disabilities) were capable of using at least some form of public transport.

Over two million people with disabilities (65.6 per cent) were able to use all forms of public transport with no difficulty, and a further 80 500 (2.4 per cent) were able to use some forms of public transport without any difficulty. In total, almost 2.3 million people with disabilities (68 per cent) have no difficulty using public transport. However, almost 12 per cent of people with disabilities (or 396 700) are not able to use any form of public transport, while a further 1 per cent (31 300) do not leave home.

Getting to/onto stops/stations and getting into/out of vehicles/carriages caused most concern for those people with disabilities using public transport, because these activities involve steps. A total of 443 100 people with disabilities (13.1 per cent) reported steps in vehicles/carriages as causing the most difficulty. Getting to/onto stops/stations was the second largest cause for concern, with 297 700 people with disabilities (8.8 per cent) reporting difficulties (see appendix C).

ABS data show an increase in the proportion of people with disabilities using public transport between 1981 and 1998. Over three quarters of people with disabilities (78.4 per cent) did not use public transport in 1981, but this proportion had fallen to 53.3 per cent by 1998. The proportion of people with disabilities who reported difficulties using public transport changed little over the period, down from 33.3 per cent in 1981 to 31.1 per cent in 1998.

Source: ABS 1999b, cat. no. 4430.0.

Inquiry participants' views on the accessibility of public transport varied (box 5.8). Some participants argued that there have been marked improvements in accessibility, largely driven by the DDA. Others acknowledged improvements in accessibility, but argued that they are limited to particular geographic areas. Still other participants argued that there have been few improvements in the accessibility of public transport (see appendix C).

Box 5.8 Inquiry participants' views on the effectiveness of the Disability Discrimination Act in public transport

Some inquiry participants considered that the DDA had improved public transport access:

> The Act has certainly been very useful in achieving systemic change for people with disability in particular areas of everyday living, including public transport (National Ethnic Disability Alliance, trans., p. 1430)
>
> Though improvements in accessibility have been predominantly to access for people with physical disabilities, we have been able to use the DDA to support our advocacy for measures to create an accessible physical environment for blind people including the provision of tactile ground surface indicators, audible announcements on public transport and Braille and tactile signage. (Blind Citizens Australia, sub. 72, p. 22)
>
> Access to public transport in South Australia has improved significantly since 1994 when a complaint was lodged against the State Government on the grounds that it was discriminating against people with disabilities in the provision of transport services. (South Australian Equal Opportunity Commission, sub. 178, p. 6)
>
> … the access on public transport has improved. Maybe that's because of legislation within the State area, as well as the federal, because that has improved dramatically. (Dennis Denning, trans., p. 134)

Other inquiry participants noted only patchy gains or no improvement:

> In NSW, accessibility of public transport has improved on state transit buses and some train stations with newly installed lifts. However, this is not the case with privately owned buses that operate outside the inner metropolitan area of Sydney ... (Independent Living Centre NSW, sub. 92, p. 5)
>
> We believe that access to public transport has only improved in some city areas. The rural areas have not improved whatsoever. The latter might now change with the introduction of the Access to Public Transport DDA Standard. (Robin and Sheila King, sub. 56, p. 10)
>
> Blind people have noticed improvements in some aspects of access to public transport since the enactment of the DDA, and it is readily apparent from our advocacy work in this area that the catalyst for these improvements has been the imperative of the DDA and the need to comply with its requirements. … However, other trends in transport services are making public transport less safe and thus less accessible for blind people. For example, transport operators are reducing staff at railway and bus stations without providing other means to assist blind travellers. (Blind Citizens Australia, sub. 72, p. 22)
>
> The majority of the attention has been on rolling stock and access issues related to boarding the conveyances. … no formal arrangement has been proposed to inform cooperation between the range of players that collectively control and maintain the assets that support transport stock. This includes footpath and road maintenance and improvements along with other pedestrian and traffic facility management. (Marrickville Council, sub. 157, p. 11)
>
> … things have not changed a lot for us in the last 10 years in public transport. (Barb Edis, trans., p. 1838)
>
> In Tasmania, regional and rural areas receive greatly reduced transport services … Accessible transport in many of these areas is non-existent. … The provision of accessible bus services is thought to be decades away due to the ability to claim 'unjustifiable hardship' on the grounds of economic viability. (Advocacy Tasmania, sub. 130, p. 4)

Little national data are available to assess progress in implementing accessible public transport. However, an Accessible Public Transport National Advisory Committee has been established to monitor compliance with the new disability standard. The committee is developing a reporting framework that it hopes to finalise by the end of 2003. In the meantime, HREOC (sub. 143, p. 64) has provided the following summary of improvements in public transport accessibility.

- Almost 25 per cent of publicly operated and 20 per cent of privately operated metropolitan buses are now accessible. The accessibility of non-metropolitan buses is substantially lower but has begun to be implemented with around 6 per cent now accessible.
- Nationally, 7 per cent of metropolitan taxis and 9 per cent of non-metropolitan taxis are accessible.
- Almost 100 per cent of metropolitan rail carriages provide some degree of access even if not in full compliance with the standards. The figure for non-metropolitan rail carriages is lower but still exceeds the first five-year 25 per cent target.
- Rail station access is difficult to quantify but appears to have exceeded 25 per cent for physical access in all jurisdictions either for independent or assisted access.
- Accessible acquisitions commenced later for trams than for other transport modes, but is at 100 per cent in Sydney (which has seven trams) and will soon be 20 per cent in Melbourne.

HREOC (sub. 143, pp. 64–5) also identified the need to improve:

- local and State government coordination to ensure accessible transport services match with accessible local infrastructure (such as bus stops and access paths connecting with rail stations)
- the response times of accessible taxis
- access for passengers using wheelchairs to regional and rural air services.

Additional data for some jurisdictions are presented in appendix C.

DRAFT FINDING 5.4

The Disability Discrimination Act 1992 *appears to have been relatively effective in improving the accessibility of public transport in urban areas. However, it has been less effective in relation to taxis and in regional areas.*

5.5 Eliminating discrimination in the provision of goods and services and other areas

The DDA makes it unlawful to discriminate in the provision of goods, services and facilities, and in providing access to other areas that this report terms 'social participation' (the purchase of land, accommodation, clubs and incorporated associations, superannuation and insurance, and sport). Given the wide coverage of everyday activities, it is difficult to measure the effectiveness of the DDA in eliminating discrimination in all these areas.

The provision of goods, services and facilities accounts for the second highest proportion of DDA complaints after employment (section 5.2). The social participation areas do not usually attract many complaints. In 2001-02, about 1 per cent of DDA complaints related to accommodation, 2 per cent related to superannuation and insurance, and 2 per cent related to clubs and incorporated associations. No complaints were received about the purchase of land or sport.

Effectiveness of the Disability Discrimination Act in selected areas

The DDA has contributed to positive outcomes in the provision of certain goods and services, both for individuals and at a systemic level (box 5.9). There is little evidence of the use of the DDA in most areas of social participation, and it is not possible to assess the effectiveness of the Act in these areas. There appears to have been some use of the DDA in relation to insurance (superannuation and insurance are discussed in chapter 10).

Conclusion

Access to goods and services and social participation includes a broad range of activities. Access for some people with disabilities appears to have improved in some of these areas, often as a direct result of a DDA complaint or inquiry.

Many inquiry participants acknowledged the role of the DDA, with Blind Citizens Australia (sub. 72, p. 23) commenting that the DDA 'has certainly provided a mechanism to get services to change entrenched practices'. The Deafness Forum of Australia (sub. 71, p. 3) acknowledged that 'without the DDA, many deaf and hearing impaired people would be isolated and unable to participate in the society and economy at all'.

Box 5.9 **The Disability Discrimination Act and goods and services**

Banking

Following a HREOC inquiry, the banking industry adopted industry accessibility standards on Internet and phone banking, electronic funds transfer at point of sale (EFTPOS) facilities and automatic teller machines. The Australian Bankers' Association and some banks have also developed (or updated) DDA voluntary action plans (Jolley 2003, p. 50).

Telecommunications

A complaint and HREOC inquiry encouraged mobile phone companies to introduce schemes in April 2001 addressing problems for people using hearing aids (HREOC 2001e).

A DDA complaint (*Scott v Telstra* [1995] H95/34, H95/51) changed company and industry practices, and influenced the definition of a standard telephone service under the *Telecommunications Act 1992*. It has been described by many, including Bourk (2000a) and Jolley (2003), as a watershed for people with disabilities.

HREOC has received requests to investigate other telecommunications services, particularly SMS messaging on mobile phones (HREOC 2002h).

Access to information

A DDA complaint (*Maguire v SOCOG* [1999] H 99/115) had a significant impact on information availability, particularly website accessibility (Blind Citizens Australia, sub. 72, p. 9). However, some inquiry participants argued that the DDA corrective and punishment mechanisms had an effect only 'after the event', and that other influences such as international Internet standards have been more important (Physical Disability Council of NSW, sub. 78, p. 23).

Insurance and superannuation

The insurance and superannuation exemption was a topical issue in this inquiry (see chapter 10). The DDA has played a role in encouraging insurance industry reforms. The threat of a DDA complaint led to progress in developing a memorandum of understanding (MOU) between the Insurance and Financial Services Association (IFSA) and mental health sector stakeholders. The MOU requires IFSA members to revise their underwriting practices and adopt new guidelines for dealing with people with mental health problems (Mental Health Council of Australia, sub. 150, p. 10). It is too early to tell how successful this MOU might be or how it might translate into treatment received by people with other disabilities.

However, some inquiry participants argued that progress was the result of a number of factors, with the DDA being only one. The Mental Health Coalition of South Australia (sub. 171, p. 2) commented, for example, that the greater ability of most people with a disability to participate in community life is due 'in part to funding

increases for services since 1985 as well as regulatory actions like the introduction of the DDA'.

DRAFT FINDING 5.5

The Disability Discrimination Act 1992 *has played a significant role in reducing discrimination in access to some goods and services, including electronic banking and telecommunications.*

5.6 Effectiveness of the Disability Discrimination Act for different groups

The effectiveness of the DDA has varied for different groups of people with disabilities. These groups include people with different types of disability, and people with disabilities and other potential sources of disadvantage.

People with different types of disability

Overall, the DDA has led to better outcomes for people with 'visible' disabilities (such as mobility and sensory impairments) than for people with 'hidden' disabilities (such as mental illness, intellectual disability, acquired brain injury and long term chronic illness such as multiple chemical sensitivity and chronic fatigue syndrome). Outcomes have also been less favourable for people with dual or multiple disabilities (HREOC 2003d; NNDDLS 2001).

Some people with disabilities face particular barriers to using the DDA complaints process, which in turn limits the effectiveness of the DDA for these people (see chapter 11). The Mental Health Council stated:

> The complaints process for reporting occurrences of discrimination is no doubt a stressful process. But particularly for people with a psychiatric disability, the necessary self-disclosure and stigma they may experience during the process may act as a deterrent and the process may indeed be a risk factor in illness relapse. (sub. 150, p. 19)

People with different forms of cognitive disability often rely on carers or advocates to complain on their behalf. People living in institutional accommodation can also find it difficult to make complaints because they are wholly or partly dependent on the person or organisation about whom they would like to complain.

DRAFT FINDING 5.6

The Disability Discrimination Act 1992 *appears to have been more effective for people with mobility and sensory impairments than those with a mental illness,*

intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation.

People with multiple disadvantages

Some people with disabilities have multiple sources of potential disadvantage, which can limit the effectiveness of the DDA in eliminating discrimination.

Indigenous people with disabilities

There is a lack of comprehensive data on Indigenous people with disabilities. The 2001 HILDA survey found that 29.7 per cent of people identifying as Aboriginal or Torres Strait Islander reported having a disability, compared with 23.2 per cent of those who did not identify as being Aboriginal or Torres Strait Islander. This underestimates the true incidence of disability among Indigenous Australians because the survey did not cover people living in remote areas of Australia, and the cultural basis of disability means that Indigenous Australians are likely to identify with disability differently from the way in which non-Indigenous Australians do (box 5.10).

There is strong anecdotal evidence that the DDA has been much less effective in addressing discrimination for Indigenous people with disabilities. The Aboriginal and Torres Strait Islander Commission (ATSIC) argued that Aboriginal and Torres Strait Islander peoples with disabilities, their families and their carers face specific difficulties:

> … difficulties normally experienced by people with disabilities, including disability discrimination, are compounded in the case of Indigenous people with disabilities by various factors. These factors include, in particular:
>
> - a lack of sensitivity and understanding of Indigenous culture by service providers
> - lack of understanding by urban support services and hospital, medical and nursing staff about the facilities and support available in Indigenous communities. For example, service providers may not fully appreciate that equipment such as wheel chairs may suffer increased wear and tear because of the terrain
> - limited influence on decisions affecting them (for example, concerning better access to government services that suit their particular needs)
> - insufficient government action to make Indigenous people with disabilities aware of their entitlements under law
> - the socially disadvantageous position of Indigenous people (in terms of health, education, employment and infrastructure services) which detracts from their awareness of their rights and their capacity to assert them. (sub. 59, pp. 2–3)

Box 5.10 **Centre for Remote Health information on Indigenous disability**

There is a severe lack of comprehensive rigorous comparable data in regard to Indigenous disability.

There are difficulties in establishing the prevalence of 'disability'. Available research tends to be confounded by several factors—the identification of Indigenous peoples, the accuracy of the estimations of the Indigenous population, varying methodologies of different studies and most importantly the differing definitions of disability between Indigenous and non-Indigenous peoples. This is partly because 'disability' is a social construct. Definitions of disability used by Western non-Indigenous health professionals may not be the same definitions as those used by Indigenous people. This may have substantial impact on reporting rates of disability, particularly when the methodology depends on self reporting.

While the exact extent of disability in the Indigenous population is unclear, there are indications that it may be substantially more than the non-Indigenous population. In general terms, the extremely poor health status and large burden of ill health, as measured by mortality, hospital separations, injury rates, and prevalence of medical illnesses, of Indigenous peoples is likely to give rise to an increased incidence of disability. Given that many diseases affect Indigenous people at an earlier age than non-Indigenous people, it is likely that disability will also affect Indigenous people at an earlier age than the non-Indigenous population.

One of the most thorough studies estimating the numbers of Indigenous people with a disability was undertaken by Thomson and Snow in 1994 in the Taree area of NSW. This study found that in the sample of the 907 Aboriginal usual residents of Taree, 25.0 per cent were identified as having one or more disabilities, 13.7 per cent as being handicapped by their disability and 5.1 per cent as being severely handicapped.

When adjusted for age, the Taree study found that Aboriginal males were 2.5 times more likely to have a disability than were all Australian males, 1.7 times more likely to be handicapped and 2.4 times more likely to have a severe handicap. Similar differences were noted between Aboriginal females and all Australian females**.**

Source: Centre for Remote Health 2001.

In addition, ATSIC noted that complaint procedures do not reflect the needs of Indigenous people with disabilities, and that insufficient government action and social disadvantage combined to reduce Indigenous people's awareness of their rights (sub. 59, pp. 2–3, 5).

Many Indigenous people with disabilities also have other potential sources of disadvantage, including multiple disabilities and remoteness. The Physical Disability Council of the Northern Territory stated:

> Many Indigenous persons have high levels of multiple disabilities and their rights can be easily infringed upon, due to the disempowerment of a most marginalised group of

> people. The remoteness and tyranny of distance can lend itself to discrimination occurring and not being acted upon to reverse the situation. (sub. 125, p. 1)

The Productivity Commission visited Indigenous people and disability service providers in Alice Springs in July 2003. These discussions highlighted a number of barriers that limit the effectiveness of the DDA for Indigenous people in that area, but also at least one example of the use of the DDA to address discrimination (box 5.11).

The Productivity Commission considers that Indigenous Australian with disabilities can face multiple disadvantages. However, a number of these disadvantages relate to factors other than disability, such as race discrimination, language barriers, socioeconomic background and remoteness. The DDA can be of only limited effectiveness in addressing these other sources of disadvantage. Nevertheless, DDA-specific issues should be addressed. More comprehensive data on the experiences of Indigenous Australians with disabilities is needed to allow the development of better policy. Some of this work is underway, with the Council of Australian Government (COAG) Steering Committee for the *Report on Government Services* developing a report on Indigenous disadvantage.

In 2002, a working party made up of representatives chosen by ATSIC, the National Disability Advisory Council (NDAC) and National Caucus of Disability Consumer Organisations recommended the establishment of a National Indigenous Disability Network. The Government is currently considering a consultant's report into the establishment of such a network.

The Productivity Commission considers that a National Indigenous Disability Network could perform a valuable role in ensuring disability policy recognises appropriate cultural sensitivities. There appears to be a role for HREOC in liaising with the National Indigenous Disability Network to improve awareness of the DDA among Indigenous disability groups and individuals, and to improve HREOC understanding of Indigenous disability issues. However, as discussed in chapter 9, the Productivity Commission does not think it is appropriate to amend the DDA to specifically refer to Indigenous disability issues.

Box 5.11 **Inquiry participants' views in Alice Spring visits**

ATSIC Commissioner Alison Anderson stated:

> A rate of deafness of 4 per cent is considered a crisis in the rest of Australia. Yet 70 per cent of children in some remote communities are hearing impaired. Vision impairment problems are severe, too, due to glaucoma.
>
> There is a culture of non-complaint amongst Aborigines, including in regard to racial discrimination. This is partly because of lack of awareness of rights, partly because of historical reasons. Also, they can be victimised if they complain, by the only service provider in town.
>
> The HREOC complaints process is too long and not culturally adapted. People will just walk away.

The Alice Springs Disability Services Centre stated:

> It appears that disability is not a primary issue when primary health care is still lacking and high on the list of priority.
>
> While individuals would like to remain in their communities, they usually have to go to Alice Springs for health care and services. This can lead to big social issues and cultural dislocation.
>
> Many Indigenous people with disabilities are not job ready and the labour market is limited.
>
> There are two Indigenous schools in Alice Springs; one is a primary school (Yiprinya) and the other one, Yirara, is the Indigenous high school. There are, and have been, students with disabilities at these schools. Originally, no extra support was provided to these students without a fuss being made. Support was eventually provided under threat of the Disability Discrimination Act, which has proven a powerful ally in addressing such matters.
>
> Indigenous organisations require more education about the DDA as there is a lack of knowledge and understanding of the Act.

Source: Alice Springs visit notes.

People with disabilities who are from non-English speaking backgrounds

The 2001 HILDA survey indicated that 17 per cent of people with disabilities came from non-English speaking backgrounds.[4] This was the same proportion as for people without a disability (HILDA unpublished).

The National Ethnic Disability Alliance (NEDA) stated that people with disabilities who are from non-English speaking backgrounds (NESB) face many barriers including:

- lack of accessible information and knowledge about rights, essential services and supports

[4] The National Ethnic Disability Alliance (NEDA) stated that 25 per cent of people with disabilities come from a non-English speaking background (sub. 114, p. 4).

- lack of culturally appropriate services and supports
- myths, misconceptions and negative stereotypes about disability and ethnicity in both the NESB and Anglo-Australian communities
- prejudice against people with disability from both NESB and Anglo-Australian communities
- government's emphasis on 'mainstreaming' without acknowledgment of the inequities that exist in relation to ethnicity
- NESB people often do not understand concepts used to describe their situation
- ethnic communities often do not have the capacity to advocate for their needs. (sub. 114, p. 7)

NEDA argued that people from non-English speaking backgrounds are reluctant to use the DDA due to:

- the complexity of the process involved—high degree of English literacy and comprehension of the Australian legal and service system is required
- fear of reprisal—a very real fear for those who originally come from countries under harsh dictatorships
- cultural perspectives of making complaints
- the associated costs—by and large, people from a NESB with disability are poorer than their Anglo-Australian counterparts
- the adversarial nature of making complaints
- the burden of proof that rests on the complainant
- not all people have to or are offered the services of an advocate to support them through the process. (sub. 114, pp. 7–8)

NEDA suggested increasing HREOC's resources so it could 'provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against' (sub. 114, pp. 5–6).

As for Indigenous people with disabilities, the Productivity Commission considers that the DDA can be less effective for people from non-English speaking backgrounds. This lower effectiveness partly relates to barriers to using the complaints process. The Productivity Commission has made recommendations to improve the complaints process, which should reduce some of these barriers (see chapter 11), and has requested further comment on perceived gaps in information about the DDA (regarding both content and presentation) (see chapter 7).

People with disabilities who are from rural and remote regions

The 2001 HILDA survey found that 59 per cent of people with disabilities were living in major cities, 29 per cent in 'inner regional areas' and 11 per cent were in 'outer regional areas (defined in terms of road distance from the nearest urban centre). Only 1 per cent were living in remote areas. These proportions were not very different from those for people without disabilities.

The DDA can be less effective for people with disabilities living in rural and remote regions. The Productivity Commission attended a number of regional forums in northern Victoria, at which several participants commented on difficulties faced by people with disabilities in regional areas (box 5.12).

People with disabilities living in regional areas face particular disadvantages. Some of these disadvantages, such as limited choice, are more closely related to remoteness and small populations than to shortcomings in the DDA. Other disadvantages are more closely related to the effectiveness of the DDA, such as the lack of awareness and barriers to using the complaints process (see chapter 11).

The effectiveness of the DDA in regional areas can also be limited by the increased likelihood that the defence of 'unjustifiable hardship' will apply. As noted by participants in the regional forums, many services in the regions are provided by small businesses or local councils that do not have significant resources. In addition, many services are provided in historic premises which can be expensive to modify or which have heritage considerations.

DRAFT FINDING 5.7

People with disabilities from Indigenous or non-English speaking backgrounds, and those living in regional areas face multiple potential sources of disadvantage. However, reasons for this often relate to factors other than disability discrimination, such as race discrimination, language barriers, socioeconomic background and remoteness.

Box 5.12 **Inquiry participants' views in Victorian regional forums**

Comments on awareness included:

> There are fewer people with each type of disability than in the city, so people with a disability are even more of an invisible minority than in city areas. (Upper Hume)
>
> People do not have much knowledge of anti-discrimination law. … There is no general community awareness of the DDA, so how can they be expected to comply? (Central Hume)

Comments on belonging to a small regional community included:

> Belonging to a small community can have benefits if people understand your needs. But it can have disadvantages if you become identified as a troublemaker. (Central Hume)
>
> Many services are located in historic buildings with access issues. (Central Hume)
>
> Even local offices that people with disabilities need to visit regularly, such as Centrelink and FaCS, are not accessible. (Upper Hume)
>
> Students with disabilities and their families often have to move to larger towns to get access to suitable services. This is not a discrimination issue as such, but a problem of access to specialist services in small population centres. (Upper Hume)
>
> There are limited accommodation options for people with disabilities … Public housing is not always suitable ... The private rental market is tight, so people who might require the landlord to spend money on adjustments are not considered. (Upper Hume)

Comments on making complaints included:

> People are not inclined to make complaints about discrimination because of the fear of being ostracised or victimised. This is particularly important in a small community. … It seems contradictory to the general objective of getting along with others. People want to fit in, not to make waves and draw attention to themselves. (Central Hume)
>
> The DDA is seen as too difficult, and HREOC as too distant, to respond effectively to complaints. (Upper Hume)

Comments on progress over the past 10 years included:

> Generally there has been some progress over the last 10 years or so in reducing discrimination but there is a long way to go. Improvements have been more in the physical disabilities area than in the less obvious non-physical areas such as intellectual disability, mental health, chemical sensitivities etc. (Central Hume)
>
> The DDA brought so much hope when it was established in 1992, but it has been very disappointing. There has been no practical change in regional areas. (Upper Hume)
>
> With regard to physical access to public buildings such as shops and offices, threatening to make a formal complaint under the DDA has brought results in several cases. (Upper Hume)

Source: DDA Inquiry regional forum notes.

5.7 Summary and conclusions

There is no direct measure of the level of discrimination. The Productivity Commission has drawn together a number of indirect measures with evidence from inquiry participants to give a general picture of disability discrimination and the

effectiveness of the DDA in eliminating discrimination. Although these measures amount to a somewhat mixed report card, the DDA appears to have had some influence on reducing discrimination. It is reasonable to presume that discrimination on the ground of disability, in the absence of the DDA, would be worse than it is now. However, there is still some way to go.

Ten years is not a long time in which to achieve the types of fundamental change intended to be achieved by the DDA. Pervasive 'network effects' mean that many of the benefits of the DDA will be fully realised only as more of the system becomes accessible. Removing discrimination in employment, for example, might be ineffective if discrimination in education limits the opportunities for people to obtain labour force skills. Similarly, the benefits of accessible public transport will increase as more destinations become accessible.

DRAFT FINDING 5.8

Given its relatively short period of operation, the Disability Discrimination Act 1992 *appears to have been reasonably effective in reducing overall levels of discrimination. However, there is still some way to go to achieve its object of eliminating discrimination.*

6 Equality before the law

The second object of the *Disability Discrimination Act 1992* (DDA) is to ensure equality before the law for people with disabilities. This chapter examines the concept of equality before the law, its treatment under the DDA, and the effectiveness of the DDA in four areas in which inquiry participants raised particular issues:

- protecting the freedom and privacy of people with disabilities living in institutional accommodation
- ensuring appropriate safeguards for decision making by (and for) people with cognitive disabilities
- removing barriers to fair and equal treatment in the justice system and in civic participation for people with disabilities
- challenging laws that deliberately or inadvertently discriminate against people with disabilities.

Many of these areas fall primarily within the Constitutional responsibility of the States. This has significant implications for the effectiveness of the DDA and options for disability policy.

6.1 The Disability Discrimination Act and equality before the law

The DDA contains few, if any, substantive provisions that relate directly to the object of equality before the law. As the Human Rights and Equal Opportunity Commission (HREOC) stated '… the reach of the substantive provisions of the DDA is limited compared to this object' (sub. 143, p. 39).

Early drafts of the Disability Discrimination Bill contained specific provisions on equality before the law, but these were dropped before the Bill was presented to Parliament (section 6.5).

This section examines the following aspects of the DDA that have relevance to equality before the law:

- the 'equality before the law' object

- relevant HREOC functions.

Later sections cover other aspects of the DDA.

The object

The second object of the DDA is:

> … 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 … (s.3(b))

There has been little elaboration of this object. The explanatory memorandum to the DDA states in regard to all the objects of the DDA:

> [The objects clause] … is also designed to ensure that people with disabilities have, as far as possible, the same rights as other citizens. (Explanatory memorandum, p. 7)

Inquiry participants did not raise many concerns about this object, although some participants criticised the inclusion of qualifiers in objects 3(a) and (b). The Darwin Community Legal Service argued:

> 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 ... (sub. 110, p. 3)

However, other participants recognised limits on achieving the DDA's objectives. The ACT Discrimination Commissioner stated:

> … the Act is aspirational in its objectives and, even within its own provisions, recognises that there will be limits on meeting those objectives. (sub. 151, p. 6)

Equality before the law is a fundamental human right. Australia is a signatory to the UN International Covenant on Civil and Political Rights, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. (article 26).

However, specific practical limits need to be taken into account in pursuing equality before the law for people with disabilities.

- Some people with disabilities are unable to make reasonable decisions about their personal circumstances or their financial and legal affairs (section 6.3).
- The DDA includes exemptions where the rights of people with disabilities are constrained, such as public health measures relating to infectious diseases, *Migration Act 1958* decisions, and combat and peacekeeping services (see chapter 10).

The UN Declaration on the Rights of Mentally Retarded Persons and the UN Declaration on Rights of Disabled Persons recognise situations in which some people with disabilities are unable to exercise their rights in a meaningful way, or in which it is necessary to restrict or deny some rights.

Functions of the Human Rights and Equal Opportunity Commission

Section 67 of the DDA confers functions on HREOC that contribute to achieving equality before the law. First, HREOC can report to the Minister on actions that the Australian Government should take on matters relating to discrimination on the grounds of disability (s.67(1)(j)). HREOC does not appear to have used this function to date.

Second, HREOC is empowered to examine Commonwealth enactments (and, when requested by the Minister, proposed enactments) to determine whether they are inconsistent with the objects of the DDA, and to report to the Minister (s.67(1)(i)). HREOC has exercised this function on occasion. In 1996-97, HREOC commented on Regulations restricting Medicare benefits for psychiatric services (box 6.1).

Box 6.1 **HREOC investigation of changes to Medicare benefits for psychiatric services**

Regulations introduced in 1996 meant the Medicare rebate for psychiatric consultations was halved after a patient's 50th visit in any one year. The Regulations were intended to address overservicing, but there were concerns about their effect on people with high support needs. HREOC investigated whether the Regulations were inconsistent with or contrary to the objects of the DDA.

HREOC considered the original restrictions on Medicare benefits for certain psychiatric services, had a discriminatory impact on people with a psychiatric disability. However, the Regulations had been modified following further consultations, and HREOC concluded that they were no longer inconsistent with the objects of the DDA. The restrictions that remained were comparable to those that applied to Medicare benefits for other areas of medical treatment, rather than singling out psychiatric treatment and psychiatric patients. HREOC's involvement appears to have assisted in achieving these improvements.

Source: HREOC 2003d, p. 26.

However, HREOC noted that 'use of this function to date has been limited':

> … principally because issues of discrimination identified to HREOC as priorities for action whether through complaints or through other means have generally concerned discrimination in practice rather than discrimination embedded in laws. There is some

> scope however for HREOC to give increased attention to this function as and if it is identified as a priority including through this inquiry. (sub. 143, pp. 35–6)

Several inquiry participants raised concerns about laws with potentially discriminatory effects (although many of these were State rather than Commonwealth laws) (section 6.5). The Commission considers that this function could play an important role in bringing any concerns about Commonwealth laws to the attention of the Attorney General.

Third, where thought to be appropriate and with the leave of the court, HREOC can intervene in court proceedings that involve issues of discrimination on the ground of disability (s.67(1)(l). HREOC stated that it has had little opportunity to use this power:

> So far, opportunities to appear as *amicus* or intervene in court proceedings under the DDA have been limited. In several cases where the Commissioner had indicated an interest in joining the proceedings the matter has settled before going to hearing.
>
> The Commissioner is interested in working more closely with disability community organisations in exercising this function, and during 2003 will be seeking suggestions for criteria and priorities to be applied in deciding in which cases to become involved. (HREOC 2003d, p. 15)

The Australian Human Rights Commission Legislation Bill 2003 (currently before Parliament) amends this function to require the renamed Human Rights Commission to obtain the leave of the Minister to intervene in court proceedings under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) (or, if the president of the new commission is a Federal Court judge, to notify the Attorney General). The Bill lists broad criteria for the Attorney General to consider in making this decision. It relates to actions under the HREOC Act; it does not affect HREOC's ability to intervene in proceedings arising under the DDA without approval from the Attorney General.

In the explanatory memorandum for the Bill, the Government argued:

> Requiring the new Commission to seek the Attorney General's approval for such an intervention before the new Commission exercises its function to seek leave to intervene will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account. (Explanatory Memorandum, p. 9)

A number of inquiry participants expressed concern that this proposal would undermine the new Human Rights Commission's independence (particularly in situations where the Australian Government is a party to the matter). The Australian Human Rights Commission Legislation Bill 2003 is outside the terms of reference for this inquiry (see chapter 1). However, the Productivity Commission notes the

concerns of inquiry participants and observes that independence is an important characteristic of organisations such as HREOC.

In a related issue, the Anti-Discrimination Board of New South Wales (sub. 101) and the New South Wales Office of Employment and Diversity (sub. 172) suggested expanding HREOC's intervention powers to cover proceedings involving industrial relations issues, based on the New South Wales model.

Under the HREOC Act, complaints about discriminatory acts done under an Award can be made to HREOC. If the president of HREOC considers that a discriminatory act has occurred, then the complaint must be referred to the Australian Industrial Relations Commission (s.46PW). That Commission is required to take account of the DDA (along with the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*) in performing its functions (*Workplace Relations Act 1996*, s.93).

The Productivity Commission considers that these arrangements appear to provide adequate protection in industrial relations matters for people with disabilities. The need for specific provisions dealing with equality before the law is discussed in section 6.6.

DRAFT FINDING 6.1

Current arrangements in the Human Rights and Equal Opportunity Act 1986 *(s.46) dealing with discriminatory acts under Awards are appropriate.*

6.2 Institutional accommodation

Under the Commonwealth State Disability Agreement (CSDA), accommodation services for people with disabilities are the responsibility of the States and Territories (see chapter 14). Historically, many people with disabilities, particularly people with intellectual disabilities and some forms of mental illness, were institutionalised. Since the 1970s, emphasis has been on integrating people with disabilities into the community—an approach commonly called de-institutionalisation. This section examines issues raised by inquiry participants relating to those people with disabilities who remain in institutions, the effects of de-institutionalisation, and the potential role for a disability standard for accommodation.

People with disabilities in institutions

According to the ABS Survey of Disability, Ageing and Carers, 184 000 people with disabilities lived in 'cared accommodation' in 1998 (ABS 1999b, p. 21).[1]

People with disabilities living in institutional accommodation can face constraints on their choice, liberty and privacy, and are vulnerable to abuse or neglect (Stephanie Mortimer, sub. 13). The Public Advocate in Victoria stated:

> Many people with disabilities live in accommodation specifically provided for them by government or community-based agencies. Any disability specific support services are sometimes also often provided by the same agencies. This means that these people with disabilities are wholly reliant on the service provider to provide for them and lack real choices about how, when or even if such services are provided. In such situations many are vulnerable to being exploited, abused or neglected. (sub. 91, p. 3)

HREOC (sub. 143, p. 37) stated that 'the DDA has had limited impact to date on issues in institutional living' for several reasons. First, people living in institutions or their advocates are often reluctant to make complaints because they are concerned about the consequences. The effectiveness of the DDA complaints process is discussed in chapter 11. The effectiveness of the DDA in eliminating discrimination for different groups of people with disabilities, including people in institutions, is discussed in chapter 5.

Second, disability advocates can use more effective mechanisms than the DDA to deal with standards for disability services. Alternative mechanisms include internal complaints mechanisms for disability services (see chapter 14) and State and Territory bodies such as ombudsmen and public advocates (section 6.3). Serious allegations of abuse are more appropriately made to the police.

HREOC recognised limits to using the DDA to challenge abuse and lack of options in institutional accommodation:

> The Commission conducted substantial background research in this area in 1997. This work did not identify any options under the DDA likely to be more effective than the continued pursuit of available mechanisms under other laws. (HREOC 2003d, p. 29)

People with disabilities living in institutional settings appear to face particular barriers to achieving equality before the law. However, as discussed in chapter 14, there is limited scope to using the DDA to challenge government decisions about access to disability services or the quality of those services. Alternative complaint mechanisms are often more appropriate.

[1] 'Cared accommodation' includes hospitals, homes for the aged (such as nursing homes and aged care hostels), cared components of retirement villages, and other 'homes' such as children's homes (ABS 1999a, p. 65).

DRAFT FINDING 6.2

People with disabilities living in institutional settings face particular barriers to achieving equality before the law. However, there is limited scope to apply the Disability Discrimination Act 1992 *in this area.*

De-institutionalisation

Largely in response to the types of issues raised above, there has been a strong emphasis on the de-institutionalisation of people with disabilities, both internationally and across all States and Territories in Australia. The Equal Opportunity Commission Victoria stated:

> De-institutionalisation policies, which began in the early 1970s, coincided with and reflected a growing focus on individual human rights and dignity. The effects of these policies, which aim to enable people with disabilities to participate fully within the community, have become apparent in the last ten years. (sub. 129, p. 9)

The Australian Housing and Urban Research Institute (AHURI) noted 'a strategic emphasis on de-institutionalisation and the restructuring of housing assistance' over the past 15 years (AHURI 2001a). In particular, it noted the introduction of the CSDA, which set out the rights of people with disabilites to live within the community rather than in segregated settings:

> Accommodation support should not lock programs into one or two models. It should not be confined to group homes. It should be as flexible as the wide range of living options in the community generally and the ways that could be used to support individuals in those living options, for example, share houses or flats, co-tenancy or live-in arrangements or married living arrangements, or drop-in support models (Department of Community Services 1987, p. 1, in Hardwick et al, 1987, p. 32).

The process of de-institutionalisation has raised several issues. Some inquiry participants argued that policies of closing institutions for people with disabilities are discriminatory because they deny choice to residents and families (Community and Institutional Parents' Action on Intellectual Disability, sub. 21; Kincumber Lodge Resident Advocacy Group, sub. 22; Robert Atkins, sub. 26). Other participants argued that the closure of institutions led to less accommodation for people with disabilities and placed additional burdens on families (Brian O'Hart, sub. 85).

Several inquiry participants argued that many people with disabilities in de-institutionalised accommodation lacked tenancy rights (Tony and Heather Tregale, sub. 30; Office of the Public Advocate in Victoria, sub. 91). This can arise for several reasons.

First, many people with disabilities live in itinerant accommodation such as boarding houses and caravan parks, where there is very little tenancy law. They are regarded as licensees, rather than tenants, and have limited security of tenure. However, this is not a disability-specific issue. All residents share this problem.

Many people with disabilities in supported accommodation outside institutions are not covered by residential tenancy laws. The Victorian *Residential Tenancies Act 1997*, for example, excludes 'health or residential services'. In 2001, an independent working group in Victoria recommended extending tenancy rights. However, a 2003 Victorian Government review of disability legislation identified tensions in implementing these recommendations, including the need to balance tenancy rights with the need to provide support, concerns about the safety of other residents and staff, and concerns about the ability of some tenants to make informed decisions. The review committee is reconsidering these issues.

Perhaps most significantly, many participants argued that de-institutionalisation has not been adequately supported by access to disability services. Chenoweth (2000) summarised many of these concerns, arguing that access to services and supports is essential for the wellbeing of those who have been moved into the community, and that the failure to provide sufficient resources could place people with disabilities in a more invidious position than they had in their previous institutional lives. Inquiry participants' comments show little progress in this area since the 1993 Burdekin Report into de-institutionalisation of mental health care. That report found that savings from de-institutionalisation had not been directed into community-based care and that such services were seriously underfunded (Burdekin 1993).

As with institutional accommodation, HREOC noted that the scope of the DDA is limited in this area:

> Individuals (people with disabilities or parents) or organisations who consider that government policies regarding disability accommodation involve a discriminatory lack of choice are free to lodge complaints under the DDA. … However, … in either case there would be a number of legal issues to address, including those of identifying appropriate comparators and assessing the applicability of the special measures defence for measures reasonably intended to address special needs. (sub. 219, p. 42)

The Productivity Commission considers that de-institutionalisation can further the rights of people with disabilities but needs to be supported by access to quality disability services. However, there are limitations to the use of the DDA to challenge government decisions about the provision of accommodation and access to disability services (see chapter 14).

The process of de-institutionalisation needs to be supported by access to quality disability services. However, there are limitations to the use of the Disability Discrimination Act 1992 *to challenge government decisions about provision of services.*

An accommodation disability standard

The DDA provides for the development of a disability standard for accommodation. However, there has been little progress on the development of an accommodation standard. Although a number of disability peak bodies lobbied the DDA Standards Project in 2000 to begin work on an accommodation standard, the Attorney-General's working group argued that priority should be given to work on other standards (see chapter 12).

The scope of an accommodation disability standard is not clear. It could be argued that such a standard should be limited to addressing discrimination in access to rental accommodation. On the other hand, it could also be argued that access to rental accommodation is adequately addressed by the DDA provisions on access to premises, and goods, services and facilities, and that the standard should instead address the *quality* of accommodation services specifically provided to people with disabilities, including those living in institutions.

The quality of institutional accommodation for people with disabilities falls under the CSDA. Access to services covered by the CSDA, and its anticipated replacement, the Commonwealth, State and Territory Disability Agreement (CSTDA) are discussed in chapter 14. However, many people with disabilities live in forms of accommodation, such as boarding houses and private rental accommodation, that do not come under the CSDA. A disability standard for accommodation could provide greater clarity about the rights of people with disabilities in these forms of accommodation. However, several issues would have to be addressed before such a standard were adopted.

People with disabilities are not the only residents in these forms of accommodation. If regulation is required, it might be more appropriate for it to cover all residents. Otherwise, minimum standards for people with disabilities that do not apply to other residents might discourage landlords from renting to people with disabilities. However, broader application would be beyond the scope of a disability standard.

Tenancy rights are the responsibility of State and Territory governments. An accommodation standard would thus have implications for existing State and Territory arrangements. Victoria, South Australia and Queensland already have boarding house regulation. New South Wales has both licensed and unlicensed boarding houses, and has commissioned a review into the regulation of boarding houses licensed to provide accommodation for people with disabilities (The Allen Consulting Group 2003b, p. 1). However, a national disability standard might provide uniformity in this area.

Many of these forms of accommodation provide low cost housing. Although minimum standards might be desirable, their effect on affordability would need to be considered. There is already concern about the scarcity of low cost accommodation, for which suggested reasons are 'gentrification' (particularly in inner city areas), a decline in profitability and an increasingly complex client group (Department of the Premier and Cabinet South Australia 2002).

REQUEST FOR INFORMATION

The Productivity Commission seeks further comment on the desirability of developing an accommodation disability standard, and the forms of accommodation such a standard should cover (for example, private rental accommodation, supported accommodation and/or institutional accommodation).

6.3 Decision making by and for people with cognitive disabilities

Some people have a 'cognitive disability', which results in the person being unable to make reasonable decisions about their person or circumstances, or their financial and legal affairs. Included in this group are people with some forms of intellectual disability, acquired brain injury and acute mental illness. Given a risk that other people might make decisions that are not in the best interest of a person with a cognitive disability, complex legal rules have been developed to govern decision making by (and for) people with cognitive disabilities.

The States and Territories have primary responsibility for safeguarding the rights of people with cognitive disabilities. Each State and Territory has institutional and procedural arrangements in place to cover:

- the rights of involuntary patients (including financial rights, privacy of correspondence, and restraint and seclusion practices)
- the admission, review of detention, and appeals against detention of involuntary patients

- consent for certain treatments
- the appointment of guardians and the provision of advocacy services
- financial administration.

The role of the Office of the Public Advocate in Victoria in protecting the rights of people with cognitive disabilities is summarised in box 6.2. All jurisdictions have similar arrangements.

Box 6.2 **The Office of the Public Advocate in Victoria**

The Office of the Public Advocate is an independent statutory office, answerable to the Victorian Parliament. It represents the interests of Victorian people with disabilities. Its aim is to promote the rights and dignity of people with disabilities, and to strengthen their position in society. It can investigate and speak out about situations in which people are exploited, neglected or abused.

It works with the Guardianship List of the Victorian Civil and Administrative Tribunal, to ensure the rights and opportunities of people with disability are protected. Its services include:

- **advice**—information and assistance about the rights and services relevant to people with disability, including complaints about services; care and treatment; information about guardianship, refusal of medical treatment, powers of attorney and treatment for patients who cannot consent
- **advocacy**—individual advocacy for people with disabilities; strategic advocacy to address systemic issues arising from individual advocacy work
- **guardians**—guardianship for people with disability when orders are made by the Victorian Civil and Administrative Tribunal.

The Guardianship List of the Victorian Civil and Administrative Tribunal protects persons aged 18 years or over who are unable, as result of a disability, to make reasonable decisions about their person or circumstances, or their financial and legal affairs.

Sources: Office of the Public Advocate 2001; VCAT 2003.

Despite these protections, a Victorian Auditor General's report on services for people with an intellectual disability noted that legislation for disability in Victoria has limitations in protecting and safeguarding the rights of people with a disability who cannot make informed decisions or provide legally effective consent (DHSV 2003, p. 55). The Victorian Government has commenced a review of disability legislation (the *Intellectually Disabled Persons' Services Act 1986* and the *Disability Services Act 1991)*. The discussion paper for this review raised several issues associated with decision making and consent for people with cognitive

disabilities, in the context of developing a future legislative framework for disability (DHSV 2003).

In all jurisdictions, many controversial issues remain, whereby legislative rules must balance competing claims about the best interests of a person with a disability. Several inquiry participants raised examples of conflict between legal requirements and the desires of family or carers (the Gippsland Carers Association, sub. 203; E Hutson, sub. 193; Cyril Dennison, sub. 107; Stephanie Mortimer, sub. 13).

HREOC considered that State rules governing decision making by people with cognitive disabilities are not subject to the DDA:

> Rules in other laws (including mental health and guardianship laws) governing decision making by or on behalf of people with impairments to decision making capacity are not addressed by the DDA. (sub. 143, p. 36)

However, HREOC clarified that the presumption that certain people are not competent to make decisions for themselves can be unlawful under the DDA:

> Constraints on ability to make decisions in other contexts for example if it is simply assumed that a person with an intellectual disability lacks the capacity to enter into a transaction such as renting a flat or hiring a video—are capable of challenge through the DDA, although only a small number of complaints has been made in this area to date. (sub. 143, p. 36)

HREOC has researched the area of decision making by and for people with cognitive disabilities, but stated that it has been constrained by a lack of resources (HREOC 2003d). One area in which HREOC and others have undertaken significant work is the sterilisation of girls and young women with intellectual disability (box 6.3).

The Productivity Commission considers that there are practical limitations to achieving equality before the law for people with cognitive disabilities. Often, such people are not in a position to complain about discriminatory treatment, although family, carers and advocacy organisations could complain as associates or representatives of the person with a disability (see chapter 11).

Box 6.3 **Work on the sterilisation of girls and young women with intellectual disability**

Since before the passage of the DDA, HREOC has had a strong interest in the issue of people with disabilities being unnecessarily or unlawfully subjected to sterilising surgery. It has sought to promote appropriate safeguards and the provision of alternatives to families.

Following the publication of a commissioned report, *Sterilisation of Girls and Young Women in Australia* in 1997, HREOC held meetings with the Department of Health and Family Services and the Attorney-General's Department to discuss strategies to address the problem of unlawful sterilisations. In 1998, HREOC negotiated changes to the Medicare Benefits Schedule. These included a note attached to the fee schedule for relevant procedures reminding practitioners that it is unlawful to sterilise a person under 18 years unless the procedure is a byproduct of surgery appropriately carried out to treat malfunction or disease, and without authorisation of the Family Court of Australia (or, in some States, an authorised tribunal or board),

A follow up report was released in 2001, and the advocacy organisation Women with Disabilities Australia issued its own report in 2002. There are ongoing discussions with the Attorney-General's Department on education strategies and legal reform.

Source: HREOC 2003d, p. 29.

There is no evidence that existing State and Territory arrangements for safeguarding the rights of people with cognitive disabilities are inappropriate, although there appears to be some room for improvement. However, there is a role for HREOC in researching issues of national importance and providing opportunities for the States and Territories to compare approaches and learn from each other.

DRAFT FINDING 6.4

There are practical limitations to achieving equality before the law for people with cognitive disabilities. Existing State and Territory arrangements safeguarding the rights of people with cognitive disabilities appear to be working appropriately, but Human Rights and Equal Opportunity Commission research in this area can provide a useful national focus and assist regulatory benchmarking by the States and Territories.

6.4 Justice and civic participation

Equality before the law for people with disabilities extends to the right to fair and equal treatment in the justice system, and the right to participate in civic activities such as voting and jury duty.

Physical access

People with disabilities often face physical barriers to the justice system and civic participation, such as inaccessible premises and lack of information in accessible formats. The DDA provisions that cover access to premises, and goods services and facilities include access to courts and polling places, and the provision of information. The effectiveness of the DDA in eliminating discrimination in these areas is discussed in chapter 5. The following section focuses on particular issues relating to equality before the law.

The justice system

Evidence suggests that people with disabilities face particular barriers to achieving equal treatment in the criminal and civil justice systems.

The criminal justice system

The Office of the Public Advocate in Victoria noted that people with disabilities receive less favourable treatment in the justice system:

> The evidence strongly suggests that people with disabilities either as victims, witnesses or perpetrators of crime receive less favourable treatment because of their disability. (sub. 91, pp. 3–4)

It provided evidence that people with intellectual disabilities are overrepresented as victims of various forms of abuse, particularly sexual abuse, and that victims of crime and/or witnesses with cognitive incapacities are generally viewed as unlikely to be reliable witnesses. Alleged perpetrators may not even be charged (sub. 91).

Some commentators have argued that this problem is compounded by the lack of recognition of many crimes against people with disabilities. According to Hauritz (1997, p. 199) the use of euphemistic language disguises the nature of criminal acts by some care providers, professionals and even parents. The terms ‘psychological abuse’, ‘threat’, ‘physical abuse’, ‘punishment procedure’, ‘aversive treatment’, for example, can be used to describe what would be regarded as assaults in other contexts. The terms ‘abuse’ or ‘professional misconduct’ can be used to describe rape or sexual assault.

There is little concrete data on the number of offenders and prisoners with disabilities (particularly cognitive disabilities), but evidence suggests that people with cognitive disabilities are overrepresented as offenders and prisoners (box 6.4).

The UN International Covenant on Civil and Political Rights, to which Australia is a signatory, sets out minimum guarantees for the determination of criminal charges, which include the rights:

- to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court (UN International Covenant on Civil and Political Rights, article 14, s.3)

Several inquiry participants argued that people with disabilities (particularly people with cognitive disabilities) are often denied these rights, and that those charged with offences are thus more likely than people without a disability to be found guilty and to receive more severe sentences. Villamanta Legal Service noted:

> … research has shown that many people appearing before the courts and incarcerated in Australia's prisons would be diagnosed as having a cognitive impairment or borderline disability, low literacy levels, limited functional adaptability and are socially isolated. (trans., p. 1870)

The Disability Services Commission stated:

> … people with disabilities are likely to receive more severe sentences and are less likely to receive parole or conditional release … (sub. 44, p. 3)

The Office of the Public Advocate in Victoria stated:

> … people with cognitive disabilities are more likely to be over represented in the criminal justice system as offenders … they are less likely to have adequate legal representation and to have their disability-specific needs addressed in prison. (sub. 91, p. 4)

Some commentators have argued that policies of de-institutionalisation in practice have become policies of 're-institutionalisation' in prisons, because there appears to be a correlation between de-institutionalisation and the rising number of offenders and prisoners with cognitive disability (Armstrong 2002). As discussed in chapter 2, many disability issues involve difficult balances. De-institutionalisation and protections against involuntary commitment protect the rights of people with disabilities but can reduce access to mental health services and make people more vulnerable to being caught up in the criminal justice system.

Box 6.4 People with cognitive disabilities in the criminal justice system

A literature review by the Office of the Public Advocate in Victoria found that available evidence strongly suggests that people with cognitive disabilities face many barriers in dealing with the criminal justice system.

As offenders

Offenders with intellectual disabilities are most likely to commit crimes that reflect impulsive or unpremeditated behaviour (NSW Law Reform Commission 1996).

People with intellectual disabilities are more likely to admit to offences, even if innocent, due to a desire either to please an authority figure or to conceal the fact that they do not understand the questions (NCOSS 2003; Petersilia 1997).

If apprehended, people with intellectual disabilities are more likely to be ignorant of, or unwilling to exercise their rights and more likely to confess or plead guilty (Glaser and Deane 1999). They are also more likely to be refused bail (NSW Law Reform Commission 1996).

In corrective services

Prisoners with an intellectual disability in Australia are estimated to make up 1–10 per cent of the prison population (Petersilia 1997). Other estimates are 12–13 per cent of the prison population in New South Wales (Hayes 2002), (compared with a rate of 1–3 per cent in the community (Intellectual Disability Rights Service and the New South Wales Council for Intellectual Disability 2001).

Prisoners with a mental illness are estimated to make up 30 per cent of the prison population (NCOSS 2003).

People with intellectual disabilities are more likely to receive a longer sentence, be denied parole and be victimised in the prison system (Glaser and Deane 1999). They may also receive more custodial sentences because there is a lack of alternative placements in the community (NCOSS 2003; Glaser and Deane 1999; NSW Law Reform Commission 1996).

Inability to follow prison rules can extend the sentences of people with a cognitive disability (Glaser and Deane 1999). Further, a lack of appropriate accommodation or other necessary supports means that parole is often delayed and occasionally denied (Victorian Adult Parole Board 2003).

Borderline and undiagnosed offenders with cognitive disabilities do not receive support services and are more likely to re-offend (The Framework Report, NSW 2001). Offenders with an intellectual disability are 78 per cent more likely than mainstream prisoners to return to prison. During 1990–1998, 68 per cent of inmates identified as having an intellectual disability were re-imprisoned within two years, compared with 38 per cent of the total prison population (The Framework Report, NSW 2001).

Source: Office of the Public Advocate in Victoria, pers. com., 12 August 2003.

Further, some inquiry participants argued that many people with disabilities in prisons do not have access to appropriate services and face punishments for behaviours that are related to their disability. The Office of the Public Advocate in Victoria made this point (sub. 91).

The Productivity Commission considers that even the limited evidence canvassed here on the experience of people with disabilities in the criminal justice system is of great concern. As argued by ACROD, 'there is no evidence to suggest that the overrepresentation of people with disabilities in the prison population reflects a greater tendency towards criminality than among other parts of the community'. ACROD cited evidence gathered by the New South Wales Law Reform Commission that 'strongly indicates the influence of indirect discrimination, especially among those with intellectual disabilities' (sub. 45, p. 3).

DRAFT FINDING 6.5

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are over-represented in the criminal justice system (as both victims of crime and as alleged offenders).

The civil justice system

Civil law regulates conduct between private individuals, in areas such as contracts and family law. It includes discrimination law, where it is up to individuals to take civil action to enforce their rights. As in the criminal justice system, people with disabilities can face barriers in the civil justice system.

Little comprehensive data were available to the Productivity Commission in relation to people with disabilities in the civil justice system. The Mental Health Legal Centre argued that people with psychiatric disabilities face discrimination in the Family Court and in child protection services (sub. 108). The Office of the Public Advocate in Victoria also raised concerns about unequal treatment of parents with disabilities by child protection services (sub. 91).

The Productivity Commission considers that people with disabilities in the civil justice system are likely to face difficulties similar to those that they face in the criminal justice system.

Conclusion on access to justice

All citizens are entitled to fair treatment in the justice system. It is particularly important to protect the rights of those who are most vulnerable and least able to defend themselves. Many aspects of the justice system, particularly criminal justice, are the responsibility of State and Territory governments. However, there is a clear role for the Commonwealth Government in ensuring basic human rights, evidenced by Australia's adoption of the UN Covenant on Civil and Political Rights.

The Commonwealth Government has demonstrated its willingness to provide leadership on disability issues through the DDA—for example, through the development of disability standards that bind State and Territory governments in areas such as public transport, access to premises and education. It should also provide leadership in an area as important as access to justice.

The Attorney General should commission an inquiry into access to justice by people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system. Subject to appropriate resourcing, HREOC could be requested under s.67(j) of the DDA to conduct such an inquiry.

As argued by the Villamanta Legal Service, an inquiry into equality before the law for people with an intellectual disability would improve justice for all:

> Such an inquiry could investigate the problems within areas of law and the possible solutions. If we can devise ways for greater participation in the law and the legal process for people with intellectual disabilities, it will significantly improve our legal and justice systems for all. (trans., p. 1870)

This inquiry could draw on work such as the *Access to Justice* report by the Access to Justice Advisory Committee in 1996 and the *Report of the National Inquiry into the Human Rights of People with Mental Illness* by HREOC in 1993. The Law and Justice Foundation of New South Wales is currently examining the ability of disadvantaged people to participate effectively in the legal system. Such work, although dealing with specific topics, does not comprehensively address the barriers faced by people with disabilities in the justice system.

DRAFT RECOMMENDATION 6.1

The Attorney General should commission an inquiry into access to justice for people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal justice system.

Civic participation

People with disabilities can face many barriers to participation, including participation in the civic life of the community (see appendix D). Contributing to civic life helps develop social capital (see chapter 2) and is an important means of demonstrating that people with disabilities accept social responsibilities as well as rights. The Disability Council of New South Wales argued:

> … people with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure these rights are upheld. … While they are, ostensibly, equally entitled, they are effectively disentitled by the failure to recognise differential access and forms of participation as valid. (sub. 64, p. 13)

Inquiry participants have raised two areas of civic participation that have particular relevance to equality before the law: voting and jury duty.

Voting

Voting is regarded as an important civic duty. Every Australian citizen (18 years or over) is required by law to vote. If an enrolled citizen fails to vote and cannot provide a valid reason for not voting, then penalties can be imposed. HREOC (2003d, p. 27) noted in *Ten Years of Achievements using Australia's DDA*, that 'equal electoral access clearly has great significance for equality of citizenship'.

However, some people with disabilities argue that they have been actively discouraged from voting or required to vote from their car, or have had to submit postal votes (Blind Citizens Australia, sub. 72; Peter Young, sub. 199; Paraplegic and Quadriplegic Association of Queensland, sub. 138; Disability Council of New South Wales, sub. 64; Joe Harrison, sub. 55). One inquiry participant gave an example of apparent discrimination in access to voting, and described how the Commonwealth and New South Wales electoral officers adopt different approaches (box 6.5).

Box 6.5 **Accessible voting**

Betty Moore (sub. 42, p. 2) noted:

> At the recent State election, we were faced with inappropriate venue problems which had been documented at the regional office and Sydney headquarters for the previous two State elections. The Sydney officer still had on his file all the previous correspondence but failed to act.
>
> The new regional officer again rented a first floor conference room for the pre-poll voting venue. This building does not have a passenger lift nor any method of communication between the ground and first floor. It also has 14 steps up to the front door. It took a concerted effort of political lobbying to the Labor Party MLC and the letting agent for the building to prevent use of this venue.
>
> The Sydney officer in charge would not change the Saturday polling venue—he stated it was classified 'assisted disabled access'. This, despite file documentation and new information of two other available fully accessible buildings in the CBD. He did not inspect the venue or provide the electoral staff to do the 'assisting'.
>
> Hats off to the Federal Electoral Commission, whose new regional officer saw fit to physically inspect the traditional voting venues in this area, and made the decisions to change to accessible voting venues.

Dr Cath Gunn of the Communication Project Group found that confidentiality of the electoral ballot is still a concern for people with disabilities (trans., p. 902). Many voters need assistance to complete their paper ballot because they are visually impaired, lack manual dexterity or have an intellectual or communication impairment. These voters must vote with the assistance of an electoral officer or another person nominated by the voter, thus creating the potential for undue influence to be exerted on their voting decisions.

Dr Gunn surveyed 639 people who received the disability support pension or other allowance (some of whom received help from a care giver and some of whom did not) about their voting experiences. Although statistical analysis of the data is still underway, many responses indicated problems, particularly for people who needed assistance to fill in a ballot paper. One respondent summarised many issues:

> You're joking? Come on—round here we do what they (carers) want. I'm dependent on them for everything so you don't argue. I'd like to choose for myself—but the only way that could happen was for you to have to use an official person and not someone who knew you. They'll never do that. It's too expensive so I'll never get to vote will I? Disenfranchised that's me—and a lot of others. (Gunn 2003, pers. comm., 29 August 2003).

Other issues raised in Dr Gunn's research are provided in box 6.6.

Box 6.6 **Voting by people with disabilities**

A number of people believed that persons on the disability support pension either did not have to, or were not eligible to vote, for example:

> No, I'm not allowed to vote … because I get the pension.

Many people were not aware that elections were being held, for example:

> I didn't know about no election. Don't have the telly and the radio was busted and I never talk to no one so I didn't know, see.

Access difficulties, including getting to a polling place, discouraged some people from enrolling or voting, for example:

> Going to vote is awkward. We used to do it in a church hall but they changed it to the school and there are two steps into their hall. My Dad had to take the ramp over, not just for me but a couple of other people as well. They should think of that sort of thing but they don't—just let him do it instead.

Many people were 'advised' how to vote by someone else, for example:

> I voted the way my parents said, because my sister would have told them if I hadn't done it that way.

Only two respondents were aware that they could ask for independent assistance, and others thought it should be compulsory (not optional), for example:

> First I've heard of it and who's going to ask someone else for help when the help they're supposed to be getting is already standing there? I'd really like it if they made it so you had to have one of the staff to do it … it would be more private. … They make those laws so you can ask for help but they don't think it through—think how impossible it would really be—don't they realise that you can't ask sometimes even when you want to because—well you just can't.

Many did not even see the ballot paper after it was filled in on their behalf, for example:

> I didn't even get to see the papers to start with and he didn't show me when he finished. (Did you ask him?) Sure I asked him and all he said was 'Don't you trust me?' so of course I had to say yes and then he said, 'Well you don't need to see them do you?' but I reckon he didn't do what I wanted because we don't think the same.

Source: Gunn 2003, pers. comm., 29 August 2003.

HREOC stated that results have been limited, despite individual complaints about electoral access and a public inquiry on electoral processes in 1999-2000 (sub. 219). In *Ten Years of Achievements using Australia's DDA*, HREOC stated:

> A number of complaints have been conciliated with agreement to improve electoral access in particular locations. In an effort to secure broader progress, a public inquiry into an individual complaint regarding a range of barriers to accessibility in local government elections was conducted in 1999. This led to agreement in 2000 by the Australian Electoral Council—of which all electoral commissions are members—to establish a committee … to develop a standard definition for access, and set benchmarks for its achievement over a period of years. Formal progress through this committee process has not been as effective as anticipated. (HREOC, 2003d, p. 27)

In some cases, redress for the lack of accessibility of voting places and the lack of secrecy of the ballot has been unavailable because HREOC has been unwilling to accept complaints about actions performed in accordance with a law. In 1999, for example, the HREOC Disability Commissioner advised a complainant that the *Electoral Act 1918* did not give the Electoral Commission any discretion to permit the electronic voting that the complainant was seeking to protect his privacy. The relationship between the DDA and actions taken in compliance with other laws is discussed in section 6.5.

HREOC recommended a consideration of legislative requirements for accessible voting:

> The United States has more specific legislative requirements in place requiring accessible polling places to be used unless the responsible officer certifies no such place is available in the district. It may be appropriate to consider such a provision for inclusion in electoral Acts to give greater specificity to the general application of the DDA in this area. (sub. 219, p. 40)

Voting is an essential element of Australian citizenship. The Productivity Commission considers, given the lack of progress following HREOC's inquiry in 1999-2000, that it is desirable to take direct action to ensure polling places are accessible to all citizens eligible to vote. Accessibility involves both physical access and an appropriate means of allowing people who require assistance to vote to do so confidentially. This important to allow people with disabilities the opportunity to vote at the same time as others with up-to-date information, and access to independent assistance. It could be achieved through various means.

Following the US approach, electoral Acts could be amended to require accessible polling places. This approach would require separate action by each jurisdiction.

If the provision of voting facilities were regarded as the administration of a Commonwealth law or program, then the Attorney General could develop disability standards for Commonwealth voting facilities. These would also have strong evidentiary weight for complaints about State voting facilities.

If the provision of voting facilities were regarded as 'services', then there is no power to make disability standards for the provision of goods and services. The possible expansion of the power to make disability standards is discussed in chapter 12. If this expansion were to occur, then disability standards could be developed, requiring accessible polling places for both federal and State voting facilities.

The defence of unjustifiable hardship might apply to some of these approaches (see chapter 10 for a discussion of the application of unjustifiable hardship to the administration of Commonwealth laws and programs). However, the Productivity

Commission considers that the defence would be highly unlikely, in the short term, to arise in locating physically accessible facilities and training staff to assist people with disabilities. Some issues might arise if longer term solutions prove more expensive (for example, suggestions involving electronic voting).

The Productivity Commission considers, given the significance of voting as part of citizenship, that it is inappropriate to rely on individual complaints to improve access. The HREOC inquiry should have placed authorities on notice that access needed to be improved. The Australian Government should amend the *Electoral Act* to require all federal polling places to be accessible, and encourage all State and Territory governments to do the same.

DRAFT FINDING 6.6

Standards of physical access and independent assistance at polling places are not uniform. Given the importance of voting, it is inappropriate to rely on individual complaints to improve access.

DRAFT RECOMMENDATION 6.2

The Australian Government should amend the* Electoral Act 1918 *to ensure polling places are accessible (both physically and in provision of independent assistance) to ensure the right to vote of people with disabilities.

Jury duty

Like voting, jury duty is regarded as a civic duty and is compulsory for large sections of the population. However, a person is usually ineligible for jury duty if (among other reasons) they are unable to read or understand English, or if as a result of sickness, infirmity or disability, they cannot discharge the duties of a juror. (Legislative details vary between jurisdictions.)

The DDA has been used by people with disabilities to address issues of jurors' physical access to courts. HREOC's *Ten Years of Achievements using Australia's DDA* provided the following example:

> Two people with physical disabilities complained they had been discriminated against in 1994 by lack of provision of access for people who use wheelchairs to serve as jurors in certain courts in Sydney and at Coffs Harbour. The commission found there had been a refusal to provide the service of assisting an eligible person to perform jury duty when Ms Druett was directed against her wishes to apply for exemption from duty. Damages of $5000 were awarded accordingly. (HREOC 2003d, p. 38)

Jurisdictions are also taking steps to address access. However, the emphasis appears to have been on physical access. The Office of the New South Wales Sheriff's

(2003) advice on people with disabilities and jury duty states that 'the Sheriff's Office will take all reasonable steps to help you to participate in jury duty', but focuses on issues such as wheelchair access and accessible parking.

However, some inquiry participants argued that people with certain other types of disability are being discouraged from participating in jury service. Blind Citizens Australia stated:

> We are also aware that frequently blind and vision impaired people are discouraged from participating in jury service. Blind Citizens Australia believes that juries should be sourced from the widest possible pool. (sub. 72, p. 10)

This raises the difficult issue of what is required for a person with a disability to 'discharge the duties of a juror'. As discussed in chapter 2, some disability issues involve difficult tradeoffs. In this instance, there is a potential tradeoff between (1) the rights of people with disabilities to participate in jury service and (2) society's desire to ensure the fairest possible system of justice. It could be argued that juries should be more representative of the general population, including people with disabilities. However, some people with disabilities might not be independently able to assess all the evidence—for example, a juror with a sight impairment might not be able to assess visual evidence. Does a defendant have a right to expect that all members of the jury can assess evidence in its original form? If so, what degree of disability should make a potential juror ineligible?

In April 2002, the New South Wales Law Reform Commission began a review into jurors with disabilities. The review is examining whether there is a need to exclude people from juries on the basis of serious hearing or vision impairment or if these people are being unnecessarily barred from jury duty. It is also examining ways of supporting those who do want to carry out their civic duty in this way. The review is considering the New South Wales *Anti-discrimination Act 1977*, the DDA and the need to maintain confidence in the administration of justice in New South Wales. A discussion paper is due to be released late in 2003 (NSW Law Reform Commission 2002).

The NSW Law Reform Commission review has implications for access to jury duty for people with disabilities throughout Australia. The Productivity Commission encourages interested parties to contribute to the NSW Law Reform Commission examination.

6.5 Laws with discriminatory effects

A significant issue relating to the DDA and equality before the law is the potential to use the DDA to challenge actions taken under laws that might have a

discriminatory effect. (The DDA makes it unlawful to undertake various 'acts'; it does not make legislation invalid.) A related issue—the interaction of State and Territory anti-discrimination laws and DDA disability standards—is discussed in chapter 12.

Several inquiry participants raised examples of laws with potentially discriminatory effects. The Mental Health Council of Australia argued that the Victorian Wrongs & Limitation of Actions Act (Insurance Reform) Bill 2003 (which the Victorian Lower and Upper Houses passed in the August session 2003) discriminates against people with psychiatric disability:

> This legislation appears to be directly discriminating against people with psychiatric impairment. Key points relating to this discrimination include:
>
> 1. Physical injury must obtain more than 5 per cent impairment
>
> 2. Depression due to injury is excluded altogether
>
> 3. To claim any psychiatric injury you must have nearly double the impairment in percentage points … (sub. 150, p. 11)

The Mental Health Council of Australia also criticised the disproportionate effect of Centrelink 'breaching rules' on people with mental illness (sub. 150). Other inquiry participants criticised the exclusion of supported accommodation from *Residential Tenancies Act 1997* protection (Tony and Heather Tregale, sub. 30).

As noted in section 6.1, the original Disability Discrimination Bill included provisions that would have allowed people to use the DDA to challenge legislation that was discriminatory, based on provisions in the Racial Discrimination Act (box 6.7). These provisions were dropped as a result of concerns about their possible effect on special legal regimes in relation to people with disabilities, including guardianship and mental health legislation (HREOC, sub. 143). It is not clear what these concerns were, or why the exemption mechanism in the DDA for 'prescribed laws' could not have been used to exempt these laws from the operation of the DDA.

Box 6.7 **Equality before the law under the Racial Discrimination Act**

10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Source: *Racial Discrimination Act 1975,* s.10.

However, even in the absence of substantive provisions relating to equality before the law, it might be possible to use the DDA to challenge actions taken under other legislation. The DDA expressly exempts 'anything done by a person in direct compliance with a prescribed law' (s.47), implying that compliance with a law that is *not* prescribed is no defence to an action under the DDA.

The Sex Discrimination Act (which does not have specific provisions dealing with equality before the law)[2] has been used to challenge actions taken under Victorian State law (box 6.8).

[2] The Act mentions equality before the law in its preamble, but does not have a specific object covering equality before the law. It does not have specific provisions allowing actions taken under laws with discriminatory effects to be challenged.

Box 6.8 **McBain v Victoria**

In July 2000, the Federal Court decision in *McBain v Victoria* (2000) 99 FCR 116 rendered the *Infertility Treatment Act 1995* (Vic.) inoperative to the extent that it restricted assisted reproductive technology to married or heterosexual *de facto* couples. The decision paved the way for single women and lesbians to access IVF and medically administered donor insemination.

The case arose following a request by a single woman for IVF services. The request was made to a medical practitioner specialising in reproductive technology. The practitioner considered that the woman was suitable for the treatment, but was precluded from providing the treatment under the Victorian Act. The practitioner applied to the Federal Court for a declaration that section 8 of the Victorian Act was inoperative due to inconsistency with section 22 of the Commonwealth Sex Discrimination Act, which outlaws discrimination on the basis of marital status. The State of Victoria and the Minister did not concede inconsistency, but they did not address any argument to the Federal Court in support of the validity of the Victorian legislation. The Infertility Treatment Authority adopted a passive role. The only active supporters of the Victorian legislation were the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church, which were granted leave to intervene as *amicus curiae* (friends of the court).

The Attorney General granted the bishops a fiat (special leave) to apply to the High Court. This application was dismissed.

Source: Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor (2002) HCA 16 (18 April 2002)

However, several inquiry participants stated that HREOC would not accept complaints about actions taken under other laws. Blind Citizens Australia stated:

> [Section 47] appears to enable a complainant to lodge a complaint against an action or decision made in direct compliance with a law as long as it is not a prescribed law and the action or decision was not made within three years of the commencement of the section. The three-year exclusion period has long expired. It has nonetheless been impossible for Blind Citizens Australia to date to lodge a complaint where compliance with a not prescribed law has been in issue. HREOC has maintained that it is not possible to make a law the subject of a complaint and that it is not possible to use section 29 in this context because it is not the administration of the law which is at issue. (sub. 72, p. 6)

In its comments on this issue, HREOC distinguished two situations (sub. 219).

- Where another law creates a power to act and gives no discretion but to act in the manner complained of, HREOC believes the DDA does not apply. That is, the DDA does not apply to discrimination in the *content* of laws.

- Where another law gives a person discretion to act, and the person uses that discretion to act in a discriminatory manner, HREOC believes the DDA does apply. That is, the DDA does apply to discretionary actions under other laws.

HREOC's reasoning for this distinction is not clear. The DDA states:

> During the period beginning at the commencement of this section and ending three years after the day this section commences, this Part does not render unlawful anything done by a person in direct compliance with another law. (s.47)

Three years after this section commenced, therefore, part 2 of the DDA was capable of rendering unlawful direct compliance with another law (unless another, more specific exemption applied). The DDA makes no reference to the degree of discretion of the decision maker.

The Productivity Commission considers, given the uncertainty surrounding this issue, that the scope of the DDA to challenge actions taken under other laws should be clarified. It considers that such actions should be able to be challenged. Governments should be held accountable to the principles they espouse and the duties they impose on the rest of the community. Where governments want to ensure actions taken under laws are free from challenge, they should be prescribed under section 47, as the DDA allows.

DRAFT FINDING 6.7

There is uncertainty about the application of the Disability Discrimination Act 1992 *to acts (actions) done in compliance with laws that have not been prescribed under section 47 of the Act.*

DRAFT RECOMMENDATION 6.3

The* Disability Discrimination Act 1992 *should be amended to make it clear that acts (actions) done in compliance with non-prescribed laws are not exempt from challenge under the Act, regardless of the degree of discretion of the decision maker.

Clarifying the Disability Discrimination Act

As noted, the Productivity Commission considers that actions taken under non-prescribed laws should be open to challenge under the DDA. On one reading of the DDA, this is already the case. If so, HREOC could issue guidelines clarifying the use of the DDA to challenge actions taken under other laws.

If the provisions of the DDA do not allow actions taken under non-prescribed laws to be challenged, then explicit provisions on equality before the law should be introduced into the DDA, based on those in the Racial Discrimination Act (box 6.8). The Commission is requesting comment on which of these approaches should be adopted (see below).

Interaction with 'special measures' and 'prescribed laws' provisions

Clarification of the scope to challenge actions with discriminatory effects taken under other laws would need to recognise the interaction among different provisions of the DDA, particularly:

- section 45 exemptions for 'special measures' designed to benefit people with disabilities
- section 47 exemptions for 'prescribed laws'.

Section 45 of the DDA exempts actions (acts) that are 'reasonably intended' to provide people with disabilities with 'goods or access to facilities, services or opportunities' or 'grants, benefits or programs, whether direct or indirect, to meet their special needs'. A distinction should be drawn between laws with discriminatory effects and laws that establish levels of funding or eligibility criteria for disability services (see chapter 14).

The section 47 'prescribing' mechanism can be used to exempt specific legislation from the scope of the DDA. It operates transparently, making clear any tradeoffs between potential discrimination and other objectives (see chapter 14). If the scope to use the DDA to challenge other laws with discriminatory effects were clarified, then it might be necessary to provide a transitional period to allow governments to prescribe other laws. It might also be necessary to establish appropriate consultative mechanisms to ensure exemptions are justified—for example, a public inquiry by HREOC.

REQUEST FOR INFORMATION

The Productivity Commission seeks further information on how the Disability Discrimination Act 1992 *should be amended to clarify the scope to challenge other laws with discriminatory effects, particularly:*

- *the desirability of specific 'equality before the law' provisions (modelled on section 10 of the* Racial Discrimination Act 1975*)*
- *their interaction with provisions relating to 'special measures' (s.45)*
- *their interaction with provisions relating to 'prescribed laws' (s.47).*

6.6 Effects of the DDA on equality before the law

Limited national data are available on the experiences of people with disability and equality before the law. This chapter draws on available information from individual States and Territories. The Productivity Commission is interested in any additional information that inquiry participants know deals with these issues.

Given this caveat on data availability, the following general points can be made about the effectiveness of the DDA in achieving equality before the law for people with disabilities. First, there are practical limits to the DDA's effectiveness in achieving this object. The States and Territories have primary responsibility in many important areas, and their existing arrangements appear overall to be appropriate. However, it should be made clear that acts done in compliance with non-prescribed laws are not exempt from challenge under the DDA, regardless of the degree of discretion of the decision maker.

Second, HREOC research in this area can provide a useful national focus and assist regulatory benchmarking by the States and Territories. One area where research is particularly warranted is access to justice by people with disabilities. The Productivity Commission has recommended a separate inquiry into access to justice, with a focus on practical strategies for protecting the rights of people with disabilities in the criminal justice system.

Finally, one of the most important symbols of equality before the law is the right to vote. The Australian Government should legislate to ensure all polling places are accessible (both physically and in the provision of independent assistance) to people with disabilities.

7 Promoting community recognition and acceptance

People with disabilities can confront physical, institutional and attitudinal barriers. The third object of the *Disability Discrimination Act 1992* (DDA) in part seeks to address attitudinal barriers, aiming:

> … 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. (s.3(c))

The two aspects of this object suggest two broad indicators of its achievement: changes to community awareness (recognition) and changes to attitudes (acceptance). Recognition implies an awareness or knowledge of the rights of people with disabilities, but acceptance goes further, implying that the community agrees such rights are due to people with disabilities.

This chapter examines the extent to which the DDA has successfully promoted community recognition and to the extent possible, acceptance. It also discusses potential improvements that can be made based on this examination. It examines how the DDA has been applied in this area (section 7.1), and the extent to which community awareness and attitudes have changed since the enactment of the DDA (section 7.2). Section 7.3 examines the effectiveness of the current approach to promoting community recognition and acceptance, while section 7.4 examines options for improving the effectiveness of this promotion, focusing on the Human Rights and Equal Opportunity Commission's (HREOC) education and information provision functions.

7.1 The approach so far

Aspects of the DDA have the potential to contribute to promoting community recognition and acceptance. Under s.67 of the DDA, HREOC must:

- promote an understanding and acceptance of the Act (s.67(1)(g))
- undertake research and educational programs to promote the objects of the Act (s.67(1)(h))

- prepare and publish guidelines for the avoidance of discrimination (s.67(1)(k)).

HREOC is also required to undertake educational and other programs under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). It conducted a number of educational activities (such as distributing an information paper to peak organisations) during the DDA's first year (HREOC 1993a, pp. 72–3). Hastings (1997) commented, however, that a 'substantial part' of HREOC's work and budget in that year was allocated to developing the National DDA Awareness Campaign foreshadowed in the second reading speech of the DDA (Australia 1992a, p. 2755). The campaign, launch in March 1994, aimed to increase community awareness of the DDA. It had some positive impacts, but was generally perceived to be constrained by a lack of resources, although Hastings (1997) suggested that even a much larger scale campaign in the United States resulted in 'disappointingly low levels of awareness' (see appendix H).

HREOC has not since conducted any large scale information campaigns. Instead, it has focused on: regional visits; public speaking by commissioners; staff participation in informal and formal educational events, conferences and workshops; media releases and newsletters; and the provision of information on a website, in publications of various formats, and through the media and community networks.

Other aspects of the DDA have also been used as educative tools.

- Public inquiries have aimed to help parties immediately involved in a particular complaint or issue, as well as to disseminate information more widely. Consultation has been an important aspect of inquiries.
- Guidelines and advisory notes, have been prepared to clarify aspects of the DDA's operation (see chapter 12).
- The development of disability standards has involved wide consultation.
- Other research and policy work has been conducted in areas such as the sterilisation of girls with intellectual disabilities, accommodation and abuse, and mental health projects.
- Complaints resolved through court decisions (or earlier through HREOC) can achieve 'national media publicity … which is otherwise difficult to generate for disability discrimination issues'. HREOC also publishes summaries of conciliated complaint outcomes in its annual reports and website, but noted 'more high profile publicity' of these outcomes 'is only undertaken or attempted with the agreement of the parties so as not to discourage parties from entering into conciliated agreements' (sub. 143, p. 54).

- Voluntary action plans registered with HREOC are made available on its website. Jones and Basser Marks (1998, p. 63) commented that both actions plans and disability standards 'are designed to play a role in … value formation', with educative effects stemming from the development process.

Other bodies have also been involved in awareness raising activities, of both the DDA and disability issues. HREOC (2003d, p. 24) noted specifically:

> … the significant community education and awareness activities on rights and responsibilities undertaken by disability community groups, State and Territory anti-discrimination bodies, industry and government organisations and in particular through the network of Disability Discrimination Legal Services.

In some cases, HREOC has provided input to the activities of these groups. A manual to assist legal services educate people with disabilities about their rights was developed under the supervision of HREOC, which also conducted training for staff of advocacy services (HREOC 1994).

Not all awareness raising about disability issues has been conducted within the framework of the DDA. Major campaigns to raise awareness of mental illness, for example, have been undertaken under the National Mental Health Strategy (an agreement between the federal and State and Territory governments that aims to improve the lives of people with mental illness).

Changes proposed under the Australian Human Rights Commission (AHRC) Legislation Bill 2003 increased the emphasis on education. Some participants (such as Anti-Discrimination Commission Queensland, sub. 119) were concerned about the possible negative impact of the reforms on the profile of disability issues, because the new AHRC would not have a disability-specific commissioner. Reviewing the Bill is beyond the scope of this inquiry (see chapter 1).

7.2 Changes in community awareness and attitudes

One step in assessing the effectiveness of the DDA in this area is to measure changes in community awareness of disability issues and attitudes towards people with disabilities over time. Measuring attitudes is not easy because they are essentially unobservable. Most measurement techniques are based on asking people for agreement or disagreement with particular 'attitude positions' (Zimbardo and Leippe 1991; Vaughan and Hogg 2002). Problems with these approaches include their reliance on the willingness of survey participants to reveal their true feelings. Comparison across studies is also difficult because they define and measure attitudes differently—for example, using different 'attitude positions' (Vaughan and Hogg 2002).

A lack of baseline data compounds the difficulties of assessing changes in attitudes towards people with disabilities in Australia, and the possible influence of the DDA. The following discussion thus draws on direct and indirect, qualitative and anecdotal indicators of attitudes. This approach is useful but has problems. If, for example, the DDA has changed expectations of what is acceptable, then people's perceptions of changes in community attitudes might have been affected. The Productivity Commission's approach is, nonetheless, the best option given the available information.

Inquiry participants presented a mixed picture of community awareness and attitudes, and how these have changed over time. Perceived improvements included:

- generally improved attitudes towards people with disabilities (Anti-Discrimination Board of New South Wales, sub. 101; Mansfield community forum, sub. 202)
- the reduced social stigma of people with disabilities (Kaerest Houston, sub. 19)
- progress in community acceptance of the rights of people with disabilities (Media Entertainment and Arts Alliance, sub. 60; Public Advocate in Victoria, sub. 91; Mental Health Coordinating Council, sub. 84)
- improved knowledge of what disability is (that is, that it means more than 'wheelchair user') (Independent Living Centre NSW, sub. 92).

Positive changes have been highlighted in relation to specific types of disability and areas of activity. Blind Citizens Australia (sub. 72) noted improved awareness of issues for blind people, particularly in relation to accessible information and the use of guide dogs. Housing Connection NSW noted positive attitudes towards people with intellectual disabilities who live independently in the community:

> … clients living fairly independently in the community are well received, welcomed, … assisted by neighbours and other people in the community. This extends to many small acts of kindness (eg. help with keys, telephone), friendly greetings, showing interest in clients' programmes, and helping out with repairs/tools. (sub. 161, p. 3)

Some improvements in attitudes were also noted in sport, recreation and the arts at a local level (SPARC Disability Foundation, sub. 15). The Mental Health Coordinating Council commented on an apparent wider acceptance of people with disabilities in education and other areas of the community, particularly in large organisations (sub. 84). Australian Parent Advocacy Inc. noted a 'paradigm shift' in open employment (sub. 164).

Some commentators and inquiry participants suggested that these perceived positive changes have been reflected in changed behaviours. Davis et. al. (2001) commented that there appears to be greater exposure to, acceptance of, and openness about,

disability issues, which might have contributed to increased self-reporting of 'severe restriction'. Similarly, Becky Llewellyn referred to an increased willingness to seek help:

> The difference in attitude I feel from one of virtually begging is that now I feel supported by benefits of citizenship in a democracy that cares about involving all its members. I no longer feel ashamed of needing to ask for something 'special' and 'different'. (sub. 9, p. 3)

However, other inquiry participants suggested that acceptance in some cases has occurred only at a conceptual level. The South Australian Equal Opportunity Commission noted:

> … while the message about fairness in not excluding people with disabilities from participation in employment and other social benefits has community support, there is still considerable disagreement about how these issues become reality. (sub. 178, p. 3)

The Council for Equal Opportunity in Employment had a similar view:

> [It is] important to recognise that many employers have high levels of goodwill but in an increasingly competitive and global economy, [a] sense of urgency to get things done often means people with a disability are stereotyped by employers as 'slow' and non-productive. (sub. 204, p. 1)

Scope for further change was noted. The City of Melbourne, argued that:

> Significant and entrenched lack of knowledge exists in recognition and acceptance of the right of people with disabilities to equal access in all facets of life within society. (sub. 224, p. 3)

Comparing Australia with other countries, ParaQuad Victoria suggested:

> From anecdotal evidence from Australians with disabilities visiting these countries [United States, Canada, United Kingdom], the feeling of acceptance and respect, the awareness, the ease of functioning in the day to day world of buildings and transport is much superior to what they experience here. (sub. 77, p. 3)

Some participants suggested awareness and attitudes remain a problem for people with 'invisible' or 'hidden' disabilities, such as multiple chemical sensitivity (Australian Chemical Trauma Alliance Inc., sub. 152; Stella Hondros, sub. 167; Ann Want, sub. 194), intellectual disabilities (NSW Council for Intellectual Disability, sub. 117) and mental illness (Pete Casey, sub. 3). The Media Entertainment and Arts Alliance (sub. 60) and Souraya Bramston (sub. 33) expressed similar views.

Experience of hostility is an indicator of negative attitudes. Survey data would seem to suggest that a high proportion of people with disabilities do not commonly experience hostility and aggression in their local neighbourhood (table 7.1).

Nonetheless, the 2001 Household, Income and Labour Dynamics, Australia (HILDA) survey found that a slightly higher proportion of people with disabilities than of people without disabilities reported such experiences as 'fairly' or 'very' common. Time-series data are not available to assess trends over time.

Table 7.1 **How often people are hostile and aggressive in the local neighbourhood, 2001[a]**

	People with a disability			*People without a disability*		
	All	*Rural* [b]	*NESB* [c]	*All*	*Rural* [b]	*NESB* [c]
	%	%	%	%	%	%
Never	29	29	31	27	28	33
Very rarely	35	37	32	40	40	33
Not commonly	23	21	22	23	22	22
Fairly commonly	5	5	6[d]	4	5	5
Very commonly	3	3	4[d]	2	2	2
Don't know	5	5	5[d]	3	3	5

[a] Percentages are calculated as the proportion of the people in each category who responded correctly to the question. [b] Rural excludes major cities of Australia, but includes inner regional Australia, among others. [c] Non-English speaking background: excludes people born in Australia, New Zealand, the United Kingdom, the Channel Islands, Ireland and Eire, Canada, the United States and South Africa. [d] The relative standard errors on the data from which these percentages are calculated are just over 25 per cent. These estimates should be used with caution—see ABS (1999d, pp. 60–2) for a discussion of relative standard errors.

Source: Productivity Commission estimates based on unpublished data from the 2001 HILDA survey.

Apparent negative attitudes and continuing stereotyping of people with mental illness have also been reported in the medical profession (Mental Health Council of Australia, sub. 150; Groom, Hickie and Davenport, 2003). Many inquiry participants—including Pete Casey (sub. 3), Arafmi Hunter (sub. 36) and SANE Australia (sub. 62)—pointed to the media's role in perpetuating stereotypes through its continuing negative portrayal of people with mental illness.

DRAFT FINDING 7.1

In general, community awareness of disability issues and attitudes towards people with disabilities appear to have improved in the past decade. Scope for further improvement remains, however, both in certain areas of activity, such as employment, and in relation to particular disabilities, such as mental illness.

Awareness of the DDA, which may underpin community awareness of disability issues, is discussed in the next section.

7.3 Effectiveness of the current approach

The next step in assessing the effectiveness of the current approach is determining the extent to which the DDA has generally contributed to the perceived positive changes (or is 'responsible' for any lack of change) in awareness and attitudes identified in section 7.2. Particularly important is the effectiveness of information provision under the DDA, given its possible influence on attitudes in the longer term (see appendix H).

Many difficulties confront such an assessment. First, attitude change is a long term process. The ACT Discrimination Commissioner noted:

> … 10 years in the life of legislation like the DDA—which seeks to redress major social imbalance and alter centuries of belief about people with disabilities—is not a long time. (sub. 151, p. 7)

Further, the DDA was enacted at a time of significant social change, both in Australia and abroad. Consequently, attitudes about human rights, including disability rights, were already changing. Becky Llewellyn noted that the 1981 International Year of Disabled Persons 'was a huge catalyst to awaken community attitudes and begin the process of hearing the voices of people with disabilities' (sub. 9, p. 1). It is difficult, therefore, to identify the extent to which changes in awareness and attitudes are attributable to these earlier changes or to the DDA.

Other factors might also have contributed to any perceived change, or lack of change, in awareness and attitudes. The Anti-Discrimination Commission Queensland stated:

> … it is both inappropriate and impractical to quantify the DDA's effectiveness in … promoting recognition and acceptance within the community … No doubt the DDA has played its part … in effecting cultural change but it is not possible to ascribe such change totally to the DDA nor even to quantify the changes. Many other factors are at work, including State and Territory anti-discrimination legislation, de-institutionalisation, educational changes, employment schemes and international developments. (sub. 119, p. 10)

Inquiry participants also identified the following influences since 1992 on community attitudes towards people with disabilities:

- the ageing population
- lobbying and other work by people with disabilities
- State and Territory government initiatives, such as disability service plans in Western Australia, State disability action plans in Victoria, and initiatives to promote inclusion in sport in South Australia
- the 2000 Paralympics.

The fact that other factors have had an influence does not mean the DDA has had no effect. Some of these influences may themselves have been influenced indirectly by the DDA. The rest of this section examines current awareness of the DDA as this can underpin a general awareness (recognition) of the legal rights of people with disabilities. It also examines the extent to which the DDA might have contributed to attitude change.

Awareness of the Disability Discrimination Act

Awareness of the DDA means that people (including people with disabilities, those with responsibilities under the DDA and the general community) are aware of the legal rights of people with disabilities. However, mere awareness is not the same as 'acceptance'. Moreover, widespread awareness of the DDA and its provisions might not be necessary for the DDA to influence community attitudes. Awareness by some people may be enough to encourage change, which has indirect effects on others. Some inquiry participants, however, suggested the importance of awareness of the legislation for attitude change:

> … if rights-creating legislation is to positively alter community attitudes—and we believe it can—it must at least be something that people know exists. (Women's Health Victoria sub. 68, p. 4)

The education campaign accompanying the DDA's enactment produced mixed results in terms of awareness. It initially generated many inquiries to a hotline and an increase in complaints, but Hastings noted:

> … the campaign had only patchy success in generating awareness of the existence or effect of the Act, even among the disability community, and less still among some important sectors of people with responsibilities. (Hastings 1997, p. 13)

HREOC submitted:

> … [while this campaign was effective] in increasing awareness of the existence and application of the DDA, this increase was from a very low base and awareness remained low even among specific target audiences including employers and people with a disability. (sub. 143, p. 54)

Many participants noted a continuing lack of community awareness of the DDA, including Queensland Parents for People with a Disability (sub. 103), participants in the Mansfield community forum (sub. 202), DDA Inquiry regional forum (regional forum notes) and Women's Health Victoria (sub. 68). Others suggested a perceived lack of awareness among specific groups or sectors, including:

- people with disabilities (Equal Opportunity Commission Victoria, sub. 129; Deafness Forum of Australia, sub. 71). Some inquiry participants suggested that awareness is especially low among specific groups of people with disabilities,

such as those with a psychiatric disability (Mental Health Council of Australia, sub. 150), people with disabilities from non-English speaking backgrounds (National Ethnic Disability Alliance, sub. 114), and Indigenous people with disabilities (ATSIC, sub. 59).

- people with responsibilities under the DDA, such as the legal profession (Disability Justice Advocacy Inc., sub. 5; DDA inquiry regional forums notes)
- people in regional areas (DDA inquiry regional forum notes)
- those involved in sports clubs (Leichhardt Council Disability Access Committee, sub. 75).

These problems suggest that awareness of the DDA has not been a major influence on the positive attitude changes identified in section 7.2. However, to the extent that key organisations—such as advocacy groups and the Disability Discrimination Legal Services—are aware of the DDA or have been empowered by its introduction, this awareness might be sufficient to allow reasonably effective protection of people's rights under the DDA. The Public Advocate in Victoria argued that the number of complaints made—particularly in employment and goods and services, which are 'key indicators of the level of community access, acceptance and participation',—suggests the DDA is 'well utilised' (sub. 91, pp. 1–2). However, it also noted:

> … it will take time to reach the level of community acceptance and understanding of the DDA that the Sex Discrimination Act (1984) and the Race Discrimination Act (1975) currently have. (sub. 91, p. 2)

General impact of the Disability Discrimination Act on community awareness and attitudes

Despite a perceived lack of awareness of the DDA, some of the perceived positive changes in awareness and attitudes identified in section 7.2 have been attributed to the DDA, both by inquiry participants and others (box 7.1). However, improvements in attitudes since the DDA was introduced appear to have been more significant in certain areas of activity and towards people with particular types of disability. David Buchanan considered that the DDA had had a positive impact in contributing to the decreased stigma associated with HIV/AIDS, for example, (sub. 163).

Similarly, other inquiry participants noted the DDA's contribution to improved attitudes in employment (Recruitment and Consulting Services Association, sub. 29; Mental Health Coordinating Council, sub. 84), sports, art and recreation (SPARC Disability Foundation, sub. 15), and education (Australian Association of Special

Education, South Australian Chapter, sub. 3). The DDA was also seen to have contributed to an increased awareness about access issues for people with disabilities (Housing Connection NSW, sub. 161; Blind Citizens Australia, sub. 72).

In contrast, some inquiry participants asserted that the DDA has had little effect on attitudes towards mental health issues (Western Australian Office of Mental Health, sub. 94) and people with an intellectual disability (NSW Council for Intellectual Disability, sub. 11; Housing Connection NSW, sub. 161).

Box 7.1 **Inquiry participants views on changes in awareness and attitudes**

Some inquiry participants attributed the changes in community awareness and attitudes to people with disabilities to the DDA:

> One of its greatest benefits is that it has raised the profile of the rights of people with disabilities and expectations about those rights. (Joe Harrison, sub. 55, p. 12)
>
> … the DDA has done much … to dispel the vision of people with a disability as denizens of backwaters. …the full impact of the DDA is to be seen in the many subtle and immeasurable ways in which it is helping to shape attitudes and replace the paradigm of benevolence with one of equality. (Bruce Maguire in HREOC 2003d, pp. 67–68)
>
> The DDA has literally increased the visibility of people with disabilities. … It is arguable that it is this visibility, more than anything else, which has had the greatest impact on community attitudes to people with disabilities, and the introduction of the DDA, and the shift to a rights based approach to access for people with disabilities which it represented, was fundamental to this. (Blind Citizens Australia, sub. 72, p. 11)

Impact of aspects of the Disability Discrimination Act on awareness and attitudes

Specific aspects of the DDA have contributed to varying degrees to the DDA's overall impact on awareness and attitudes, and thus to promoting community recognition and acceptance.

Education, research and other policy work

HREOC's education and information provision role elicited considerable inquiry participant comment. Some inquiry participants, including Anti-Discrimination Commission Queensland (sub. 119) and Blind Citizens Australia (sub. 72), considered that HREOC has been an effective educator, given its resources. Others, such as Paraquad Victoria (sub. 77) and Leichhardt Council Disability Access Commission (sub. 75), commented on the usefulness of its disability rights website, which attracts about 50 000 hits per month (HREOC 2003d, p. 24). The website

provides general information about HREOC's disability rights work and includes resources targeted at students and teachers.

By contrast, other inquiry participants argued that too little effort is put into educating the community, as evidenced by:

- continuing negative attitudes towards people with disabilities (Marrickville Council, sub. 157)
- a lack of awareness about the DDA and its processes (Mackay Regional Council for Social Development, sub. 87)
- a lack of information on, and the low profile of, HREOC in the States and Territories (Job Watch Victoria, sub. 215; SPARC Disability Foundation, sub. 15; ACT Anti-Discrimination Commissioner, sub. 151).

HREOC has acknowledged both the strengths and the shortcomings of its approach. The current Acting Disability Discrimination Commissioner (Ozdowski 2002a, p. 3), suggested that the DDA 'has had a bigger impact because we have not tried to change community attitudes head on', by spending most of its money 'on advertising campaigns attempting to change attitudes, or lecturing people about what to think or say'. Hastings (1997, p. 41) also suggested that focusing on 'system change rather than attitude change … is the best way to win … hearts and minds'.

Hastings (1997, p. 11) noted 'informing and catalysing activity by other agencies in government and organisations' can help to increase HREOC's effectiveness. This effect appears particularly important given that education about disability issues needs to reach a large, dispersed and heterogeneous group.

HREOC continues to communicate with other organisations and actively cooperates with State and Territory anti-discrimination bodies about education and public information activities (HREOC, sub. 143; Equal Opportunity Commission Victoria, sub. 129). The extent to which these links have overcome the problems experienced in HREOC's or DDA's first five years is unclear, but a continuing perceived lack of awareness suggests improvement is possible.

HREOC's general research and policy work did not receive as much comment from inquiry participants. This work is an important aspect of HREOC's education role, informing policy makers and others about important issues, and potentially influencing future research, attitudes and policy. The Anti-Discrimination Commission Queensland stated that it 'relies on the research and policy work done by the specialist units at HREOC' (sub. 119, p. 5), and the Intellectual Disability Services Council commented on the benefits of HREOC's sterilisation report (sub. 162). A benefit of HREOC's policy work has been its highlighting of issues that otherwise might not have arisen through the DDA. The number of projects

conducted has not been large, possibly reflecting resource constraints (see chapter 14).

DRAFT FINDING 7.2

The Human Rights and Equal Opportunity Commission's education and research function is an important aspect of promoting community recognition and acceptance.

Public inquiries

HREOC viewed public inquiries as 'one of the major means for promoting awareness and compliance with the DDA' (sub. 143, p. 55). This view was supported by inquiry participants such as the Blind Citizens Australia (sub. 72), the Equal Opportunity Commission Victoria (sub. 129) and the Intellectual Disability Services Council (sub. 162). Some inquiry participants perceived the educative value of inquiries to outweigh that of complaints. The Anti-Discrimination Commission Queensland noted 'the scope of inquiries to achieve systemic change and to have an educational value which confidential individual complaints can never have' (sub. 119, p. 7) (see chapter 11).

Several inquiry participants—including Disability Action Inc. (sub. 43) and Equal Opportunity Commission Victoria (sub. 129)—noted that resource constraints limit HREOC's ability to conduct inquiries. HREOC also commented on this issue, particularly on its ability to conduct inquiries in non-complaint contexts (sub. 143).

DRAFT FINDING 7.3

Public inquiries appear to have had positive impacts to date on promoting community recognition and acceptance, due to their extensive consultation processes, and public availability of submissions and other material.

Complaints

The impact of complaints on public awareness and attitudes has been mixed. Some high profile cases, such as *Maguire v SOCOG* (1999) (HREOC H99/115) and *Scott v Telstra* (1995) (HREOC H95/3), have been very effective in raising awareness of accessibility issues for people with disabilities.

However, few cases have generated as much publicity and several inquiry participants—such as the Northern Territory Disability Advisory Board (sub. 121) and ParaQuad Victoria (sub. 77)—suggested there is insufficient publicity of complaint outcomes. Scope to increase publicity may be limited somewhat because

most complaints are settled by conciliation and are subject to confidential agreements (although HREOC publishes some conciliated outcomes in a non-identifying way—see chapter 11). As a result, complaints generally provide less scope than inquiries do for promoting widespread recognition and acceptance.

Some inquiry participants suggested the complaints-based approach even had the potential to stimulate negative community attitudes towards people with disabilities, by presenting this group as aggressive and overly litigious:

> … the legislation places people with a disability in the position of being the aggressive party. This does not create a positive image of people with a disability … In many ways it perpetuates the idea that people need 'special' treatment and are making themselves different by demanding something 'extra' … (Disability Coalition, sub. 67, p. 6)

Queensland Parents for People with a Disability (sub. 103) expressed similar views.

DRAFT FINDING 7.4

Some complaints, particularly high profile cases proceeding beyond conciliation, appear to have helped promote community recognition and acceptance. However, the usefulness of many complaints in this respect is constrained by the confidentiality of conciliated agreements.

Disability standards and voluntary action plans

Disability standards and voluntary action plans appear to have had some positive effects on awareness and attitudes. The Equal Opportunity Commission Victoria noted:

> … provisions relating to voluntary action plans and disability standards … have encouraged a greater level of attention, communication and consultation in relation to disability discrimination issues than would otherwise have occurred. (sub. 129, p. ii)

The Australian Building Codes Board (sub. 153), the National Catholic Education Commission (sub. 86) and the Association of Independent Schools of South Australia (sub. 135) expressed similar views.

However, unless standards are widely available during their development, the educative potential of the process is limited. Bruce L. Young-Smith commented:

> During the development of the current [education] standards, draft copies … were difficult to obtain … Such an important document/process should be available to the public to enable valuable discussion by the community. (sub. 80, p. 4)

Moreover, the real benefit of standards—in terms of creating systemic change and certainty (chapter 12) and awareness raising—comes from their introduction. The

time taken to develop standards, along with the fact that only one (the transport standard) has been completed, has therefore severely limited their overall impact.

DRAFT FINDING 7.5

The process of developing and implementing disability standards appears to have had a positive impact on promoting recognition and awareness in some sectors, but the overall educative impact of disability standards has been limited because only one has been completed to date.

In relation to voluntary action plans, the Equal Opportunity Commission Victoria argued that the number lodged 'illustrates that some service providers have turned their attention to the needs and rights of people with disabilities' (sub. 129, p. 10). Disability Rights Victoria argued that 'benefits are most evident in [the] public sector where implementation process has done more to raise awareness about the DDA and its intent than any other process' (sub. 95, p. 4).

Nonetheless, inquiry participants also expressed concerns about the overall impact of voluntary action plans, especially the low number of plans lodged by business organisations (see chapter 12). This low number would have moderated the overall educative effect of action plans. Disability Action Inc. suggested that action plans 'can, and in some instances do delay the removal of discriminatory practices and attitudes' (sub. 43, p. 3). This comment appears to reflect concerns that 'paper compliance' will replace real change. Further, because action plans are voluntary and do not apply industry wide, the extent to which they can increase awareness on a large scale is limited relative to the effectiveness of disability standards.

DRAFT FINDING 7.6

Voluntary action plans have raised awareness but their overall impact has been limited by the relatively small number that have been lodged.

Guidelines and advisory notes

Guidelines and advisory notes can have many awareness raising benefits. Carers Australia stated that they 'perform an educative role and clearly set out expectations to eliminate discrimination' (sub. 32, p. 4). Industry appears to have found guidelines and advisory notes useful sources of information, although there has been some issue about how they apply in practice (see chapter 12; appendix D). The Insurance and Financial Services Association, for example, welcomed the life insurance and superannuation guidelines as providing clear guidance on the types of information that industry could rely on in making underwriting decisions (see appendix D). Innes (2000b) noted that these guidelines received about 60 hits per

month on the HREOC website, although, although the number of hits does not indicate who was using guidelines or how useful users found them. Although guidelines and advisory notes can have similar content, guidelines might have a greater potential impact because they are recognised in the DDA (see chapter 12).

DRAFT FINDING 7.7

Guidelines and, to a lesser extent, advisory notes appear to have raised awareness of disability issues and Disability Discrimination Act 1992 *requirements.*

An overall assessment of effectiveness

It is impossible to quantify the effectiveness of the DDA in promoting community recognition and acceptance. Even a qualitative assessment is difficult, given the conflicting views of inquiry participants, as well as problems such as limited information, the need to try to isolate the DDA's impact from that of other influences, and the relatively short period of time for which the DDA has operated.

The DDA does appear, however, to have made some contribution to improved community awareness and attitudes towards people with disabilities. HREOC's website appears to be a particularly important and highly accessed source of information. HREOC's general research and public inquiries also appear to have made contributions, as have disability standards and voluntary action plans, although their overall effect has been limited. The impact of complaints appears to have been more variable, and constrained somewhat by the confidentiality of conciliated agreements.

Awareness of the DDA appears low in some sectors, suggesting there is scope to improve the way in which information is disseminated, such as through HREOC's links with other organisations. Notwithstanding the scope for improvement, outcomes so far appear to have been reasonably effective, given resource constraints and the relatively short period for which the DDA has operated.

DRAFT FINDING 7.8

The Disability Discrimination Act 1992 *appears to have contributed to improvements in community awareness of disability issues and attitudes towards people with disabilities, but there is limited awareness of the Act itself. There is scope to improve awareness of the Act further.*

7.4 Improvements to the current approach?

The difficulties of assessing the DDA's effectiveness also make it difficult to identify areas for improvement. Nonetheless, a number of inquiry participants raised the need for improved education by HREOC as a way of improving community awareness and attitudes (although some, including Disability Action Inc. (sub. 43) and Blind Citizens Australia (sub. 72), also cautioned against HREOC's education role diverting attention from other work, such as complaints). Ways of improving education were suggested, ranging from general awareness campaigns to programs targeted at particular groups or types of disability (box 7.2). Whatever approach is taken needs to recognise that:

- it is inherently difficult to achieve the object of promoting community recognition and acceptance, particularly in short timeframes
- gaps are likely to remain, regardless of the appropriateness of the options chosen, and how effectively these are implemented
- resources significantly affect what can be done and what results can be expected
- awareness raising must be considered in a broader context, specifically the extent to which this object should take precedence over, and resources from, other priorities, such as complaint handling.

General public awareness campaign

Many inquiry participants supported the use of a general public awareness and education campaign (box 7.2). Public awareness campaigns using mass media can provide many benefits. In particular, they potentially reach a large and broad audience. As Henderson (1991) noted, these campaigns can also influence the behaviour of individuals by creating a favourable climate of opinion in the community. Such campaigns appear to have had beneficial impacts on attitudes and behaviour in many areas, such as drink driving and smoking (see appendix H).

Lessons from successful campaigns suggest they must be well resourced and ongoing, involve extensive research and evaluation, and be one part of a much broader approach (see appendix H). Advertising campaigns do not tend to change attitudes, but they do tend to increase awareness and the level of information, help the formation of beliefs, and sensitise the audience to other forms of communication. They appear best suited to conveying particular types of information, such as specific messages with specific implications for behaviour.

Box 7.2 **Inquiry participants' views on improving education**

Comments on a public awareness campaign included:

> More publicity promoting the dignified treatment of the disabled and the public's responsibility within the Disability Discrimination Act not only legally but morally is needed. Campaigns such as those … that educate on the issues of drug, alcohol abuse and driver responsibility are prime examples of … ongoing public education designed to alter unacceptable social behaviour. This same type of awareness campaign could be initiated to overcome the social issues faced by the disabled. (Souraya Bramston, sub. 33, p. 2)
>
> … a real push in mental health education in the public and in the media would help alleviate discrimination towards mental health … It is this type of education, in schools, public, and in the media, that … should be adopted … (Arafmi Hunter, sub. 36, p. 7)
>
> … perhaps it is timely to conduct another community information and education campaign. (Mental Health Council of Australia, sub. 150, p. 19)

Comments on strategies targeting particular groups included:

> …[is it possible to] incorporate an educational unit within the school system that would teach and promote tolerance, empathy, justice and consideration for all the many diverse communities within Australia including the disabled … (Souraya Bramston, sub. 33, p. 2)
>
> …we recommend the government provide more resources for community education … with a particular emphasis on … employers with less than 20 staff. (Job Watch, sub. 90, p. 2)
>
> Training and awareness raising … could … fruitfully occur in schools, neighbourhood centres and other venues where information is shared with members of the community. (Housing Connection NSW, sub. 161, p. 5)

Comments on accessible information included:

> … HREOC … [should] develop concrete and relevant multilingual information and resources about disability, rights and the DDA … provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against. (National Ethnic Disability Alliance, sub. 114, pp. 6, 7)
>
> … A plain English booklet on the DDA should be distributed through Centrelink and provided directly to clients … Needs to be clear, concise, user friendly and available in a variety of formats eg. talking books, Braille and through a variety of outlets eg. libraries, local governments, service providers etc. (Mansfield community forum, sub. 202, p. 1)

Comments on the type of information needed included:

> … [there is a need for] awareness/education of where to find skilled employees with disabilities … (Recruitment and Consulting Services Association, sub. 29, p. 2)
>
> … community education … could cover raising awareness of invisible disabilities, and the impact of disability on families and carers. In addition to ensuring people are aware of their obligations to all groups under the DDA, education could look at flexible approaches to inclusion … (Disability Coalition, sub. 67, p. 3)
>
> … [there is] a need for improved information … regarding the differences between the DDA and relevant State or Territory legislation. (Equal Opportunity Commission Victoria, sub. 129, p. 36)
>
> … in Victoria, HREOC does not have a high profile … The function and work of HREOC must be publicised extensively so that there is a nationwide understanding of its existence, purpose and accessibility. (Job Watch, sub. 215, p. 2)

An advertising campaign by HREOC could focus on increasing awareness of the DDA and/or changing attitudes. However, experience suggests that major public education campaigns in this area do not necessarily provide the desired results. HREOC's 1994 campaign and US attempts to promote awareness had relatively poor results (see appendix H). Similarly, there appears to be significant prejudice in Australia against people with mental illness, despite large scale campaigns conducted under the National Mental Health Strategy. This prejudice might reflect unrealistic expectations and the fact that it takes time to observe changes, but it might also reflect the inherent difficulty of raising awareness in this area. The South Australian Equal Opportunity Commission noted that many messages relating to disability issues may not be amenable to mass media public education campaigns because they are too complex (sub. 178) (see appendix H).

The use of large scale advertising campaigns for disability issues might best be reserved for conveying messages that are relatively clear and simple, and/or focus on a particular issue. If significant changes are made to the DDA as a result of the recommendations of this inquiry, then a one-off campaign by HREOC to publicise these changes might be warranted, for example.

There might also be benefits from undertaking campaigns to address specific issues, such as mental illness, but HREOC should not necessarily be responsible for all disability related campaigns (see appendix H). Mental illness, for example, might be better addressed directly by other organisations under the National Mental Health Strategy (HREOC, sub. 219).

Targeting specific groups

Several inquiry participants suggested that awareness strategies be targeted to specific groups, including employers, the media and schools (box 7.2). This type of approach can have several benefits. It has had positive impacts in the past on attitudes and behaviour in areas such as health promotion, as well as in relation to people with disabilities (see appendix H). It can be tailored to deliver information that is most relevant to these groups, using the most appropriate medium (such as the Internet, brochures and training materials). If carefully targeted, it can also be less resource intensive for HREOC than a major advertising campaign. As with other approaches, it could be undertaken by HREOC in conjunction with other groups, including State and Territory anti-discrimination bodies.

Professional development

Some inquiry participants thought HREOC should take a more active approach to targeting professional development of groups such as the media, teachers and architects (see, for example, Marrickville Council, sub. 157; Mansfield community forum, sub. 202). HREOC could take one or more of three broad approaches to influencing professional development: (1) directly providing education, (2) in conjunction with educators and/or professional associations, developing course material, and (3) informally raising awareness of DDA requirements by publicising them to educators (or making *ad hoc* presentations to classes).

HREOC does not generally favour having direct involvement in professional education, arguing that it lacks the resources and authority to conduct education for professionals (sub. 219). The Productivity Commission agrees. However, a more informal education role for HREOC—such as running occasional short courses or seminars—might be appropriate in some cases. This could be the case, for example, where other organisations do not have sufficient knowledge of the subject matter to conduct their own courses. This strategy might also involve trying to develop the expertise of other organisations so they can eventually take on the education role. This type of approach, targeted at sectors in which awareness has been identified as a particular problem, could also be a valuable way of informing and influencing those already in the workforce.

HREOC could also use its expertise and understanding of human rights issues to encourage educators or professional associations to develop appropriate curricula. In a limited number of cases (those considered to be of particular importance or need), joint production of course material may be warranted, resources permitting.

DRAFT FINDING 7.9

The Human Rights and Equal Opportunity Commission has a role in raising the awareness of the Disability Discrimination Act 1992 *among professional associations and educators.*

Schools

Several inquiry participants suggested focusing on schools (box 7.2). There are many ways of undertaking such a focus, not all of which would involve HREOC. A dedicated schools resource, first developed in 1997 and most recently updated in 2003, has been prepared for race discrimination issues. Consideration could be given to developing a similar dedicated resource for disability issues.

This type of material, which otherwise might not be included in school curricula, has the potential to provide several benefits. It could increase students' understanding of, and improve attitudes towards, people with disabilities. Student could then take those improved attitudes into other areas of life, both in the short and long term. The resource could also encourage schools to adopt other community-specific strategies related to disability issues, and help to improve the experience of inclusion for school communities. Such a resource would be particularly valuable given the increasing inclusion of students with disabilities in mainstream schools and the implementation of the education disability standard.

DRAFT FINDING 7.10

The Human Rights and Equal Opportunity Commission has a role in developing a schools resource specifically addressing disability issues, along the lines of that developed for race discrimination issues.

Employers

The Productivity Commission considers educating employers to be a priority, given perceived continuing issues in workplace awareness and attitudes. Such targeting would be particularly important if employer obligations under the DDA were to change as a result of this inquiry, such as through the introduction of a positive duty on employers (see chapter 13). Approaches to informing employers about legislative obligations in other areas, such as occupational health and safety, might help to raise awareness of, and compliance with, DDA obligations. Lessons might also be drawn from HREOC's earlier experience in promoting the DDA to employers.

Availability of information

Targeting some groups requires particularly considering how information is presented and disseminated. HREOC already provides information in a variety of formats and community languages to try to make information accessible to people with particular disabilities, and people with disabilities who are from non-English speaking backgrounds. Despite this, some participants commented on the need for more information and resources to be made available in accessible forms, including in community languages and 'plain English' (box 7.2).

The accessibility of information also depends on how the information is distributed. HREOC's website has been an important source of information for many people, and it is one way of reaching those who are not part of formal disability networks. However, many people with disabilities (and other groups, particularly those in

rural areas) do not have access to the Internet so that medium alone cannot be relied on for information distribution.

The Mansfield Community Forum highlighted the importance of multiple distribution channels, suggesting Centrelink, libraries and local governments as possible outlets through which to distribute information (box 7.2). Fostering links with other organisations may also help to improve the effectiveness of information dissemination. Overall, the best approach to information distribution can be assessed only on a case-by-case basis, considering the benefits and costs, and factors such as the needs of particular groups and the extent to generic information can meet these needs.

DRAFT FINDING 7.11

The Human Rights and Equal Opportunity Commission's website has become an important way for people to access information. Due to limited Internet access among some groups, however, other means of distributing information remain important.

Research and information gathering

While most inquiry participants were concerned about the distribution of information, some suggested the need for further research in some areas. The Disability Council of NSW (sub. 64) and Joe Harrison (sub. 55) suggested more statistical data are needed. They argued that such data could form the basis of a state of the nation report that provides valuable information, stimulates public debate and enhances community awareness of disability. HREOC commented:

> … [it] is not itself in a position to conduct a 'state of the nation' audit but agrees that improved indicators of a range of disability issues would be highly useful to inform policy and program activity and to inform public and media discussion of disability. (sub. 219, p. 4)

A comprehensive integrated data source on people with disabilities is not available (see chapter 3), but there are a number of existing sources of data on people with disabilities (many of which have been drawn on in this report). As well as the annual reports and occasional research of HREOC, information sources include the Survey of Disability, Ageing and Carers (SDAC), the HILDA survey, the *Report on Government Services* (which includes a chapter on services for people with disabilities), and publications by the Australian Housing and Urban Research Institute.

The Productivity Commission considers that HREOC's research function does not extend to an ongoing role in collecting and publishing general disability-related

data. Rather, HREOC should continue to provide data within the context of its core duties, such as fulfilling its annual reporting requirements (by collecting and publishing complaints data) and undertaking specific research projects.

The Productivity Commission considers problems with existing data sources are best addressed by the relevant data collection agencies. It recognises the efforts of agencies such as the ABS to improve the quality and quantity of data on people with disabilities. In terms of general research, HREOC (2003d) indicated a desire to do further work in the psychiatric disability area. Access to justice is another area that requires research (see chapter 6). The Productivity Commission acknowledges that HREOC cannot deliver all the information and education needed to change community attitudes, given its resource constraints, but considers that its contribution is valuable.

Links with other organisations

The importance of cooperation and the development of links with other organisations was noted earlier. Some inquiry participants, including HREOC (sub. 143) and the Equal Opportunity Commission Victoria (sub. 129), highlighted the scope for, and desirability of, further cooperation with various organisations, in education and information provision.

HREOC also recognised:

> … possibilities for expanded cooperation with business, disability community organisations, local government, or other agencies in providing information on the DDA and its application and on related disability issues. HREOC is particularly interested in pursuing partnerships of this kind in recognition of limits on its own resources, expertise and ability to reach people with appropriate information (sub. 219, p. 29).

Benefits could be achieved by:

- helping to identify, and address, particular issues and the most appropriate ways of disseminating information in the respective States and Territories
- enhancing awareness of, and reducing confusion about, the federal and State systems
- reducing duplication, which may free up resources that can be used in other areas or to increase the scope of educational activities (improving the efficiency of overall resource use)
- enhancing the perceived strength of the message, by presenting a 'united front' on disability issues.

The effectiveness of this increased cooperation depends on its implementation.

ParaQuad Victoria (sub. 77) suggested HREOC encourage other government departments and non-government organisations to produce education and training materials. Similarly, the Physical Disability Council of Australia argued:

> … there's enough national and state based organisations to actually take on the role of educating people on their rights. There's advocacy organisations; there's the Disability Discrimination Legal Services … it's about time that the power was shared between some of those organisations so that it's not just HREOC's role. (trans., pp. 180–1)

The potential benefits from expanding cooperation include:

- consolidating knowledge and resources through cooperation, making the best use of the particular expertise of each group, and perhaps also reducing pressure on HREOC's resources and the duplication across organisations
- identifying the information needs of specific groups and allowing better distribution of information to them—for example, fostering further links with State and Territory governments, which may enhance access to disability groups formed by those governments (such as Victoria's regional access project groups)
- encouraging involvement by government departments and organisations that do not currently perceive such involvement as their responsibility
- creating a less adversarial environment for eliminating disability discrimination.

Enhancing links and thereby improving information dissemination is not easy. Leichhardt Council Disability Access Committee suggested HREOC may have 'a leadership role … to advise all levels of government and the community where discrimination is taking place' (sub. 75, p. 4), while Anti-Discrimination Commission Queensland noted the need for HREOC's current research and policy work to be done at the national level (sub. 119). Even so, the active involvement of other groups remains crucial.

DRAFT FINDING 7.12

There is potential for the Human Rights and Equal Opportunity Commission to expand cooperation with State and Territory anti-discrimination bodies and other organisations in promoting community recognition and acceptance of the rights of people with disabilities.

The Productivity Commission considers that further cooperation between HREOC and other organisations dealing with disability discrimination issues will help to identify areas of need in each region, reduce duplication and enhance awareness of, and reduce confusion about, the federal and State systems.

The Australian Council of Human Rights Agencies could pursue enhanced links with other anti-discrimination bodies (see chapter 11). The council could do so by becoming a clearing house for ideas, and providing a means for discussing research priorities/programs for disability discrimination issues and their funding.

7.5 Summing up—striking a balance

The DDA appears to have contributed to improving community awareness of disability issues and attitudes towards people with disabilities, so it has made some progress towards achieving its object of promoting community recognition and acceptance. The exact scope of its contribution is not known, given factors such as limited, largely anecdotal information available to measure the DDA's effectiveness and the relatively short period for which the DDA has operated. Uncertainty about the effectiveness of different approaches to promoting community awareness and acceptance also makes it difficult to suggest improvements, but there seems to be some scope to enhance the DDA's effectiveness in specific areas.

Improving ways in which to promote community recognition and acceptance is about striking a balance—between different possible strategies, different objectives, the roles of different organisations, and competing resources—in a context of HREOC's resources and incomplete information about the benefits of particular awareness raising approaches. Preliminary analysis suggests the most significant improvements to community recognition and acceptance of people with disabilities are likely to derive from HREOC:

- performing additional research into specific priority areas
- enhancing links and cooperation with other anti-discrimination organisations
- improving the targeting of its information provision, by:
  - expanding its use of the Internet to provide information
  - focusing on schools (particularly students), employers and other groups with responsibilities under the DDA.

A general, large scale mass media campaign does not appear justified at present, especially given the cost and uncertain benefits of such an approach, but a focused campaign to promote a particular issue—such as to publicise major changes to the DDA flowing from this inquiry—might be appropriate.

8 Competition and economic effects of the Disability Discrimination Act

This review of the *Disability Discrimination Act 1992* (DDA) derives from the Competition Principles Agreement (CPA) between the Australian, State and Territory governments (see chapter 1). Under the terms of that agreement, legislation should not restrict competition unless the benefits to society of that restriction outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

This chapter addresses the inquiry's terms of reference dealing with the competition and economic effects of the DDA. Particularly relevant are those terms of reference that require the Productivity Commission, in reporting on the appropriate arrangements for regulation, to account for:

- the social impacts in terms of costs and benefits that the legislation has on the community as a whole
- any parts of the legislation that restrict competition
- efficient regulatory administration
- compliance costs.

The purpose of this chapter, therefore, is to examine the nature of the ongoing costs and benefits generated by the DDA, and to suggest possible improvements to the operation of the DDA where competition or efficiency might be adversely affected. However, the DDA covers virtually all areas of economic and social life, and has the potential to produce myriad economic and competition effects. Many of these benefits are intangible or prospective, and evidence on costs is sparse. For these reasons, it is not feasible to carry out a comprehensive cost–benefit analysis of the DDA that would quantify an overall 'net economic benefit'.

This chapter focuses on examples of the DDA's economic effects and on the likelihood of these effects occurring. It contains a combination of quantitative and qualitative evidence that is somewhat fragmented and incomplete. In many instances, information is lacking to reach even tentative conclusions about the economic impact of the DDA.

Following a brief description of the broad costs and benefits of disability discrimination legislation (section 8.1), the economic impact of the DDA is examined in more detail at three different levels. First, the DDA's implications for the operation of individual organisations is investigated (section 8.2). Second, some of the DDA's potential economywide effects are discussed—for example the implications for output and income of more people with disabilities being employed (section 8.3). Third, how the costs and benefits of the DDA are distributed among different groups within society is considered, along with the implications for funding of anti-discrimination measures (section 8.4). The final section summarises the competition effects of the DDA (section 8.5).

8.1 Some economic benefits and costs

As discussed in chapter 2, the DDA embodies a social model of disability. According to that model, disability stems from physical, emotional and psychological barriers erected by society, that exclude people with disabilities from enjoying the same rights as other citizens. The nature of these barriers suggests that, if successful, disability discrimination legislation will generate intangible as well as tangible benefits. Both types of benefit are examined below, followed by a brief overview of the costs associated with disability discrimination policies.

Benefits

The aim of the DDA is to reduce disability discrimination, not reduce disability *per se*. Nonetheless, the DDA can alleviate the costs that disability imposes on society. These costs are significant, as shown by a recent study of the costs of schizophrenia in Australia (Access Economics 2002). That study estimated that the cost of schizophrenia was $1.85 billion (in real dollars) in 2001. This figure would be greatly multiplied if the costs of all disabilities were added together.

Most of the costs associated with disability are not amenable to reduction via anti-discrimination policies. For example, the cost estimate for schizophrenia, mentioned above, includes direct health costs estimated at $653 million. But there are other costs that are likely to stem in part from disability discrimination. Access Economics estimated the lost earnings of persons who could not work because they had to care for people with schizophrenia at $83 million in 2001. Assuming that discrimination is part of the reason that people with schizophrenia are unemployed, any progress achieved by the DDA in that area would be reflected in an increase in earnings of both people with disabilities and their carers.

The major benefits from disability discrimination legislation arise through the removal of barriers that restrict the range of education, work, consumption, leisure and socialising opportunities available to a person with a disability. Direct and indirect discrimination in several areas of society means that people with disabilities might not be able to translate whatever natural abilities they have into marketable skills and income earning opportunities. Restrictions on access to school, university, the workplace, the sports field, the theatre or other social networks combine to lower the income and consumption of people with disabilities below that achievable by persons with identical capabilities but without a disability.

An inaccessible physical environment also prevents people with disabilities from making consumption decisions that would give them the most satisfaction. A person who has a disability is limited in the range of goods and services that they can consume, because they lack access to some products. In some cases, making a product accessible to a person with any type of disability poses insurmountable technical challenges. In many more cases, however, technical solutions are available that would make the product accessible at no or little extra cost. By mandating such adjustments, the DDA can broaden the consumption options of people with disabilities, and thus increase the level of satisfaction and fulfilment that they derive from goods and services.

The range of goods and services from which a person with a disability can choose is also constrained by the additional costs that disability imposes. Where a person without a disability may choose to spend more on, say, entertainment than transport, a person with a disability with the same income and preferences may have no option but to spend more on transport, for example, because they have to use taxis rather than public transport. By lowering some additional costs of disability, anti-discrimination legislation such as the DDA can assist people with disabilities in expressing their true preferences and obtaining the maximum rewards from their consumption (including consumption of leisure) decisions.

Alongside the tangible benefits of the DDA are significant intangible benefits—for example, the sense of worth and equality that a reduction in discrimination can give people with disabilities (see chapter 7 and appendix H). SANE Australia noted:

> Research … reveals that stigma and discrimination—being treated as less worthy than other members of the community—is a primary concern of people with a mental illness, contributing to low self-esteem … (sub. 62, p. 1)

One inquiry participant remarked that society as a whole could also benefit in non-measurable ways from reductions in discrimination:

> In our view, the major benefit of legislation such as the DDA is its contribution to elevating not only the dignity of individuals but, perhaps more importantly, the quality of our society. (Queensland Anti-Discrimination Commission, sub. 119, p. 4)

In summary, the tangible and intangible benefits of the DDA allow people with disabilities to lead richer and more fulfilling lives, psychologically, socially and materially. Blind Citizens Australia noted:

> The DDA has literally increased the visibility of people with disabilities. Since the introduction of the DDA, increasing accessibility has enabled people with disabilities to become more active as employees, consumers and as social, political and cultural participants in the community. (sub. 72, p. 11)

This is likely to translate into benefits for society also, as the DDA helps to free up the potential of a significant proportion of the population. At the firm level, for example, the DDA should improve the availability of labour and the matching of skills to jobs (see below).

Costs

The benefits of the DDA come at a cost in terms of community resources. Choices need to be made, therefore, about the tradeoffs between policies aimed at combating disability discrimination and other policies pursuing other desirable societal objectives. Society faces a tradeoff, for example, between expenditure on preventing disability from occurring (for example, through medical research and workplace accident prevention) and expenditure on accommodating disability that does occur.

The 'unjustifiable hardship' provision and some exemptions contained in the DDA are an acknowledgment of these tradeoffs. It would be counterproductive to, for example, impose disability adjustment costs on an organisation that would leave it unable to address workplace safety issues adequately or drive it out of business.

Legislation or regulation that imposes duties on organisations and individuals can sometimes generate unexpected costs. The DDA is no exception, with many of its provisions and associated regulations having the potential to generate costs that are wider than at first thought. The following are examples in the areas of transport access, employment and education:

- Requiring buses to be accessible to people with disabilities could mean a reduction in vehicle capacity and, thus, an increase in operating costs. This effect, in turn, could lead to fewer public buses, a decrease in public transport patronage and/or an increase in road congestion.
- Requiring employers to make costly adjustments to the workplace to accommodate the needs of employees with disabilities could result in reductions in the overall level of employment in the economy.

- Requiring educational institutions to include all children with disabilities could lead to a reduction of educational outcomes for other children (although, in many instances, there will be beneficial effects as well).

By imposing costs, legislation can lead to a reallocation of society's scarce resources in ways that decrease economic efficiency—for example, by restricting competition. A long-standing critic of anti-discrimination legislation, Richard Epstein, adopts the view that anti-discrimination legislation cannot but lead to inefficiencies and to a waste of resources (box 8.1). However, Epstein's view largely ignores the intangible benefits that this type of legislation can produce, mentioned earlier. If any efficiency costs created by the DDA are outweighed by the sum of the community benefits (including intangible benefits) that arise from the Act, then the legislation is welfare enhancing and satisfies the first part of the CPA test applied in legislative reviews—that is, that the benefits outweigh the costs. Nonetheless, Epstein's criticism is relevant to the second objective of such reviews, which is to explore whether the benefits of the legislation could be generated at a lower cost to the economy.

Box 8.1 **Epstein's view on the economic effects of disability discrimination legislation**

Epstein argued that the requirement that all firms be prepared to accommodate all types of disability up to the point of unjustifiable hardship 'requires social expenditures that could be avoided if the firm refused to hire the handicapped worker' (1992, p. 491). The accommodation duty of firms, he contended, represents a waste of resources compared with the situation that would prevail under unconstrained employment markets. In the absence of disability discrimination legislation, he argued, there would be division of labour and firm specialisation, whereby people with particular disabilities would work in industries that could accommodate them relatively cheaply (and voluntarily). Firms would be able to reap the economies of scale that would arise from making one adjustment benefiting many employees with disabilities. In Epstein's view, this would represent a more efficient allocation of society's scarce resources. However, a purely market driven solution such as recommended by Epstein would result in occupational segregation, which is commonly regarded as a form of discrimination (see appendix A). Such a solution would be difficult to countenance, therefore, as part of legislation that aims to reduce discrimination.

Source: Epstein 1992.

8.2 Organisation-level effects

The DDA places obligations on organisations, many of which can be expected to give rise to compliance costs. An example is the obligation for employers to make

adjustments in response to the needs of their workers who have a disability. The DDA may also produce benefits for organisations—for example, by expanding their customer base through improved access, and heightening customer recognition of their 'disability friendly' standing.

Except for the education sector, the Productivity Commission has received little qualitative or quantitative evidence from individual businesses and business organisations on the possible costs and benefits of complying with the DDA. The Commission would welcome further information on both the costs and the benefits that the DDA might have generated for employers and for goods and services providers.

The OECD (2001a) distinguishes three types of cost arising from organisations having to comply with government regulations:

- administrative compliance costs (for example, filling out forms or responding to government information requests)
- capital expenditure (for example, making the investments required for compliance with regulations)
- indirect compliance costs (for example, being hampered in attempting to innovate, operate efficiently and adjust to changes over time).

It could be argued that all three types of cost arise from the operation of the DDA. The first type might arise as a result of, for example, the design costs of meeting standards or the need to produce and update voluntary action plans. The second and third types of cost may arise as a result of the duty to accommodate the needs of employees, customers or students with disabilities.

The balance between the three cost types might differ depending on whether an organisation is complying with its obligations as an employer, a goods and services provider, or an educator. It will also depend on whether the organisation is covered by disability standards. For organisations operating under a set of standards, capital costs might be expected to dominate other compliance costs. Given their importance, and their widespread applicability within an industry, compliance costs associated with standards have received the most attention.

The following section examines the issue of compliance costs in general. It then considers the special case of disability standards.

Compliance costs

Administrative compliance costs created by the DDA can be expected to vary greatly among organisations. Except for transport (where disability standards are already in operation), compliance with the DDA is viewed as largely voluntary, which means that some organisations incur no costs. Organisations that have committed to implementing a voluntary action plan face some compliance costs. Finally, those organisations that are the target of a complaint (and possibly court action) might face high monetary and non-monetary compliance costs.[1]

In the absence of comprehensive Australian data, overseas evidence suggests that the costs of adjustments imposed by disability discrimination legislation (although they vary significantly) are often low or non-existent. Figures provided by Meager et al. (2002) on the average initial costs of adjustments carried out by UK businesses ranged from zero for many adjustments to £12 167 ($33 518) for lifts, hoists or evacuation chairs.[2] Average ongoing costs ranged from zero to £589 ($1623) per year (excluding website maintenance). Meager et al.'s results are discussed further in section 8.3. Figures on the costs of workplace adjustments in the United States (see appendix A) similarly reveal that many adjustments are costless in monetary terms.

A major problem for business is that compliance costs of all types can be unpredictable and they are additive (that is, many small compliance costs add up to material impacts on business efficiency and viability). For an employer, the costs might be relatively minor until a person with a disability applies for a job. If that person is hired and does not have any special needs, then compliance costs remain low. If workplace adjustments are required, then larger compliance costs might arise, including time spent searching for a technical solution, the purchase of equipment or software, the restructure of work processes and/or applying for government funding. If the job candidate with a disability is rejected and lodges a disability discrimination complaint, then compliance costs could increase significantly as a result of ensuing legal action.

While an organisation can 'insure', up to a point, against a disability discrimination complaint by lodging a voluntary disability action plan with HREOC and taking basic steps to improve accessibility generally, it cannot cancel that risk altogether

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1 These costs include legal costs incurred by the organisation in defending itself against a complaint. They exclude any damages awarded against the organisation as these are, by definition, a result of courts finding non-compliance with the DDA.

2 Foreign exchange conversion at the average 2001-02 British pound sterling–Australian dollar exchange rate.

(see chapter 4). Organisations typically cannot predict when a complaint might be made and what its costs implications might be. As described by The Allen Consulting Group:

> … the DDA does not prescribe particular compliance approaches and compliance is only identified in the negative once a complaint has successfully been made … the DDA is passive legislation, in that organisations may believe that they are compliant with the DDA, but can only ever be sure when challenged by parties seeking to rely on the DDA. (The Allen Consulting Group 2003a, pp. 24–5)

This uncertainty is a problem for businesses. In commenting on legal decisions on indirect disability discrimination, the Australian Chamber of Commerce and Industry stated:

> How could an employer have predicted the results when the courts themselves were thoroughly divided? How can employers quickly and accurately deal with such issues when the tribunals and courts themselves have so much difficulty in resolving them? (ACCI 2000, p. 3)

Apart from those compliance costs that arise when an organisation has to defend itself against a complaint, uncertainty regarding compliance is likely to increase the organisation's ongoing costs. Some organisations, for example, might retain specialised legal personnel 'just in case' (EOCV, sub. 129). This regulatory burden is likely to be less onerous for large organisations with permanent legal departments than for small to medium sized businesses who lack such specialist skills.

The case of disability standards

In theory, the regulatory burden imposed on individual organisations by clearly defined and adequately enforced disability standards is both more precise and more predictable than in the case of complaints. Transport standards, for example, set identical requirements and a detailed implementation timetable for all organisations providing public rail passenger services. In the education sector, schools, TAFEs and universities will be able to refer to the detailed requirements in the proposed education standards, and to the standards' guidance notes, to check whether they are compliant. Through the standards, therefore, DDA compliance costs could become another, predictable 'cost of doing business', much like the costs of complying with environmental safeguards and occupational health and safety regulations.

If their role is merely to clarify what is required under the DDA, standards should not impose significant 'additional' costs on organisations. If such costs nonetheless arose as a result of the standards, then it might be concluded that organisations were not previously complying with the DDA. As illustrated by the draft education standards, organisations often have difficulty in determining the extent of their

duties under the DDA, and the consultations leading up to the standards can help clarify these duties (box 8.2). Thus, by translating an organisation's general duties under the DDA into specific requirements, standards might simply bring forward costs that would have arisen anyway in response to complaints. In some cases, standards might lower compliance costs, by removing the need for litigation, compensation and the retro-fitting of equipment.

There are circumstances, however, when standards might increase the costs of complying with the DDA. First, having to incur costs earlier than would have been the case in the absence of the standards can increase an organisation's costs. The accelerated replacement of assets under the transport standards is an example. Implementation of these standards requires providers to meet accessibility targets at regular intervals over the next 20 or 30 years. While a set timetable for implementation offers providers considerable certainty about the meaning of DDA compliance over time, it also means that providers might no longer be able to amortise an existing asset over its entire economic life. However, the transport standards provide for the progressive achievement of accessibility targets over a period of up to 30 years. This extended time scale was adopted to ensure existing providers can minimise the disruption and costs caused by the standards. Moreover, the definition of unjustifiable hardship in the transport standards was significantly expanded and clarified—relative to that found in the DDA—in recognition of the costs that a shorter timetable and higher requirements would impose on providers (HREOC, sub. 219). In addition, transport providers can seek temporary exemptions from the standards from HREOC.

Standards could also impose unnecessary costs if they forced large numbers of organisations and individuals to make adjustments too soon or that are not required at all. This would create 'deadweight losses' in the economy, as resources would be wasted on producing goods and services that hold little value for society. However, there are a number of safeguards in the DDA and its standards—such as unjustifiable hardship, exemptions and the Regulation Impact Statement process—that minimise the possibility of such losses arising.

Box 8.2 **Compliance with draft education standards**

As part of the Regulation Impact Statement (RIS) for the draft education standards, education providers in all States and Territories were asked to provide financial estimates of the costs of complying with the proposed standards. Estimated compliance costs differed considerably across States and Territories, and across areas of activity. Part of the divergence lay in each jurisdiction's interpretation of the requirements that the standards would impose on its education sectors. Cost differences also arose as a result of some jurisdictions attributing some costs to the DDA, while others attributed the same costs to the standards.

In the assessment of The Allen Consulting Group:

> The variance in costs [of compliance] estimated by jurisdictions indicate that there is significant difference in current practice, and difference in what jurisdictions consider is compliance with the DDA. (2003, p. 49)

Examining the costs estimates provided by each jurisdiction, The Allen Consulting Group concluded that the only quantifiable additional costs attributable to standards were professional development costs, designed to make education staff aware of their obligations under the standards. Among the costs that The Allen Consulting Group attributed to the DDA rather than to the standards were enrolment costs (for example, consultation with the student's family about the student's needs).

Based on the costs estimates provided by the different education jurisdictions in the RIS, and on The Allen Consulting Group's estimates of the incremental costs of standards, the Productivity Commission estimated the overall compliance costs associated with the education provisions of the DDA alone, without education standards. The lowest possible estimate for the whole of Australia was $152.6 million, and the highest was $2.6 billion. This represented 0.4–7.6 per cent of total government expenditure on education in 2000-01. The broad range of estimates illustrates the difficulty in measuring precisely the costs of compliance with anti-discrimination legislation that is enforced only through complaints. By contrast, the additional costs of complying with the standards were more certain; The Allen Consulting Group estimated them at $148.9 million (one-off) in total for the education sector.

By comparison, the RIS for the transport standards estimated the average gross cost of implementing the standards at $187.2 million per year over 20 years. Accounting for indirect benefits of the standards (for example, reduced government spending on home and community care for people with disabilities) led to a prediction that the standards would result in a net cost of $119.6 million (low benefits scenario) or a net surplus of $76.2 million (high benefits scenario) annually.

Sources: The Allen Consulting Group 2003a; SCRCSSP 2003; Attorney-General's Department 1999.

REQUEST FOR INFORMATION

The Productivity Commission seeks information on the costs and benefits to organisations of complying with the provisions of the Disability Discrimination Act 1992 *and disability standards. The Commission would welcome information on the nature of those costs and benefits, and on their magnitude.*

DRAFT FINDING 8.1

Available evidence suggests that the costs of complying with the Disability Discrimination Act 1992 *and disability standards vary widely across organisations. For many organisations, these costs could be quite small.*

DRAFT FINDING 8.2

The costs of complying with the Disability Discrimination Act 1992 *can be unpredictable in the case of complaints-based enforcement. Disability standards can help clarify the costs of complying with the Act.*

8.3 Economy wide impact of the Disability Discrimination Act

A large number of inquiry participants argued that the operation of the DDA produces significant economywide benefits, in terms of both the amount of goods and services that the economy can produce (the supply side) and the demand for these goods and services (the demand side). The Office of the Director of Equal Opportunity in Public Employment stated:

> The reduction in unlawful discrimination can aid [gross national product] 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. (sub. 172, p. 3)

These claims are examined in turn below.

Supply-side effects

The output of an economy depends on the quantity and quality of factors of production such as labour. All else being equal, an increase in the number of workers will result in greater output (a 'quantity' effect). Output also increases when labour productivity rises—as a result of improvements in the quality of labour

(from greater education and skill levels) or better matching of jobs and job seekers, for example.

In theory, by reducing discrimination, the DDA could lead to increases in the quantity and quality of labour available to the Australian economy. These increases could result in greater productivity and output. The potential supply-side effects of reducing disability discrimination can be direct and indirect. Direct effects result from reduced discrimination in employment. Indirect effects result from reduced discrimination in other areas, such as education and access to goods and services. Other than having direct and indirect effects, reduced discrimination can also have wider effects, such as contributing to social capital. However, as noted in chapter 5, it is difficult to estimate the effectiveness of the DDA in reducing discrimination. In the following sections, therefore, it is often difficult to attribute particular economic impacts to the DDA with any certainty.

Direct effects

Quantitative estimates presented in appendix A suggest that employed workers with disabilities received slightly lower hourly wages in 2001 than those of their counterparts with identical characteristics but no disability. While care was taken to ensure that these estimates are statistically independent of any differences in productivity-related characteristics, it is difficult to ascertain the extent to which this 'unexplained' gap in earnings is due to wage discrimination.

Although the hourly wage differential between workers with and without a disability is low in absolute terms, the wage discrimination component of that differential might nonetheless have discouraged some workers with disabilities from entering the labour force (see appendixes A and G). The fact that the labour of these discouraged workers remained unused in 2001 means that overall output, income and employment in Australia were below potential in that year, other factors being equal. Nonetheless, it is possible that wage discrimination and thus the number of discouraged workers would have been greater without the DDA. If this were true, then the DDA could be regarded has having caused greater levels of output, income and employment than would have been achieved in its absence.

A larger employment effect may be expected from a successful reduction in disability discrimination encountered at the hiring and firing stages of the employment relationship, rather than in relation to wages. Results from Wilkins (2003), cited in appendix A, show that having a disability significantly reduced the employment probability of both men and women in 1998. To the extent that this probability effect was due to disability discrimination at the recruitment and lay-off stages, reducing discrimination would add to the productive capacity of the

economy. In appendixes A and G, the Productivity Commission estimates that the probability of being employed increased from 1993 to 1998 for men with disabilities and decreased for women with disabilities. However, it is not possible to isolate the role of the DDA in either of these changes.

A number of inquiry participants argued that a 'quantity of labour' effect is, indeed, one of the benefits of the DDA, especially in the context of an ageing population (Disability Action Inc., sub. 43; EOCV, sub. 129). Some inquiry participants suggested that the operation of the DDA has increased the quality of labour too, leading to increases in the amount of human capital available to the Australian economy. Some argued that the prohibition of discrimination and the duty to make adjustments expands the range of skills from which employers can choose (HREOC, sub. 143; EOCV, sub. 129). Greater availability of skills to employers might lead to increases in productivity through, for example, better matching between jobs and individuals (Office of the Director of Equal Opportunity in Public Employment, sub. 172).

Another way for the DDA's employment provisions to increase human capital is through greater education incentives. If any wage and employment discrimination decrease as a result of the DDA's operation, then returns to education will increase for people with disabilities, who will come to regard education as a more worthwhile expenditure of time, effort and money.

Verkerke (2002) argued, in the context of the *Americans with Disabilities Act 1990*, that the duty of employers to accommodate workers' disabilities leads to greater labour market efficiency when workers have 'hidden' disabilities. In the absence of anti-discrimination legislation, a worker whose disability is detected by an employer could be fired by that employer, and then possibly hired by another employer with less information. The cycle would then repeat itself, with no improvements—and possibly even a deterioration—in the worker's productivity. Labour market inefficiencies such as 'mismatching', 'churning' and 'scarring' would accumulate.[3] By requiring the initial employer to accommodate a worker's disabilities, the Americans with Disabilities Act can put an end to such inefficiencies (box 8.3).

[3] 'Mismatching' occurs when jobs are not assigned to those workers who are best suited to them. 'Churning' occurs when an employee is laid off and moves from job to job, without the quality of the job match increasing. 'Scarring' occurs when employers rely on readily observable signals such as a blemished work history or lack of employment references to refuse work to someone whom they could employ profitably. Scarring is related to statistical discrimination (see appendix A).

Box 8.3 **The labour market efficiency of the Americans with Disabilities Act**

Verkerke argues, because many disabilities are hidden, that their effects on productivity can be observed only after the employee has been recruited. In these circumstances, employees and past employers have more information than has a new (potential) employer about the productivity effects of the disability. According to Verkerke, this information asymmetry would result in market failure and inefficiency without the reasonable accommodation provision of the Americans with Disabilities Act. The discovery that a hidden disability impairs productivity would lead to employees being dismissed. The process of hiring–discovery–firing would then repeat itself, leading to labour market mismatching, churning and scarring, thus reducing efficiency, productivity and output.

In Verkerke's analysis, the duty of employers to accommodate workers' disabilities helps reduce the occurrence of mismatching, churning and scarring. Even though the disability increases employer costs relative to worker productivity, the employer must retain the worker and accommodate their needs. This avoids a repeat of the above process, whereby each new employer wastes resources on screening, recruiting, training and firing the employee. Mandated accommodation avoids scarring of the employee and the risk of chronic unemployment of persons who could be employed productively.

Source: Verkerke 2002.

It is likely that Australian employers are sometimes confronted with the discovery of hidden disabilities in their employees. This likelihood is apparent from evidence presented by inquiry participants that people with mental illnesses often do not disclose their disability to their employers for fear of being discriminated against (Mental Health Council of Australia, sub. 150; Advocacy Tasmania, sub. 130; Mental Health Coordinating Council, sub. 84 and trans., p. 1460).

Given the existence of hidden disabilities in Australia, and given the similarity between the employment provisions of the Americans with Disabilities Act and the DDA, it is likely that the unproductive churning of some workers with disabilities described by Verkerke would occur in the absence of the DDA. But it is difficult to establish whether, by preventing churning, the DDA has generated the labour market efficiency benefits suggested by Verkerke. It is true that the workers who might previously have been fired, but who must be retained under the DDA, are likely to be productive. However, there is no guarantee that the value of their output exceeds their cost to employers. These workers may be employed at a net cost to the employer if their productivity is low. For that situation to be socially desirable, the benefits to other employers (from avoiding hiring, training and firing costs) would need to be sufficiently high.

In summary, theory suggests ways in which a successful DDA that reduced levels of disability discrimination might lead to increases in the amount of employment, output and income. In principle, any reductions in wage and employment discrimination would result in more labour and more skills being available, and in a more efficient labour market. Under certain conditions, these effects would translate into a greater capacity to produce goods and services.

The DDA could also lead to a reduction in labour market efficiency if the duty to accommodate workers with a disability meant that employers had to retain workers who they might otherwise have dismissed because of low productivity. However, the safeguards contained in the DDA—the inherent requirements and unjustifiable hardship tests (see chapter 10)—are likely to moderate such inefficiencies.

It cannot be determined with certainty what the net impact of the employment provisions of the DDA on the supply side of the economy have been. In chapter 5, the Productivity Commission concludes that the DDA appears to have been relatively ineffective in eliminating disability discrimination in employment. This conclusion suggests that the potential supply-side benefits described in this section have not yet fully materialised.

Indirect effects

Changes induced by the DDA outside the labour market (for example, in education) have the potential to produce strong positive economic effects. If a reduction in discrimination in education allows better educational outcomes for students with disabilities (and if outcomes for students without a disability are not diminished), then favourable economic consequences should follow. Labour market data show that higher educational outcomes are associated with a greater probability of employment and higher labour earnings.

Dockery et al. (2001) estimated the economic benefits that would flow from the greater representation of people with disabilities in the vocational education and training (VET) sector. They considered two alternative scenarios: (1) a one-off increase Australia-wide that would bring the VET participation of people with disabilities in each age group on par with that of people without a disability; and (2) a one-off increase Australia-wide that would bring the VET representation of people with disabilities on par with their representation in the overall population. Dockery et al. calculated that such increases would yield net (of additional training and workplace accommodation costs) present value economic benefits of $2.5–4.3 billion over the working life of the new VET entrants (depending on the scenario). The net present value of the lifetime benefits accruing to each new

entrant was estimated at $59 502, and resulted from an increased likelihood of employment and higher lifetime earnings.

Dockery et al.'s results underline the potential loss in labour income that could result from disability discrimination preventing greater participation in education by people with disabilities. However, these results probably represent an upper-bound estimate of the benefits that would result from greater educational participation. The link between educational attainment and labour income that this study relies on is mainly applicable to people without a disability. Given the diversity of disabilities that the new entrants into the VET sector would embody, it cannot be assumed that their labour income would similarly benefit from improved educational qualifications. For some, their disabilities might be such that their productivity would not significantly benefit from the acquisition of formal skills.

In chapter 5, the Productivity Commission concludes that the DDA appears to have had some effect in improving educational opportunities for school students with disabilities. If this success at school translates into success in the tertiary education sector (which cannot be established from existing data), then the kind of employment and lifetime earnings benefits envisaged by Dockery et al. might have resulted from the DDA's operation. This conclusion, however, presupposes that no displacement effects occur (see below).

Reductions in discrimination in other areas might also lead to greater employment and thus output. If, for example, the DDA made travelling to work more affordable, or more workplaces accessible, then more people with disabilities might be prepared to join the workforce. Two Australian studies attempted to quantify some of the employment and/or output benefits of a more accessible physical environment (box 8.4).

Based on these studies, it is possible to speculate that the DDA's effectiveness in reducing discrimination in the area of accessibility—such as the implementation of transport standards and the improved accessibility of public buildings (see chapter 5)—has helped encourage more people with disabilities to enter the labour force and thus reduced the amount of employment forgone as a result of an inaccessible environment.

DRAFT FINDING 8.3

The progress achieved by the Disability Discrimination Act 1992 *in promoting a more accessible physical environment is likely to have removed some barriers to the employment of people with disabilities.*

Wider effects

The direct and indirect employment effects of the DDA on people with disabilities cannot be considered in isolation, however, when attempting to gauge the supply-side impact of the Act. These effects might be compounded by wider employment effects occurring elsewhere in the economy; for example, greater employment of people with disabilities might be accompanied by greater workforce participation by primary carers. In 1998, the labour force participation rate of primary carers was 59.2 per cent, compared with 80.1 per cent for people without a disability (ABS 1999b). This difference suggests that carers also face significant barriers in employment due to the constraints on their time from caring for persons with disabilities, and possibly to discrimination. To the extent that the DDA allows greater employment of people with disabilities, that effect might be compounded by increased employment of carers as well. This reasoning would also apply to parents of children with disabilities, some of whom cannot hold a job because they need to look after their children during the day (Cora Barclay Centre, trans., p. 1030).

Box 8.4 **Supply-side benefits of an accessible physical environment**

Frisch (1998a) estimated the loss in output due to an inaccessible physical environment (for example, buildings and transport) for Australians who use a wheelchair. He argued that lack of access constitutes a significant barrier to the greater labour force participation of this group of people with disabilities. Based on what he regarded as conservative assumptions about productivity, wages and potential increases in participation, he calculated that the value of output forgone as a result of an environment that is inaccessible to people using a wheelchair is $300 million per year (or $6 billion over 20 years). He added that this figure represents an underestimate of the total loss of output due to an inaccessible environment because it does not account for other types of physical disability or for the output forgone because carers of people with disabilities have had to assist with transport, transfer and mobility.

As part of the Regulation Impact Statement prepared for the draft disability transport standards (Attorney-General's Department 1999), consultants Booz Allen and Hamilton used a method developed in the United Kingdom (Fowkes et al. 1994) to measure the cross-sector benefits of implementing the Australian transport disability standards. One benefit identified was the increase in employment that would flow from the greater availability of accessible transport. In contrast to Frisch, however, Booz Allen and Hamilton regarded as benefits of greater employment only the reduction in unemployment allowances and the increase in income tax that would ensue.

Source: Frisch 1998a; Attorney-general's Department 1999; Fowkes et al. 1994.

Older workers are another category of workers who might benefit from the DDA. Rita Struthers argued that the DDA, by improving accessibility of the physical environment, could provide incentives for older Australians to continue working,

thus countering the loss of human capital that their early retirement would cause (sub. 118).

On the negative side, it is possible that the DDA causes increases in the employment of some groups of workers that occur at the expense of other groups of workers. This effect is termed a 'substitution' or a 'displacement' effect, and could occur for two main reasons.

- If anti-discrimination legislation leads to some employers hiring people with disabilities where previously they would have hired workers without a disability, then the latter group will experience reduced levels of employment.
- If anti-discrimination legislation leads to some employers making costly workplace adjustments, then those employers' overall capacity to hire labour will be diminished. In this scenario, all categories of workers will experience reduced levels of employment.

In the first scenario, the objectives of the DDA would be achieved, because discrimination would have diminished and the employment of workers with disabilities would have increased. In the second scenario, the DDA might hurt rather than assist the employment situation of workers with disabilities.

It is difficult to detect, let alone measure, any displacement effects caused by the DDA (or any legislation). Doing so would require knowledge of what changes would have taken place in the labour market in the absence of the DDA. Although displacement effects could have occurred in individual firms, Acemoglu and Angrist (1998) found no evidence that the Americans with Disabilities Act had negative consequences on the overall employment of people without a disability in the United States.

Social capital

A number of inquiry participants argued that one of the positive economic effects of the DDA was its contribution to social capital (Disability Services Commission, sub. 44; Office of the Director of Equal Opportunity in Public Employment, sub. 172; Paul Jenkin, sub. 100). Disability Action Inc. stated:

> There is no doubt that the DDA contributes to the reduction of discrimination against people with disabilities in Australia. The reduction of discrimination in turn enhances the social capital of the nation and contributes ultimately to growth in the gross national product … (sub. 43, p. 2)

Social capital is defined as 'networks, together with shared norms, values and understandings that facilitate cooperation within or among groups' (OECD 2001b, p. 41). It can arise in many areas of life, such as families, religious, ethnic and

community groups, and the workplace. The potential for social capital to promote economic wellbeing is increasingly recognised. Greater amounts of social capital in a country can help reduce transaction costs, disseminate knowledge and information, and promote cooperative and socially minded behaviour (PC 2003c).[4]

Measures of social capital include participation in community activities and civic engagement. Anti-discrimination legislation such as the DDA—which aims to include people with disabilities in all facets of society—is thus likely to contribute positively to the nation's stock of social capital. Schur (2002) showed that having a job increases the likelihood of people with disabilities participating in community and political activities. She noted that this likelihood is due to employment encouraging the development of 'civic skills' and the perception that one's voice is being heard instead of ignored. Based on Schur's findings, it might be argued that anti-discrimination legislation that results in more people with disabilities being employed and thus participating in community and political life would lead to greater amounts of social capital, to the ultimate benefit of the economy.

The DDA might also have enhanced social capital more directly, by prohibiting disability discrimination in areas of social participation such as recreation, sport and entertainment (see appendix D). On the other hand, the regulatory burden imposed on community activities by the multiple layers of governmental regulation (of which the DDA is one) could have a detrimental effect on social capital. Community events, for example, may be discouraged by the extra costs associated with meeting accessibility requirements.

On balance, however, the DDA seems likely to contribute more than it detracts from the amount of social capital available to society.

DRAFT FINDING 8.4

A reduction in disability discrimination is likely to contribute to 'social capital' (community values and principles that facilitate cooperation within and among groups) and so have broad benefits for Australian society.

Conclusion

The above investigation of the ways in which reductions in disability discrimination theoretically might affect an economy's productive capacity suggests an overall

[4] This contribution may be direct (lower transaction costs) or indirect (improvements in government performance, improvements in education and health, and reductions in crime and violence).

positive impact. Although the DDA's precise contribution to the supply-side of the economy cannot be measured, there is no evidence that the DDA has led to a large-scale waste of society's resources, as argued by Epstein in relation to equivalent US legislation (box 8.1).

Demand-side effects

A number of inquiry participants suggested that the DDA produces (or has the potential to produce) economic benefits on the demand side of the economy, through increases in the amount of goods and services purchased. Reasons for this view were threefold.

- Lower reliance on government transfers such as the disability support pension could mean that taxation could be lowered, resulting in increases in aggregate demand (Physical Disability Council of NSW, sub. 78; Disability Rights Victoria, sub. 95; Disability Services Commission, sub. 44).
- DDA-induced increases in the employment of people with disabilities could lead to greater household income and consumption levels (Disability Services Commission, sub. 44; Paraquad Victoria, sub. 77).
- Improvements in the accessibility of buildings, transport, and goods and services could result in expanded/more profitable markets for business (Blind Citizens Australia, sub. 72; Public Interest Advocacy Centre, sub. 102; EOCV, sub. 129; Anita Smith, sub. 127; Disability Rights Victoria, sub. 95; Disability Services Commission, sub. 44; Robin and Sheila King, sub. 56).

The first of the demand-side benefits claimed for the DDA appears well founded. Australian Government outlays on all forms of income support grew from 25.7 per cent of the federal Budget in 1989 to 30.3 per cent in 1999 (Argyrous and Neale 2003). By promoting the employment of people with disabilities and lowering the additional costs associated with disability, the DDA could lead to a reduction in income transfers and other subsidies directed at people with disabilities. In turn, this reduction might allow a reduction in taxation which would generate both efficiency and consumption benefits.

In relation to the second claim, while it is true that greater employment of people with disabilities would be likely to lead to higher income and consumption levels economywide, such increases would be moderated by taxation effects. Newly employed persons previously on income support would lose part or whole of their existing government entitlements (such as the disability support pension or unemployment allowances). They would thus experience high marginal effective tax rates that would dampen the positive effects of greater employment on income

and consumption. Moreover, it is inevitable that some of the people with disabilities who re-entered the labour force if they perceived employment discrimination to have diminished would find themselves unemployed. Given that the financial value of unemployment benefits is less than that of the disability support pension, the income and consumption levels of those newly unemployed persons would fall, thus detracting from the economywide income and consumption benefits of less disability discrimination.

In support of the third claim, a number of inquiry participants reported anecdotal evidence that catering for people with disabilities was good for business (box 8.5). However, the large number of complaints received by HREOC about the provision of goods and services and access to premises (see chapter 11 and appendix D) indicates that not all businesses may regard customers with disabilities as a profitable market. According to the South Australia Equal Opportunity Commission, 'some businesses claim that they are expected to take on trust that disability friendly measures are good for business without evidence available to support such contentions' (sub. 178, p. 3).

Box 8.5 **Is the DDA good for business?**

A number of inquiry participants suggested that compliance with the DDA brought benefits for businesses:

> I think there's quite a lot of evidence that people have found accommodating disability is very good for business. … If you look at McDonalds' web site, if you go to some of these chains, McDonalds have a fantastic action plan. … It's obviously considered good for business that they're saying to people with disabilities, 'Well, you can come to us. You can't go to [a competitor's outlet] because they don't have an action plan' or 'They're not being accommodating in the same way as we are'. While only some places do it, they get the advantage of having all the clientele of people with disabilities who now discover they can go out somewhere to eat. They have the advantage of all the other people who are the unintended beneficiaries. (Melinda Jones, trans., p. 1522)

> Such is the potential market of people with disabilities that Tourism Queensland has identified disability as a potential untapped tourism market. Tourism Queensland is working with tourism operators, local government and accommodation providers to encourage accessible environments because it is good for business. Accessible environments not only allow and encourage people with disabilities to participate. Accessible environments and universal design is good for everyone. (Disability Action Inc., sub. 43, p. 3)

> … in the mid-90s … Australia lost 5.5 billion—that's billion, not million—dollars per annum in lost domestic tourism because we were not an accessible nation in a tourism or day trip context. … $2.5 billion was lost per annum in lost domestic tourism in the sense of people actually having a holiday and $3 billion was lost in people's inability to take day trips. (Paraplegic and Quadriplegic Association of Queensland, trans., p. 116)

> A participant in an access seminar (Good Access is Good Business 14 July 2003) reported that the installation of an access ramp at the local fruit shop resulted in increased business and the cost of the ramp ($400) being recouped within a month. (City of Melbourne, sub. 224, p. 3)

No comprehensive evidence is available on the demand-side benefits of compliance with the DDA in Australia. However, insights into the potential benefits of adjustments in the provision of goods and services may be gained from a detailed 2001 survey of the effects of part III of the UK *Disability Discrimination Act 1995* (Meager et al. 2002) (box 8.6). Of the establishments surveyed that had made adjustments to cater for customers with disabilities, a majority reported that the benefits from those adjustments outweighed their costs. Benefits reported by the establishments were both commercial (for example, increases in the number of customers with and without a disability, and in sales/turnover) and non-commercial (for example, improvements in staff morale, customer satisfaction, and reputation/image) in nature. Few establishments reported a reduction in complaints/litigation as a benefit of making adjustments.

Meager et al.'s results must be interpreted with caution, because they apply only to establishments that had made adjustments (40 per cent of the sample). Establishments that make adjustments might do so because they anticipate benefits and are predisposed to finding that the benefits outweigh the costs. Equally, the 58 per cent of establishments surveyed that did not make adjustments (2 per cent did not respond) might have found that the costs of adjustments outweighed the benefits.

Nonetheless, if applicable to Australia, Meager et al.'s results support the anecdotal evidence provided by inquiry participants, suggesting that individual organisations benefit in commercial and non-commercial ways from improving their accessibility. The Productivity Commission has not received detailed direct evidence on the costs and benefits of compliance with disability discrimination legislation, and hence cannot conclude on the likelihood of net demand-side benefits arising from compliance with the DDA.

In section 8.1, the Productivity Commission requests information on the nature and magnitude of compliance costs and benefits. Until such evidence is available, the Commission makes the following observations. First, if net benefits are to be gained by businesses from becoming accessible, then why is legislation such as the DDA necessary? A possible answer is that businesses are unaware of these potential benefits. The educative functions of the legislation fill a gap in the information required by organisations and individuals to assess the relative merits of accessibility. Left to their own devices, a single organisation or a single person might not have the resources needed to obtain that information. The punitive functions of the DDA might also help overcome a lack of inclination to become better informed, on the part of employers and providers of goods and services.

Box 8.6 **The costs and benefits of adjustments in the United Kingdom**

Since 1999, businesses covered by part III of the UK Disability Discrimination Act have been under a duty to make 'reasonable adjustments' to facilitate the use of their goods or services by customers with disabilities. On behalf of the UK Department of Work and Pensions, Meager et al. (2002) conducted a survey of 1000 establishments covered by part III of the Act (in the private, public and voluntary sector) and detailed case studies of a 50-establishment subsample.

Of all the establishments surveyed, 40 per cent reported having made adjustments to cater for their customers with disabilities. Of the establishments that did not make adjustments, the most common reason provided was that arrangements were not necessary. Only 4 per cent cited cost as the reason for not undertaking adjustments.

Whether establishments reported that costs were incurred or not as a result of making adjustments depended on the type of adjustment provided. Almost all establishments that installed hoists/lifts reported incurring costs. Conversely, the majority of establishments providing large print documents reported no associated costs. The type of adjustments undertaken also influenced whether costs were initial/one-off/start-up and/or ongoing/recurrent. Accessible toilets mainly involved initial costs, while the cost of providing audio tapes was primarily ongoing. Case studies revealed the costs of staff time and opportunity costs to be of major concern in some cases. Such opportunity costs arose in the course of providers thinking about adjustments, assisting customers with disabilities and training staff.

Although not all establishments reported benefits from having made adjustments, many reported a wide range of commercial and non-commercial benefits. The nature and incidence of the benefits depended on the type of adjustment undertaken. Twenty-two per cent of establishments that had provided wheelchair access reported an increase in the number of customers with disabilities. Twenty-three per cent of establishments that had provided 'simple language' documents reported increases in the number of customers without a disability. Only a small proportion of establishments reported a reduction in complaints/litigation as a benefit of making the adjustments.

The majority of establishments that had carried out adjustments reported that the benefits of adjustments outweighed or equalled their costs. Most of those establishments also reported that adjustments had been more effective than anticipated—for example, by benefiting customers other than those with disabilities.

Source: Meager et al. 2002.

Second, benefits accruing to individual organisations might not translate to the whole of the Australian economy. Any competitive advantage that is gained by one business through its disability-friendly policies will be to the detriment of its competitors that are inaccessible, with no positive effect on the amount of goods and services consumed in Australia. Overall demand for goods and services would increase only if, as some inquiry participants have suggested, a competitive

advantage is achieved at the expense of overseas competitors (Paraplegic and Quadriplegic Association of Queensland, trans., p. 116).

Structural and competition effects

At first glance, the provisions of the DDA apply equally to all organisations in all sectors of the economy. Unlike equivalent legislation in the United States and the United Kingdom, for example, the DDA has no small employer exemption.

However, the fact that the provisions of the legislation are nominally the same for everyone does not mean that all organisations or all industries will be affected in the same way or to the same extent, for several reasons. First, unless it operates in an area where disability standards apply, an organisation has some discretion about what it chooses to do to comply with disability discrimination legislation. Whether it undertakes any adjustments, for example, depends in part on whether any of its customers or employees have a disability.

Meager et al. (2002) used statistical techniques to analyse the factors that influenced the propensity of UK establishments covered by part III of the UK Disability Discrimination Act (applying to the provision of goods and services) to undertake adjustments. Contrary to expectations, they did not find that factors such as the number of employees, belonging to the public sector, or being part of a larger organisation were significant influences. Instead, their results showed that an establishment's propensity to make adjustments was related to the extent of its interaction with people with disabilities, its awareness of its duties under the law and its knowledge of ways in which to accommodate customers with disabilities.

That these factors increased the likelihood of establishments making adjustments suggests many adjustments are undertaken voluntarily and not forced by anti-discrimination legislation only on those establishments with the requisite financial capacity. Had ability to pay been an issue, an establishment's structural characteristics might have been expected to play a greater role. Meager et al. (2002) found, for example, that establishment size did not appear to be a significant influence on the probability of adjustments being carried out, at least in the United Kingdom. The opposite might have been expected, given that large organisations with many employees and customers would be able to exploit economies of scale in making adjustments.

However, Meager et al.'s results show that the probability of making adjustments increases when an establishment has employees with disabilities. Given that the chance of having employees with disabilities increases with establishment size, this may be regarded as an indirect effect of size.

A second factor that might cause the DDA to affect organisations unequally is whether organisations differ in their susceptibility to discrimination complaints. In relation to employment, complaints and litigation can arise from discriminatory practices in hiring, during employment or in firing (see appendix A). The costs of hiring a worker with a disability thus include the expected value of the costs of any subsequent DDA complaints emanating from that worker. If the expected cost of such complaints varies according to the characteristics of the firm, then competition might be distorted. Smaller firms, for example, might be less accustomed to hiring workers with a disability and, therefore, might not be as familiar with their obligations in regard to interviews, wage offers or lay-offs. Conversely, size may increase the susceptibility of firms to discrimination complaints if, as suggested by Jolls (2000), indirect discrimination is easier to prove in large firms.

The Productivity Commission is unaware of any studies of how different organisations or different industries respond to disability discrimination legislation, and the potential for complaints, in their employment of people with disabilities. However, some insights can be gained from international studies of anti-discrimination legislation in areas such as sex and race. Oyer and Schaefer (2002) used detailed US interindustry employment data to show that sex and race discrimination legislation, because it influences the susceptibility of organisations to complaints, promotes greater specialisation/polarisation in the economy between those industries with a low representation of protected workers and those with a high representation (box 8.7). The DDA might have similarly polarised the Australian economy into industries with a high representation of workers with disabilities and industries with a low representation of workers with disabilities. If so, then the regulatory burdens imposed by the DDA would become less equally distributed throughout the economy.

- Litigation costs would become increasingly concentrated in industries with a low representation of workers with disabilities. Even though they employ relatively fewer workers with disabilities, organisations in these industries would be exposed to a relatively greater risk of litigation when firing one of these workers or refusing to hire them.
- Adjustment costs would become increasingly concentrated in industries with a high representation of workers with disabilities. Organisations with relatively high numbers of workers with disabilities are less susceptible to litigation. However, they are required to accommodate those workers' needs, up to the point of unjustifiable hardship.

It is unclear, however, whether evidence based on sex or race discrimination legislation is readily applicable to legislation prohibiting disability discrimination. With attributes such as gender or ethnicity, productivity differences are unlikely to

be the reason for the observed polarisation effects. On the other hand, workers with disabilities are a diverse group in terms of productivity. It is possible that the reaction of organisations and industries to the introduction of disability discrimination legislation would depend more on the workers' type of disability than on the overall representation of those workers in their workforce. Also, the inherent requirements and unjustifiable hardship defences (see chapter 10) are specific to disability discrimination legislation and may have compounded or slowed the polarisation effect.

Box 8.7 Sorting and quota effects

Oyer and Schaefer (2002) studied the interindustry employment effects of the US *Civil Rights Act 1991* (CRA91), which significantly increased the protection from discrimination afforded to women and blacks ('protected workers') in the United States, relative to protection under previous legislation. These authors argued that 'many factors are likely to make firms and industries differ significantly in their susceptibility to discrimination litigation, leading to differential costs of employment of protected workers' (2002, p. 47). They found that employees from minority groups filed a relatively high number of complaints per employee in industries in which those groups were relatively less represented. They attributed this effect to the fact that industries with a low representation of minority groups are more susceptible to complaints successfully claiming indirect discrimination through the 'disparate impact' of the firm's hiring and firing criteria.

Oyer and Schaefer suggested that this differential in susceptibility to litigation across industries meant that the introduction of anti-discrimination legislation would increase the marginal costs of hiring minority group workers more for some firms than others. They hypothesised that a 'sorting' effect would result, whereby low representation industries would hire even fewer minority group workers after the legislation is introduced, and high representation industries would hire even more. Through quantitative analysis of pre- and post-CRA91 industry employment data, Oyer and Schaefer were able to detect the existence of such a sorting effect following the passage of the legislation. They concluded that the CRA91, far from leading to the quota hiring predicted by some (whereby firms with a low representation hire more protected workers to guarantee themselves against litigation), increased the polarisation of industries with a high minority group representation and those with a low representation. As a result of this polarisation, the former group would become even less susceptible to litigation, and the latter even more.

Source: Oyer and Schaefer 2002.

A third and final factor that may distort competition among organisations is whether they vary in their ability to use the unjustifiable hardship defence. One inquiry participant argued that firms operating in competitive markets would stand a good chance of claiming unjustifiable hardship (Dr Jack Frisch, subs 120, 196). Firms in

such markets cannot charge a higher price than charged by their competitors, so have limited ability to pass on additional costs to their customers. However, even in competitive markets, some firms might be better able to absorb the costs of adjustments and (possibly) litigation. A case-by-case assessment of unjustifiable hardship would still be necessary, therefore, which would take into account not only the competitive environment of the firm, but also its financial position (as well as any costs and benefits accruing to other parties).

Size may also be a factor; large firms may be less able to claim unjustifiable hardship if courts are inclined to equate size with market power and capacity to pay for adjustments. This could lead, over time, to large firms employing proportionately more workers with disabilities than employed by smaller firms. Such involuntary specialisation might restrict the capacity of large firms to compete with smaller firms. However, the relative inability of large firms to claim unjustifiable hardship is not supported by statistics that show workers with disabilities are more likely to be employed in smaller businesses (see appendix A).

The issues discussed above suggest that organisations, while nominally equal under the DDA, can be affected by its provisions to a varying degree. This implies that the DDA has the potential to alter the structure of the economy and the nature of competition among organisations. However, the small number of DDA complaints made each year relative to the number of businesses in operation suggests such effects are likely to be fairly minor.

The case of disability standards

The discussion so far has assumed the competition effects of the DDA arise somewhat at random or in an arbitrary manner, depending, for example, on how likely an organisation is to attract a discrimination complaint or to successfully claim unjustifiable hardship. However, the impact of the DDA is likely to be felt increasingly through the implementation of industrywide disability standards. By definition, standards apply to all organisations in an industry.[5] This means that intraindustry competition effects are less of an issue. As stated by Melinda Jones:

> … if all businesses make the same sorts of adjustments, then there's no competitive loss. (trans., p. 1522)

However, competition might still be affected by the implementation of disability standards if not all industries that compete with each other are subject to the standards. The transport standards, for example, do not apply to private motor

[5] With some exceptions, such as school buses in the transport standards (see appendix C).

vehicles or to small aircraft (Attorney-General's Department 1999). This means that operators of buses, trains and large aircraft might be at a disadvantage in competing with some, albeit minor, means of transport. Local industries that compete with overseas providers might also be penalised by Australian disability standards—for example, Australian airlines flying between two overseas destinations might find that complying with Australian transport standards diminishes their capacity to compete with overseas carriers that are not subject to the same stringent accessibility requirements.[6]

Another way in which standards could affect competition is through the inclusion of unjustifiable hardship. The draft education standards, for example, extend the unjustifiable hardship defence beyond the point of enrolment (see chapters 10 and 12). According to The Allen Consulting Group 2003, such an extension would be available only to smaller independent providers (for example, registered training organisations). The unjustifiable hardship defence would continue to be unavailable to larger education providers or government schools, because they have access to larger financial resources. This latter group would thus find itself at a competitive disadvantage in that respect, relative to smaller providers. In other respects, such as the possibility of reaping economies of scale, larger providers would continue to find themselves at an advantage.

Disability standards could also affect competition between existing organisations and new entrants. The costs imposed by standards on existing organisations are likely to be higher than those imposed on new entrants to the industry. Retro-fitting or accelerated replacement of existing assets is more costly than entering the market with state-of-the-art accessible technology, for example. Thus, the standards might provide an advantage to new entrants, at least during the standards implementation period.

On balance, the Productivity Commission views disability standards as more competition neutral than the complaints-based implementation of the DDA. Standards largely ensure organisations operating in the same market (however defined) compete on a level playing field. In the absence of standards, some organisations might choose to discriminate to gain a competitive advantage over risk-averse organisations, relying on the fact that compliance with the DDA is a random process. The competitive advantage enjoyed by these organisations would derive from them not meeting what society considers to be minimum acceptable requirements. Thus, while implementing the DDA through complaints rather than

[6] Overseas carriers are subject to Australian disability transport standards only if they fly within Australia. However, many such carriers would be subject to their own national access requirements.

standards may be regarded as less costly overall for society, the benefits are likely to be correspondingly lower.

DRAFT FINDING 8.5

The complaints-based implementation of the Disability Discrimination Act 1992 *has the potential to distort competition by imposing an uneven regulatory burden. By contrast, disability standards tend to promote a uniform playing field and to be more competitively neutral. They might, however, impose larger costs on the economy.*

8.4 Incidence of costs and benefits, and implications for funding

As mentioned in section 8.1, measures designed to assist people with disabilities are not costless. Disability discrimination policies affect the community in widespread and diffuse ways. Workplace adjustments that benefit employees with disabilities, for example, can impact financially on employers, but also, indirectly, on their customers, other employees and suppliers. Conversely, adjustments made by businesses to cater for customers with disabilities can benefit customers without a disability.

All social objectives create benefits and costs for different sections of the community, thus raising issues of equity (fairness) and efficiency. The DDA is no exception. It is important to examine how the costs and benefits of the DDA are distributed among various groups in society.

There are two different theoretical approaches to answering the question of who should bear the costs of social policies and community objectives, such as the elimination of discrimination against certain groups.

The first approach rests on the proposition that if the community, through the government, decides that a particular societal objective is worth pursuing, then the community should pay for it through taxes. Under this 'community pays' approach, governments should use taxpayer funds to compensate organisations for any costs imposed on them by the societal objectives contained in disability discrimination legislation.

The second approach treats societal objectives as just another 'cost of doing business', similar to the costs of providing employees with a safe workplace or ensuring a product meets safety standards. Any costs imposed on the organisation by its duty to provide a non-discriminatory workplace (including the costs of

adjustments) would thus be regarded as a social cost of production that should appropriately rest with the organisation (and its customers and suppliers if the organisation exerts some market power). If the cost of removing discrimination can be spread sufficiently broadly across an industry—for example, through standards—then its incidence is little different to an industry-based tax.

Neither approach excludes some sharing of costs between government and individual groups within the community, including individual organisations. Even where government can be expected to incur most of the costs imposed by legislation, some measure of financial involvement by producers and consumers would be justified. Conversely, under a 'social cost of production' approach, there would be reasons for government to bear part of the cost burden.

The factors influencing the distribution of costs between government and individual groups within the community are examined below, in relation to disability standards and complaints-based enforcement of the DDA.

Funding implications of disability standards

The pattern of costs and benefits associated with disability standards and, therefore, the implications for equity and efficiency in funding, differ somewhat from those associated with complaints-based enforcement. While standards rely, to an extent, on individual complaints for their enforcement, they embody widespread compliance requirements that are usually clear, precise and well publicised. Moreover, they can be linked to independent monitoring and compliance regimes—for example, through such bodies as State transport commissions. As a result, the litigation risk to organisations of not complying with disability standards is greater than those of non-compliance with the general prohibitions of the DDA.

This risk suggests that, for industries covered by standards that impose detailed requirements, that organisations are more likely to carry out voluntarily the adjustments imposed by the standards.[7] The costs of these adjustments are thus more likely to be faced by all organisations in the industry, rather than by a few organisations targeted for complaint. A 'social cost of production' approach to funding the costs of disability discrimination policies could apply in this circumstance, whereby all organisations in an industry would face the costs of making their product accessible. Moreover, costs faced by an entire industry will be

[7] Disability standards in some areas, such as employment, would be unlikely to have the same widespread effect—for example, a person with a disability would still need to apply for a job before the employer could comply with the standards' requirements concerning hiring practices.

passed on by organisations to their customers (except, arguably, overseas customers). This will result in an efficient distribution of the cost burden, because consumers will receive price signals reflecting the benefits that they derive from consuming accessible goods and services. This point can be illustrated by reference to the disability transport standards, but it applies equally to all standards (box 8.8).

Box 8.8 Incidence of costs and benefits under the disability transport standards

By imposing accessibility requirements on all public transport providers, the disability transport standards have the potential to affect four distinct groups: providers, customers with disabilities (and their carers), other customers and governments. In the Regulation Impact Statement prepared for the transport standards, consultants Booz Allen & Hamilton estimated that the costs of implementing the standards would be faced by producers in the first instance. Although some increase in overall patronage was predicted to follow the implementation of the standards, it was not expected to offset costs. Benefits were forecast to accrue to both customers with a disability (in the form of reduced travel costs) and those without a disability (in the form of greater accessibility for elderly people and people with prams or luggage).

Booz Allen also predicted that some benefits from the standards would accrue to government—for example, in the form of reduced expenditure on aged and health care, and on the disability support pension. Assuming that the costs of implementing the transport standards are faced equally by all organisations in the industry, these costs will be passed on, in part, to all the customers of that industry, including customers with disabilities. This arrangement is arguably equitable, given that all customers are expected to benefit from an accessible transport system. It is also efficient, because the division of the burden between producers and consumers will be determined by alternative opportunities for resource use by each group.

Source: Attorney-General's Department 1999.

The distribution of costs and benefits under standards might lead to the conclusion that it is sufficient to let the burden of compliance fall solely on a particular industry and its customers. However, a case for some government funding might remain in three sets of circumstances.

First, governments may want to speed up the implementation of the standards, or ensure that providers or employers meet more than the minimum targets set in standards. This might be desirable to bring forward the benefits of implementing the standards for people with disabilities or for the government.

Second, governments may want to ensure the implementation of standards does not cause the levels or quality of service to drop in ways that would be socially undesirable. If, for example, fare increases generated by the standards result in

significant falls in public transport use and thus increases in road congestion, governments might consider subsidising some segments of the industry to prevent this outcome.

Third, governments might wish to contribute financially where 'positive externalities' arise—that is, where benefits accrue to sectors of the economy other than where standards are implemented. The greater ability of people with disabilities to travel independently under the transport standards, for example, might widen employment opportunities for them and their carers. Such external benefits would not usually enter the decisions of public transport providers in deciding how much they charge for their services. This could lead to public transport provision that does not maximise benefits to society. Appropriate government subsidies or tax incentives would remedy this shortfall, much in the same way that tax concessions for research and development activities undertaken by organisations recognise the external benefits of these activities for society.

Funding implications of complaints-based compliance

The costs and benefits produced by the complaints mechanism, although they arise in all areas covered by the DDA, are best illustrated in terms of the adjustment duty that the DDA imposes on employers. Under that compliance enforcement mechanism, employers make workplace adjustments either voluntarily or when forced to do so by a court decision. This is a somewhat random process, which means that not all employers make adjustments, even when they employ people with disabilities who would benefit from them.

Depending on an organisation's degree of market power, the organisation may or may not be able to pass on part of the costs of adjustments to its customers and suppliers. At most, the benefits that the organisation provides to its employees with disabilities will be funded by a combination of the organisation, its customers and its suppliers. At the organisation level, this would mimic the distribution of the costs of adjustments that occurs when it complies with standards. It might be concluded, therefore, that a 'social cost of production' approach is also desirable in the case of the complaints-based enforcement of the DDA. However, this would be wrong, for several reasons.

First, the unpredictable or arbitrary imposition of adjustment costs under a complaints-based system raises important equity issues. In a given market, firms, employees, consumers and suppliers selected at random will be required to fund workplace adjustments.

Second, the inequitable distribution of the costs of disability adjustments is likely to detract from the DDA's objectives. Employers, for example, may seek undetectable ways of discriminating against employees with disabilities if they feel unfairly penalised by the provisions of the DDA. And employees and customers without a disability might object to subsidising (in effect) the costs of adjustments through lower wages and higher prices. Resentment might thus arise between these two groups and, possibly, lead to further discrimination.

Third, efficiency might be affected if the arbitrary distribution of the adjustment burden under a complaints-based system leads to distortions in competition. Resource flows throughout the economy would be distorted if the production costs of some firms within an industry reflected the social cost of production, while those of their competitors did not.

Given these possible drawbacks, and given that the duty to make adjustments stems from the community's desire/decision to make workplaces and goods and services accessible to people with disabilities, a 'community pays' approach would be more appropriate in the case of complaints-based compliance, and in areas such as employment where the costs of adjustment are inherently arbitrary, depending on where people with disabilities choose to work. This approach would avoid distortions and is already in use in many other areas of government social policy. Governments offer some compensation to organisations when, for example, their employees are called for jury duty or are members of the army reserves. A recent HREOC proposal for a national paid maternity leave scheme recognised that government funding is justified if government imposes wider social objectives on organisations that will increase their costs (box 8.9). Another parallel is with the education sector, in which governments fund schools for at least part of the accommodation costs required by students with disabilities (see appendix B).

In the area of employment, government funding attached to employees with disabilities (box 8.10) would reflect the fact that the costs of accommodating these workers can be substantially in excess of the costs of accommodating workers without a disability (for example, having to provide voice-activated software rather than standard software). Although it might be expected that organisations absorb most of the cost of equipping staff as a normal cost of doing business, this should not necessarily be the case when employers are expected to carry out wider social objectives.

Box 8.9 **Proposal for paid maternity leave**

In December 2002, HREOC launched its final proposal for a national paid maternity leave scheme, entitled 'A time to value', which calls on the Australian Government to fund up to 14 weeks of maternity leave for all employed women.

In a previous discussion paper, HREOC considered a large number of options for the funding of a national scheme, ranging from wholly employer funded to employer/employee funded, and to wholly government funded. Many of the following considerations, regarding who should fund the national paid maternity leave scheme, are also relevant in the case of accessibility adjustments imposed on organisations by disability discrimination legislation.

- Employers would have possible disincentives to hire women of child-bearing age if made to pay for these employees' leave entitlements.
- Government funding would recognise the social significance of maternity.
- Employer funding would acknowledge the benefits to employers of maintaining the labour force attachment of women.
- Employer funding would have an uneven impact on industries with unequal representation of women.
- Government funding would lead to possible cost shifting to government of the cost of maternity leave already provided by employers.

Following consultation with interested parties, HREOC (2002b) concluded that 'there was widespread agreement that a direct impost on employers would be untenable, given employer resistance and the tight profit margins of many businesses'. It added:

> Objectives such as ensuring the health and wellbeing of women and their children, promoting equality, eliminating discrimination, contributing to the maintenance of Australia's fertility rate and assisting with the maintenance of Australia's human capital are all social objectives that benefit the entire community. Taxpayer funding is a means of distributing the cost of this measure amongst those who benefit. (HREOC, 2002b)

Sources: HREOC 2002b, 2002i.

The adoption of a 'community pays' approach to the funding of adjustments does not mean that employers and providers of goods and services should not face any of these costs. While it might be desirable for government to fund most of the 'lumpy' adjustments costs that the legislation imposes arbitrarily, these groups should continue to face some of the costs of removing discrimination, for two main reasons.

- Employers and producers are part of the community and should face some of the costs arising from community decisions about acceptable accessibility standards for goods and services, or for employment.

Box 8.10 **A portable employee access grant**

While public funds for workplace adjustments are already available under some government schemes (see chapter 13), they are intended only to provide a 'safety net' where no obligations already exist under the DDA. This means that organisations face some uncertainty regarding the net costs of employing a person with a disability. If they are unsuccessful in obtaining public funding for workplace adjustments, they are nonetheless obliged to undertake those adjustments (unless they can successfully argue that it would cause unjustifiable hardship). This limits incentives for organisations to be pro-active and recruit people with disabilities.

By contrast, the provision of 'capitation' payments could create incentives for recruiting people with disabilities, whereby any organisation that employs people with disabilities who require workplace adjustments would receive employee-specific government funding in the form of a portable employee access grant, adjusted for the type and severity of the disability requiring adjustment. Such payments could be especially attractive to organisations that specialise in recruiting people with disabilities and thus have already made adjustments benefiting a particular type of disability (for example, purchasing a site licence for a voice-activated typing package). They could, therefore, accumulate capitation payments in return for their investment.

Hope and Kilcullen suggested greater flexibility would derive from adopting this type of approach and attaching funding to people rather than institutions. Kilcullen observed:

> If you are bringing equipment with you, rather than the employer suddenly having to fund it, then you're much more likely to get a job … than you are if they're going to have to worry about questions of unjustifiable hardship and all the things that come up later. (sub. 165, p. 7)

In chapter 13, the Productivity Commission seeks suggestions on appropriate approaches to extending public funding of workplace adjustments.

- Facing some of the costs of adjustments limits incentives for employers and producers to ask the government to pay for unnecessary adjustments. It also creates incentives for these groups to develop low cost ways of meeting their duties under the legislation.

In conclusion, the two possible approaches to the distribution of costs created by the DDA are not equally suited to the different methods of enforcing the Act. The 'social cost of production' approach is equitable and efficient in situations in which disability standards exist or could be devised. This approach provides employers, producers and consumers with appropriate incentives and price signals. However, where complaints remain the main enforcement mechanism, the difficulty of applying uniform duties on all organisations (for example, in employment) means this approach would have undesirable equity and efficiency effects. A 'community pays' approach is justified in such cases, which implies a greater funding role for governments.

Nonetheless, both approaches lead to the conclusion that the costs imposed by the DDA should be shared between government and individual groups in society, including employers, producers and consumers. The particular share of the overall burden that each group bears should be examined on a case-by-case basis. In chapter 13, the Productivity Commission requests comment on the appropriate distribution of costs across government, employers, providers and consumers.

DRAFT FINDING 8.6

It is generally appropriate for the costs imposed on employers and service providers by the Disability Discrimination Act 1992 *to be shared between organisations, consumers and governments. The extent of government funding would need to vary depending on whether the Act is implemented through complaints or disability standards.*

8.5 Summing up competition effects

As noted at the start of this chapter, the Competition Principles Agreement (CPA) requires that legislation should not restrict competition, unless the benefits to society of that restriction outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

The distribution of compliance costs under the DDA could affect competition if costs are imposed on some businesses and not others. This could happen where compliance with the DDA relies on individual complaints. Costs are imposed arbitrarily on those businesses that happen to face complaints. However, there are only a small number of complaints. Although the costs they impose might be inequitable (or 'unfair') and affect the competitiveness of the individual business involved, they are not likely to affect the overall level of competition.

Where compliance is based on disability standards, costs are likely to be spread more evenly across an industry. If all businesses face similar costs, there will be only a limited effect on competition. There might be some indirect competitive effects if an industry competes with another industry that does not face additional costs (for example, public transport competing with private cars). Industries that compete internationally might also be affected—although many other countries have similar requirements (see appendix F).

For both complaints-based compliance and disability standards, costs on business will be limited:

- by the safeguards that limit the financial impact of adjustments (including the tests of unjustifiable hardship and inherent requirements, and the Regulation Impact Statement for disability standards)
- to the extent that compliance costs are likely to be quite small for many businesses (as suggested by overseas evidence)
- where they are offset (at least partly) by government.

Overall, the DDA appears to have a relatively limited impact on competition. The Productivity Commission considers that, in the absence of further information on costs, the DDA seems likely to meet the 'net benefits' test of the CPA.

In relation to the second part of the CPA test, it is difficult to see how the objective of eliminating discrimination can be achieved without statutory enforcement. Legislation is required to establish enforceable rights and effective complaints processes (see chapters 2 and 11). Moreover, as noted above, benefits arising from network effects and overcoming information asymmetries can be enhanced by enforceable disability standards (see chapter 12).

In addition, efficiency and cost minimisation considerations suggest that the costs of improving access should be shared throughout the community. Simply relying on government expenditure would not be the best way of achieving the objects of the DDA. The DDA appears to meet the second part of the CPA test—the objective of eliminating discrimination does not seem capable of being achieved without legislation.

9 Objects and definitions

The *Disability Discrimination Act 1992* (DDA) focuses on eliminating discrimination against people with disabilities. This primary purpose is enunciated in several key sections of the Act: the objects (s.3); the definition of disability (s.4); the definitions of direct and indirect discrimination(ss 5 and 6); and harassment (ss 35–40). These sections drive the operation of the DDA, by determining who has a disability and what actions constitute unlawful discrimination on the ground of disability. In this chapter, the Productivity Commission examines these key concepts and related issues raised by inquiry participants.

9.1 Objects of the DDA

The DDA has three stated objects: to eliminate disability discrimination; to ensure equality before the law; and to promote community acceptance (see chapter 4). These objects identify the principal problem that the DDA is seeking to address, which is discrimination against people with disabilities.

Most inquiry participants said these objects are clear and appropriate, or did not comment on them. The Mental Health Legal Centre echoed the words of several inquiry participants in declaring 'the objects of the Act are clear and concise' (sub. 108, p. 2). The Queensland Anti-Discrimination Commission noted:

> The objects of the DDA are obviously aspirational, verbalising a desired community standard, as is appropriate for legislation of this kind. (sub. 119, p. 11)

Other inquiry participants raised issues regarding the objects of the DDA. First, the Human Rights and Equal Opportunity Commission (HREOC) said the current objects are appropriate and workable (sub. 143, p. 35), but suggested that 'the object of eliminating discrimination could be supplemented with a more positive equality object' (trans., p. 1148). HREOC did not expand on this suggestion in its submissions to the inquiry. The Equal Opportunity Commission WA (sub. 236, p. 2) also 'suggested the object "equality" be promoted' in the DDA.

The first object in the DDA—to eliminate discrimination in the areas to which the DDA applies—aims to remove the barriers that impede equality of opportunity for people with disabilities in these areas. As discussed in chapter 2, a distinction

should be made between formal equality of opportunity, substantive equality of opportunity and equality of outcomes. Formal equality of opportunity requires the removal of discriminatory treatment so individuals are treated purely on merit. Substantive equality of opportunity requires different accommodation or services to be provided to individuals or groups to enable them to achieve equality of opportunity, but their final outcomes still depend on merit. Equality of outcomes goes further than removing or compensating for barriers to opportunity, and requires positive measures or differential treatment of individuals and groups to ensure particular outcomes for them.

The DDA provides for limited positive steps to remove barriers that prevent people with disabilities from taking advantage of opportunities, but it does not go so far as to require equality of outcomes. The Productivity Commission considers this role appropriate for discrimination legislation (see chapter 2). Improving outcomes for people with disabilities is important, but should be pursued through more direct mechanisms (such as improved disability services) not through the DDA (see chapter 14 for a discussion of the DDA and access to services).

A second issue regarding the DDA's objects was raised by the Darwin Community Legal Service. It questioned the qualifications that appear in the first two objects:

> 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. (sub. 110, p. 3)

These qualifications reflect the 'aspirational' quality of the objects, while also recognising that the elimination of all disability discrimination in all circumstances is not achievable in practice. They are reflected throughout the DDA, through devices such as the requirement to meet the 'inherent requirements' of employment and the 'unjustifiable hardship' limits on the provision of adjustments. In addition, there are practical limits to achieving equality before the law for some people with cognitive disabilities (see chapter 6). Similar qualifications are featured in the objects of the Age Discrimination Bill, currently before Parliament.

A third issue was raised by the New South Wales Council for Intellectual Disability, which said 'the objects of the DDA need to be broadened' to acknowledge the special needs of people with intellectual disabilities in the legal system (sub. 117, p. 5). The DDA seeks to eliminate discrimination and promote equality before the law for all people with disabilities. It clearly includes people with intellectual disabilities in its broad definition of disability (section 9.2). It would be inappropriate for the objects to single out the special needs of one group of people with disabilities, however valid they might be.

Fourth, ATSIC wanted the objects of the DDA to acknowledge the special needs of Indigenous people with disabilities:

> While ATSIC considers that the objects of the DDA (s.3) are of sufficient scope, it wants the section to specifically recognise the situation of Indigenous people with disabilities. It therefore proposes that section 3 of the DDA should include the specific aim of ensuring that Indigenous people with disabilities are fully able to exercise their rights, recognising that, in the case of Indigenous people, disadvantage associated with disability is compounded by highly adverse social conditions involving a range of negative factors concerned with matters such as health, education, employment and infrastructure services. (sub. 59, p. 3)

HREOC agreed that Indigenous people with disabilities face greater disadvantage than other people with disabilities, but argued that these disadvantages should be addressed directly through improved delivery of health, education, employment and other services, rather than indirectly through the DDA. HREOC further suggested that it might be beneficial to:

> … include a provision in the ATSIC legislation and other relevant law requiring powers and functions to be exercised having regard to the needs and rights of Indigenous people with disabilities. … HREOC is also currently considering possible areas for inquiry regarding particular disadvantages experienced by Indigenous people with disabilities. (HREOC, sub. 219, pp. 3-4)

The Productivity Commission agrees with HREOC on this issue. The disadvantages faced by Indigenous people with disabilities in Australia are significant and require redress. However, amending the objects of the DDA is unlikely to be an effective method of ensuring improvements in the provision of health, education and other services for Indigenous people with disabilities. As noted by HREOC, the DDA could be used, for example, to improve assistance and adjustments for the education of Indigenous children with hearing loss, but it cannot be used to prevent the hearing loss in the first instance (sub. 219, p. 4). Such deficiencies in the provision of crucial services need to be addressed directly.

The DDA addresses discrimination against all people with disabilities, including Indigenous people with disabilities and other people with multiple disadvantages. In some instances, where an incidence of discrimination is based on race and/or disability, the *Racial Discrimination Act 1975* might be a more direct and appropriate avenue for addressing discrimination against Indigenous people with disabilities.

A fifth issue raised by some inquiry participants was a desire for the DDA to address discriminatory attitudes and behaviour in an 'holistic manner', to promote a truly inclusive community. For example, Dorothy Bowes (trans., p. 1987) said the DDA should focus more on 'social conscience' and 'social issues' as well as

business and economic issues. In a related vein, Val Pawagi (sub. 191, p. 1) said the DDA should also address the personal sphere by encompassing 'dignity and respect, self-determination (decision making and choice), personal relationships, sexuality, marriage, parenthood, financial management, culture and religion'.

These concepts could be regarded as aspects or examples of achieving full community acceptance. There are risks in seeking to spell out aspects of the objects of the DDA in too much detail, particularly when they encompass aspects of private life that are not (or cannot be) addressed by the substantive provisions of the DDA. As noted, the DDA is about eliminating discrimination and promoting substantive equality of opportunity. It is not practical—and probably not feasible—for a discrimination Act to go beyond these objects.

DRAFT FINDING 9.1

The objects of the Disability Discrimination Act 1992 *(s.3) are appropriate and do not require amendment.*

9.2 Definition of disability

The definition of disability in the DDA is deliberately broad (see chapter 4). It does not require any assessment of the severity, type or permanency of a disability, or of when or how it was acquired. It thus focuses on whether a discriminatory act on the ground of actual or perceived disability has occurred, rather than on whether the person has a disability or on the nature of their disability.

One inquiry participant suggested that this definition 'avoids unproductive disputes over whether a person with a disability fitted a particular impairment category', as can happen in other jurisdictions under other Acts (Val Pawagi, sub. 1, p. 2). HREOC said 'the existing definition works well' in this respect, particularly compared with equivalent legislation in the United States, where significant legal resources and guidance notes are 'taken up with issues of the identification of who is, and is not, a person with a disability'. Similar problems have arisen in the United Kingdom, as highlighted in a recent review of UK anti-discrimination legislation (sub. 143, pp. 5-6).

Nevertheless, the following discussion covers some inquiry participants' concerns about the definition of disability. The Productivity Commission's recommendations are summarised at the end of this section.

Social versus medical definitions

As discussed in chapter 2, the DDA as a whole is based on a social model of disability. However, to some extent, the definition of disability in the DDA is based on a medical approach that defines disability in relation to actual, possible or perceived disabilities or impairments (see chapter 2). Similar medically based definitions of 'disability' (or occasionally, 'impairment') are evident in international discrimination declarations and overseas legislation (see appendix H).

Some inquiry participants said the DDA should use a social rather than a medical definition of disability. Joe Harrison (sub. 55, p. 5) and the Disability Council of New South Wales (sub. 64, p. 4) said the medical definition of disability 'allows many social myths and value judgements to be imported to the legal system where legislation, intended to protect/assist people with disabilities is used to legitimate abuses against them'.

The Disability Council of New South Wales recommended defining disability as a:

> … disadvantage or restriction caused by a contemporary social organisation … leading to social exclusion or resulting in less favourable treatment of and discrimination against people with impairments. Therefore people with disability are people with impairments who are disabled by barriers in society. (sub. 78, pp. 7–8)

The Independent Living Centre of New South Wales (sub. 92, p. 1) criticised 'disability' as 'a socially constructed concept' that is 'marginalising'. It recommended removing the word 'disability' from the DDA entirely, because disability is:

> … the inability to interact with the environment in a way that allows fulfillment of goals normally afforded the general (non-disabled?) community. … With inclusive environmental and technological designs, many more people can interact successfully with their environment and are therefore no longer 'disabled'. (sub. 92, p. 2)

In response to these comments, HREOC (sub. 219, p. 4) said that a social model of disability was considered in the initial drafting of the DDA's definition of disability, but 'rejected because it risked leaving some instances of disability discrimination outside the coverage of the legislation'.

Similar debates occurred before disability discrimination legislation was introduced in the United Kingdom (see appendix F). In HREOC's view, the definition of disability in the UK Act 'has proved in practice much less inclusive than the Australian DDA definition' (sub. 219, p. 4).[1] In a recently completed review of UK

[1] The *Disability Discrimination Act 1995* (UK) defines a disability as 'a physical or mental impairment which has a substantial and long-term adverse effect on [a person's] ability to carry out normal day-to-day activities.' (Department for Work and Pensions 2003)

disability discrimination law, the Disability Rights Commission recommended changes to the definition of disability to increase its inclusiveness (Human Resource Portal 2003, p. 2).

Several inquiry participants supported the current definition over a social model definition for practical reasons. The National Ethnic Disability Alliance said of the two models, that 'from a pragmatic and legislative point of view the current definition of the DDA' is more useful and 'does not exclude anybody with a disability' (sub. 114, p 13). Alexa McLaughlin (trans., p. 657) said the social model has merit in some contexts, but was 'very concerned' about applying it in the DDA.

The social model appropriately describes the act of discrimination in terms of barriers to substantive equality of opportunity and it forms part of the underlying rationale of the DDA (see chapter 2). As noted by HREOC:

> The DDA considered as a whole, however, rather than only in relation to the definition of disability, already reflects a social or environmental model of disability, including in requiring change in various social systems and facilities, rather than accepting a medical or deficit model. (sub. 219, p. 4)

A social definition is an impractical way of identifying who the DDA should or should not cover. By its nature, anti-discrimination legislation needs to distinguish between discrimination that is permissible and that which is not. It does this by making it unlawful to discriminate on the ground of a defined attribute. These attributes are to be found in people, even though the barriers to participation might result from society's responses to those attributes. As long as a broad definition of disability is adopted, so that there is little chance of genuine cases of disability discrimination being overlooked, the DDA retains the essence of the social model by focussing on discrimination, even where the relevant attribute is 'disability'.

Whichever language or philosophical basis is used to describe the relevant attribute (such as disability, impairment, condition, symptom, manifestation), the DDA must include a definition of 'disability' so it can operate in a workable, practical manner. The Productivity Commission does not favour adopting a definition of disability based on the social model.

DRAFT FINDING 9.2

The Disability Discrimination Act 1992 *is based on a 'social model' of disability discrimination, but it uses a medical definition of disability. This is appropriate. A definition of disability based on the 'social model' is not practical.*

Medical conditions

Many inquiry participants considered that the DDA's definition of disability is broad enough to cover most medical conditions. The Anti-Discrimination Board of New South Wales said 'the broad definition of disability in the DDA should be retained' (sub. 101, p. 19), as did the Equal Opportunity Commission of Victoria (sub. 129, p. 26). However, others said the definition does not adequately include certain conditions, including depression, chronic fatigue syndrome, addictions, multiple chemical sensitivities (MCS) and genetic disorders.

The Communication Project Group said 'we probably need a recognition of communication problems, because although it ought to pick it up, it doesn't' (trans., p. 899). Beyond Blue was concerned that the definition does not always cover behavioural and emotional disorders that are associated with mental illness, such as depression, so 'there's a strong need to expand the language, because people do not understand the disability' (trans., p. 635).

Villamanta Legal Service said that 'disability':

> … should include addiction in our view. It is extremely inhumane to expect a person through no fault of their own—after all addiction is not a choice—should be allowed to suffer discrimination as a result. (trans., p. 1874)

The Myalgic Encephalopathy and Chronic Fatigue Syndrome Association of Australia was concerned that chronic fatigue syndrome is not sufficiently covered by the definition of 'disability' in the DDA, because the condition is not easily diagnosed (or, in some cases, acknowledged) by the medical profession (sub. 211, p. 3). Similarly, people with MCS and related conditions said they are not adequately recognised medically or in legislation such as the DDA (Agnes Misztal, sub. 160, p. 1). Dorothy Bowes (trans., p. 1988-1989) said 'recognition of new and emerging diseases is a big problem … especially for people with MCS'.

In response to some of these submissions, HREOC noted that the DDA already covers most of these conditions:

> The existing DDA definition already covers depression, addiction and obesity, as is noted in explanatory material and complaint reports available on HREOC's website and (in the case of addiction) in Federal Court case law. (sub. 219, p. 6)

However, some doubt remains about the inclusion of conditions that are not easily diagnosed or not well recognised by the medical profession. Such conditions include, for example, variations of chronic fatigue syndrome and MCS, which have identifiable medical symptoms but do not necessarily have a medically recognised underlying illness or disability.

On the other hand, a recent review of UK discrimination legislation found that too much emphasis on symptoms can inadvertently exclude people who have been diagnosed but do not yet have symptoms (as can occur in cases of cancer or multiple sclerosis) (Human Resource Portal 2003, p. 2). However, this problem should not arise in Australia because the DDA expressly includes the presence of 'organisms capable of causing disease or illness', as well as disabilities that 'may exist in the future'.

Some inquiry participants recommended extending 'disability' to include people with social disadvantages or disturbed emotions due to past experiences as an Indigenous person (ATSIC, sub. 59, p. 4) and to homelessness (Women's Health Victoria, sub. 68, p. 2; Mental Health Legal Centre, sub. 108, p. 3). However, this approach appears to confuse 'disability' with 'disadvantage', which can arise from any number of circumstances. HREOC noted that if psychiatric disorders resulted from these or other disadvantages, then the DDA would cover any incidences of discrimination on the ground of that disorder (sub. 219, p. 6).

Genetic conditions

The New South Wales Office of Employment and Diversity was concerned that the DDA does not explicitly include 'genetic mutation and chromosome abnormality' (sub. 172). The Anti-Discrimination Board of New South Wales said the current definition is broad enough to cover genetic testing issues, but should be made more explicit:

> … the definition of disability in the DDA is sufficiently broad to allow complaints on the ground of a person's genetic makeup, [but] an amendment to the definition of disability was none the less warranted on the basis of a strong public interest rationale for making such coverage explicit in anti-discrimination legislation. (sub. 101, p. 19)

In its submission to the Australian Law Reform Commission's review of law and genetics (ALRC 2003), HREOC 'supported proposals to confirm that the DDA covers genetic discrimination (although in HREOC's view this is already the case)' (sub. 143, p. 5). HREOC suggested that this clarification could be made through explanatory material rather than an amendment to the DDA. The recent review of UK disability discrimination identified a similar issue, and an amendment was recommended to ensure that the UK legislation's definition of disability includes 'genetic conditions' (Human Resource Portal 2003, p. 2).

Behaviour as a manifestation of a disability

There is doubt about whether behaviours that are a 'manifestation' of a disability are part of that disability for the purposes of the DDA. If a student with a disability is disciplined for difficult behaviour for which children without that disability would also be disciplined, does that constitute discrimination on the ground of disability? This issue involves two separate questions. first, whether the behaviour is part of the disability (so as to establish the ground of disability) and, second, whether the act is discriminatory.

Contrary to the spirit (if not the stated intention) of the DDA, this introduces debate about whether a person's behaviour constitutes, or is part of, their disability, rather than focusing on whether discrimination has occurred. Villamanta Legal Service suggested that including 'manifestations' of a disability 'was the legislation's original intent' and that the absence is a drafting oversight rather than a deliberate exclusion (trans., p. 1874).

Some inquiry participants indicated that behaviour as an aspect of disability is becoming a serious issue for many schools. The Association of Independent Schools (Northern Territory) said:

> Violent behaviour of some students is a real issue and there is no clear solution to this. The situation becomes untenable if other students or staff find themselves at risk. (Alice Springs visit notes)

Difficult or unacceptable behaviour has arisen as a significant factor in a number of disability discrimination complaints in education, employment and, to a lesser extent, the provision of services. In most (but not all) of the cases heard by HREOC as a tribunal (before 2000), discrimination on the ground of a person's behaviour was found to constitute discrimination on the ground of disability where the behaviour was a symptom of or resulted from the disability, and where the discriminator knew of the disability (HREOC 2003b, pp. 67–70).

However, more recently, the Federal Court and the Federal Magistrates Service have taken a different view of behaviour and disability. In a case involving a student with a disability who was expelled for behaviour problems, the Federal Magistrates Service found there was no direct discrimination, because the school would have expelled any other student who behaved in the same manner but did not have the same disability. That is, the different treatment on the ground of the student's behaviour was not unlawful discrimination on the ground of disability (*Minns v State of NSW* (2002) FMCA 44).

This question (behaviour as part of disability) is being examined in the High Court in *Purvis v State of NSW* (*Department of Education and Training)* (2002) FCAC

(box 9.1). HREOC and the Equal Opportunity Commission Victoria said that the DDA might need to be amended, depending on the outcome of this case. The Equal Opportunity Commission Victoria summarised the issue:

> … the decision of the Full Bench of the Federal Court in *Purvis v State of NSW (Department of Education and Training)* has indicated that there is a distinction between a disability and conduct that directly results from that disability. … this establishes a dangerous precedent which has the potential to undermine the effectiveness of the DDA. … if the Full Federal Court decision is upheld, amendment should be made to ensure that the inclusive aspect of the DDA is maintained. This could be achieved either by: amending the definition of 'disability' to specifically include manifestations of a disorder, malfunction, illness or disease; or amending the definition of 'discrimination' to specify that discrimination on the basis of an attribute includes discrimination on the basis 'of a characteristic that a person with that attribute generally has'. (sub. 129, p. 26-27)

HREOC appeared to favour 'review of the definition of discrimination … in the light of the decision of the High Court in Purvis, whichever way' it goes (sub. 143, p. 21). HREOC added:

> … we are all a bit dependent on seeing what the High Court makes of it in the Purvis litigation. Before we embark on looking to see how we might clarify the definition in there we need to have the court's line on what problems there are. (trans., p. 1136)

The Productivity Commission considers the appropriate starting point for addressing these 'behavioural' cases of discrimination is the definition of disability (even if the definition of direct discrimination must also be amended). 'Disability' in the DDA should be as inclusive and unambiguous as possible. This would help to clarify that the DDA covers people with all types of disabilities, including those with difficult or undesirable behavioural symptoms.

Concerns among some inquiry participants about the implications of including 'behaviour' in the definition of disability appear to be misplaced. A broad definition of disability does not mean that all actions that affect people covered by this definition are automatically unlawful. The DDA includes a number of defences that allow discrimination in certain circumstances. Direct discrimination is lawful, for example, if providing different accommodations and services would cause an unjustifiable hardship (section 9.4) (and also see chapter 10). Indirect discrimination is lawful if rules or conditions that have a disproportionate effect on people with disabilities are reasonable in the circumstances (section 9. 5).

Conclusions

The Productivity Commission considers that the DDA should not inadvertently exclude people because their circumstances are not included in the definition of

disability or because the wording of the definition is ambiguous. Further, the definition of disability should not require repeated updates as medical knowledge advances or as new medical conditions emerge. This will help to minimise unnecessary and unproductive debate about whether a person has a disability for the purposes of the DDA. The definition of disability should be amended to ensure there is no doubt that it includes genetic abnormalities and conditions (such as genetic predispositions to certain diseases) and conditions that have medically recognised symptoms but have not necessarily been diagnosed (such as some forms of chronic fatigue syndrome or MCS).

Box 9.1 **Disability and 'behaviour' in the Purvis case**

Daniel Hoggan, the foster child of Mr and Mrs Purvis, enrolled in a mainstream Year 7 class at Grafton High School in 1997. Daniel had a severe brain injury in infancy. During 1997, he was suspended on several occasions for aggressive behaviour including verbal abuse and kicking and punching teachers, teachers' aides and other students. His literacy and numeracy skills were assessed as being at pre-school level. The school recommended that Daniel be excluded from the mainstream school and enrolled in the special education unit instead. The New South Wales Department of Education heard and rejected an appeal from Mr and Mrs Purvis against the exclusion.

Mr Purvis lodged a disability discrimination complaint with HREOC in 1998. HREOC found the Department of Education had discriminated against Daniel on the ground of disability and ordered it to pay $49 000 compensation to him.

The Department of Education appealed HREOC's decision to the Federal Court, which upheld their appeal. The court found that discrimination did not occur because 'the behaviour of the complainant is not *ipso facto* a manifestation of a disability within the meaning of the Act' ((2001) FCA 119).

Mr Purvis appealed this decision to the Full Court. The Full Court agreed with the first court decision. Among other things, the Full Court said Daniel's behaviour 'was a consequence of the disability rather than any part of the disability'. This case is now on appeal to the High Court of Australia.

Sources: *State of NSW (Department of Education) v HREOC* (2001) FCA 1199; *Purvis v State of NSW (Department of Education and Training)* (2002) FCAFC 106.

The DDA also requires clarification regarding the status of behaviour that is a consequence or manifestation of a disability. This matter will be addressed when the High Court decides on the Purvis case (box 9.1). Nevertheless, the Productivity Commission agrees with HREOC and other inquiry participants that it would be beneficial to clarify this important point in the DDA.

DRAFT FINDING 9.3

The definition of disability in the Disability Discrimination Act 1992 *(s.4) does not explicitly include medically recognised symptoms (where the underlying cause is unknown), genetic abnormalities or behaviours related to disabilities.*

DRAFT RECOMMENDATION 9.1

The definition of disability in the* Disability Discrimination Act 1992 *(s.4) should be amended to ensure that it includes:

- ***medically recognised symptoms where a cause has not been medically identified or diagnosed***
- ***genetic abnormalities and conditions***
- ***behaviour that is a symptom or manifestation of a disability.***

9.3 Definitions of discrimination

The DDA features two separate definitions of discrimination: direct disability discrimination and indirect disability discrimination. All Australian anti-discrimination legislation distinguishes between direct and indirect discrimination in some manner (although the wording varies), in acknowledgement of the different forms that discrimination can take.

In general, direct discrimination arises when a person with a disability is treated differently to others. Indirect discrimination arises from the adverse effects of uniform treatment—for example, a rule that applies to everyone equally but disadvantages a person with a disability (see below).

One inquiry participant said the distinction between direct and indirect discrimination in the DDA is an 'academic' or legal distinction only, and suggested merging the two (Anita Smith, trans., p. 297; sub. 127, p. 2). An example of a merged definition can be found in the Human Rights Code 1996 in British Columbia, Canada, which tests all cases of discrimination against the same set of criteria.[2] However, this single test still requires proof that an action is discriminatory 'either directly or indirectly', and does not appear to operate as a single test in practice (Equal Opportunity Commission Victoria, sub. 129, p. 28).

2 The Supreme Court of Canada established this test. The British Columbia Code does not define direct or indirect discrimination (Equal Opportunity Commission Victoria, sub. 129, p. 28).

The Productivity Commission considers that the DDA's distinction between direct and indirect discrimination is appropriate. A distinction is necessary to ensure the DDA can address unlawful discrimination that arises from different circumstances.

DRAFT FINDING 9.4

The distinction in the Disability Discrimination Act 1992 *between direct and indirect discrimination is appropriate.*

Direct disability discrimination

Direct disability discrimination under the DDA occurs when a person is treated 'less favourably than, in circumstances that are the same or are not materially different, … a person without the disability' (s.5(1), see chapter 4).

Circumstances that are 'the same or not materially different' include circumstances in which 'different accommodation or services may be required by the person with a disability' (s.5(2)). This provision has been interpreted by HREOC and others as implying a requirement for employers and others to make 'reasonable adjustments' to accommodate the needs of people with disabilities (see chapters 10 and 13). Among federal discrimination Acts, this feature is unique to the DDA. It recognises that adjustments or 'different accommodations' might be needed to achieve substantive equality of opportunity for people with disabilities, in a manner that is not required for people who face discrimination on the ground of sex and race, for example (see chapter 2).

Two elements of the DDA's definition of direct discrimination raise issues for this inquiry: the use of a 'comparator' to determine 'less favourable' treatment (s.5(1)); and the requirement not to take 'different accommodation or services' into account in making the comparison (s.5(2)). These elements are closely linked but are discussed separately below.

The use of a comparator

Direct discrimination is premised on differential treatment. The DDA's definition of discrimination relies on an actual or theoretical 'comparator' to determine differential treatment—that is, how a person without that disability would be treated. Many inquiry participants raised concerns regarding the 'comparator' in the DDA.

Some inquiry participants said that suitable comparators can be difficult or impossible to find. Disability Action Inc (sub. 43, p. 2) said this is most difficult for

people with intellectual or non-physical disabilities, and when dealing with 'broader quality of life issues' instead of cases of physical access. The National Disability Advisory Council (sub. 225, p. 2) said there are 'many areas that comparison cannot be easily made and in remote areas may not exist'. People with Disability Australia (trans., p. 1322) said 'the comparator test can lead to perverse results' and does not address 'the substantial issues of the Act' or deal with 'active measures'.

The examples given by inquiry participants of difficulty in establishing a comparator mainly related to alleged discrimination in access to disability services. The National Council for Intellectual Disabilities said the comparator is a problem 'when dealing with special needs and affirmative action programs' (sub. 112, p. 12). Blind Citizens Australia (sub. 72, p. 2) recommended a review of the comparator in the DDA to clarify when and how it applies in disability services. Disability Action Inc. (sub. 43, p. 2) and the National Disability Advisory Council (sub. 225, p. 2) suggested a meaningful comparator for disability services should be 'the quality of life of the average Australian, or the life expectations of the average Australian' rather than the current approach of comparison to a person without the disability. People with Disability Australia (trans., p. 1323) said the 'detriment test' recommended by the New South Wales Law Reform Commission for that State's Act (box 9.2) is 'a more appropriate test to apply than a comparator test' in services and other areas.

These questions about whether direct discrimination under the DDA can be applied to disability services are largely misplaced, because the DDA exempts the provision of special measures for the benefit of people with disabilities (s.45). Even if the comparator were removed or amended, as some inquiry participants suggested, the exemption means the DDA would not apply to complaints about the establishment, funding or eligibility criteria for disability services. The Productivity Commission considers it appropriate that the DDA does not apply to the provision of special measures (see chapters 10 and 14).

As stated in section 9.1 and chapter 2, the DDA is aimed at eliminating discrimination on the ground of disability, to promote substantive equality of opportunity for people with disabilities. It does not aim to achieve equality of outcomes. Some people might consider access to disability services inadequate, inappropriate or even unfair. However, these are rarely issues of direct disability discrimination. If even a notional comparator cannot be found, the situation is unlikely to involve direct discrimination (although it may be unfair or undesirable for other reasons). The DDA is not intended or designed to address matters other than discrimination. Issues of eligibility or quality in disability services should be addressed directly through alternative complaint mechanisms (see chapter 14).

Alternatives approaches to the comparator

Some jurisdictions have adopted different approaches that redefine or eliminate the comparator in their discrimination legislation. Some Acts look at whether the person with a disability has been treated unfavourably or in a manner that disadvantages them, or has suffered a 'detriment' in an absolute rather than a comparative sense (box 9.2).

Box 9.2 **Alternatives to the comparator in other legislation**

The *Americans with Disabilities Act 1990* (ADA) defines discrimination in an absolute (unfavourable treatment) rather than relative sense (less favourable treatment). It defines discrimination in employment as (among other things):

> … limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee. (s.102(1))

The ACT's *Discrimination Act 1991* defines discrimination as when a person:

> (a) … treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; (s.8(1))

In its review of the *Anti-Discrimination Act 1997 (NSW)*, the New South Wales Law Reform Commission (1999, paras. 3.51-3.53) said the Act's comparator, which specifies 'less favourable treatment', causes 'conceptual difficulties as well as problems associated with proof for complainants … artificiality and resulting complexity'. It recommended replacing the comparator with a 'detriment' test, with 'detriment' defined as 'adverse effects', 'somewhat akin to damage' or 'disadvantage' (recommendation 3). This recommended amendment has not been implemented.

Sources: *Americans with Disabilities Act 1990 (US)*; *Discrimination Act 1991 (ACT)*; *Anti-Discrimination Act 1977 (NSW)*; NSW Law Reform Commission 1999.

In Australia, most discussion has centred on the approach adopted in the ACT. The ACT Administrative Appeals Tribunal described the ACT Act as 'idiosyncratic' because it 'does not include any definition at all of unfavourable treatment' (*Prezzi and Discrimination Commissioner* (1996) ACTAAT 132). The ACT Discrimination Commissioner claimed 'the lack of a comparator' in the ACT Act has the advantage of allowing for 'unique circumstances' and:

> … may be helpful to people wishing to make a complaint about disability discrimination as it allows for unique circumstances and for each individual's experience of discrimination to be explored on its own merits. (sub. 151, p. 6)

However, the ACT Discrimination Commissioner acknowledged:

> … very often there's an implied comparator in that if a person is claiming to have been treated unfavourably, almost in the back of your mind you have some notion of what might have been fair treatment or favourable treatment. (trans., p. 713).

In the Prezzi case, the ACT Administrative Appeals Tribunal commented on the lack of an explicit comparator in the ACT Act. It said that:

- in the ACT Act, 'the issue is whether the consequences of the [treatment] complained of are unfavourable to the complainant', rather than whether the treatment itself was different or 'less favourable', as would occur under other discrimination Acts, including the DDA
- 'in some special cases', the ACT approach might lead to a different decision to that made under other discrimination Acts, but, in most cases, the resulting decision will be the same
- the ACT approach 'involves some difficulty' in cases where all of the available courses of action might produce unfavourable outcomes, regardless of whether the actions involve differential or discriminatory treatment.

HREOC (sub. 143, p. 12) raised concerns about the implications of adopting the ACT approach for the scope of the special measures exemption in the DDA (s.45). It cited an ACT case regarding the provision of disability services, in which the lack of an explicit definition or comparator in the ACT Act might have encouraged the ACT Administrative Appeals Tribunal to adopt a wide interpretation of that Act's special measures exemption (which is similar to the special measures exemption in the DDA) (see chapters 4 and 10).

The conundrum for the tribunal was that without a comparison point (such as how a person without the disability might be treated), and if it had not exercised the special exemptions clause, the tribunal might have had to decide whether the person concerned was treated 'unfavourably' and, thus decide whether the person should receive the disability service in question, possibly in contravention of that service's eligibility criteria. If this concern were to arise in relation to the DDA, the Act should be amended to clarify the application of the special measures exemption to disability services (s.45) (see chapter 10).

The Productivity Commission is not convinced that these alternative approaches are significantly different from the comparator approach in the DDA. Any notion of 'unfavourable', 'less favourable' or 'detrimental' treatment almost inevitably requires a notional or theoretical comparison of the treatment of the person with a disability, and the treatment that person would have received if they did not have the disability. South Australia's *Equal Opportunity Act 1984*, for example, defines discrimination on the ground of impairment as 'unfavourable' treatment' (s.66)

using similar language to that in the ACT Act. However, it then defines 'unfavourable' treatment as treating someone:

> … less favourably than in identical or similar circumstances the discriminator treats, or would treat, a person who does not have that attribute or is not affected by that circumstance. (s.6(3))

For all intents and purposes, these different approaches are applied in a similar manner and achieve similar outcomes to that of the DDA. A direct point of comparison provides an essential, practical benchmark, against which the action of the discriminator can be measured.

DRAFT FINDING 9.5

The requirement to make a comparison between the treatment of a person with a disability and the treatment of a person without the disability to determine direct discrimination in the Disability Discrimination Act 1992 *(s.5(1)) is appropriate.*

This is not to say that the current operation of direct discrimination in the DDA cannot be clarified or improved. Some details of the DDA's definition of direct discrimination appear to require clarification, including:

- the identification of a suitable comparator in circumstances 'that are not materially different' in each case (s.5(1))
- the effect of providing 'different accommodation and services' on the comparator (s.5(2))
- whether a failure to provide 'different accommodation or services constitutes direct discrimination under this section of the DDA (s.5(2)).

These issues are discussed in turn below.

Identifying a comparator

Potential problems in identifying an appropriate comparator sets disability discrimination apart from sex or race discrimination, for which many more direct comparators are likely to be available. In its review of Federal Court discrimination cases (from September 2000 to September 2002), HREOC concluded:

> The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the inception of the DDA, and one that continues to be the subject of academic and judicial debate. (HREOC 2003b, p. 70)

In HREOC decisions,[3] the comparator was generally taken to be a real or hypothetical person in the same circumstances but without the general characteristics of that disability. The treatment of a person with HIV/AIDS, for example, was compared to that of people who are not infectious, because 'infection' is a characteristic of having HIV/AIDS (HREOC 2003b, p. 71).

HREOC's approach has been followed in some Federal Court and Federal Magistrates Service decisions but not in others.[4] Decisions appear to have depended on each court's interpretation of circumstances 'that are not materially different' and the general characteristics of the person with the disability that should or should not be imputed to the comparator (such as 'infectiousness').

Regarding this legal uncertainty, HREOC noted that the phrase 'not materially different' in the DDA:

> … does not provide any clear test of what circumstances are or are not materially different so as to justify different treatment. This phrase cannot be regarded as providing a defence for justifiable differences in treatment where the disability itself is regarded as making a material difference. (sub. 219, p. 7)

HREOC suggested deleting the word 'materially' in section 5(1) to simplify the task of identifying a suitable comparator (sub. 219, p. 8). Alternatively, greater guidance could be given on what constitutes circumstances that are 'not materially different'. This guidance could be provided in the DDA (through a list of criteria or examples) or in guidelines or disability standards (as suggested by the New South Wales Office of Employment and Diversity, sub. 172, p. 4).

The Productivity Commission notes that some of the uncertainty surrounding the comparator may be due to deficiencies in the definition of 'disability', as identified in section 9.2—for example, the question of whether 'disability' includes behavioural symptoms. The Commission has recommended that these deficiencies in the definition of disability be addressed. This would clarify the types of comparators that are relevant in discrimination cases involving, for example, behaviour.

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[3] HREOC was empowered to make decisions prior to 2000; now it only conciliates (see chapter 4).

[4] Cases that followed HREOC's interpretation include *IW v City of Perth & Ors* (1997) 191 CLR 1 and *McKenzie v Dept of Urban Services & Canberra Hospital* (2001) FMCA 20. Cases that did not follow HREOC's interpretation include *NSW v HREOC & Purvis* (2001) FCA 1199 and *Minns v State of NSW* (2002) FMCA 44.

The definition of direct discrimination in the Disability Discrimination Act 1992 *(s.5(1)) is unclear about what constitutes circumstances that are 'not materially different' for comparison purposes.*

Providing 'different accommodation or services'

The DDA states that circumstances are not considered to be 'materially different' if 'different accommodation or services' are required by a person with a disability (s.5(2)). This clause significantly extends the scope of direct discrimination, by including cases in which different accommodation or services are required to enable a person with a disability to achieve substantive equality of opportunity, as well as cases in which the person with a disability requires exactly the same treatment required by others (that is, formal equality of opportunity—see chapter 2). As many inquiry participants noted, this distinction sets disability discrimination legislation apart from sex or race discrimination legislation:

> …it may be reasonable to have an equal opportunity model under the Race Discrimination Act and under the Sex Discrimination Act, [but] that will not work in the area of disability discrimination, because treating people with disabilities the same as a notional normative person will entrench pre-existing disadvantage … positive measures, are necessary …(People with Disability Australia, trans, p. 1323)

Indeed, if s.5(2) were absent, the fact that a person has a disability might be enough to make their circumstances 'materially different' for the DDA. As found by HREOC Commissioner Wilson in the Dopking case:

> It would fatally frustrate the purposes of the Act if matters which it expressly identifies as constituting unacceptable bases for different treatment … could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act. (Sir Ronald Wilson (HREOC unreported 1994) *in* HREOC 2003b, p. 71)

In a case relating to an employee with a vision impairment who required screen magnifying software, the Federal Court found that despite the employee's different workplace needs, she was not materially different from other employees:

> The comparison in this case must be as between Mrs Humphries, with her needs to enable her to function as an ASO1, and other ASO1s who are not disabled, but who have reasonable needs for equipment which would enable them to carry out their duties. (*Commonwealth of Australia v Nerilie Ann Humphries & Ors* (1998) FCA)

This approach has been followed in subsequent DDA cases before HREOC and the courts. The DDA clearly states—and the courts have upheld—that a person who

requires different accommodations or services is 'not materially different' in their circumstances, for the purposes of determining direct discrimination.

Failure to provide 'different accommodation or services'

The more significant—and far more uncertain—issue for section 5(2) of the DDA is whether the section requires the respondent to make 'different accommodation or services', or whether it requires only that such accommodations cannot be taken into account when determining 'materially different' for the purposes of identifying a comparator. That is, is a failure to provide the different accommodation or services required by a person with a disability unlawful discrimination under the DDA?

Some HREOC and court decisions have found that 'different accommodation or services' must be provided, but others have found the opposite. In his decision for *AJ & J v A School* (2000), HREOC Commissioner McEvoy said:

> … the substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing … so that in truth the person with a disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances. (McEvoy (HREOC unreported 2000) *in* HREOC 2003b, p. 75)

By contrast, the opposite view—that section 5(2) does not impose a duty to provide the different accommodations required by a person with a disability—was found in *Clark v Internet Resources (*Commissioner Mahoney, HREOC 2000) and *Commonwealth of Australia v Humphries* (1998) 1031 FCA). The Federal Court has not yet considered this issue. HREOC (2003b, p. 78) noted that the court's recent decisions indicated 'a narrower approach … will be preferred' and section 5(2) will not imply a duty (see chapter 13).

The Productivity Commission considers that the current ambiguity about section 5 should be addressed, to clarify that failure to provide 'different accommodation or services' required by a person with a disability is 'less favourable treatment' (subject to inherent requirements, unjustifiable hardship and relevant exemptions in the DDA—see chapter 10). Alternative interpretations could lead to absurd and undesirable results—for example, it would be 'less favourable treatment' to refuse to employ a person with a disability but not 'less favourable treatment' to then refuse to provide them with technologies to assist them at work.

This obligation is stated much more clearly in discrimination Acts in some other jurisdictions. For example, *the Equal Opportunity Act 1984* in South Australia states:

> For the purposes of this Act, a person discriminates on the ground of impairment … if he or she fails to provide special assistance or equipment required by a person in consequence of the person's impairment. (s.66(d)(i))

This example and others like it provide a suitable model for amending the DDA.

This is not to say that every request for different accommodations must be met—for example, the DDA does not require the provision of different services that are not reasonably required or that impose an unjustifiable hardship. To help ensure that an obligation to provide different accommodations or services is applied in a balanced manner, the Productivity Commission makes a draft recommendation that the defence of unjustifiable hardship be available in all areas of activity in which the DDA makes disability discrimination unlawful (see chapter 10). Other relevant conditions, such as inherent requirements in employment, would continue to apply.

DRAFT FINDING 9.7

The definition of direct discrimination in the Disability Discrimination Act 1992 *(s.5(2)) does not explicitly make failure to provide 'different accommodation or services' required by a person with a disability 'less favourable treatment'. The provision has not been interpreted consistently.*

DRAFT RECOMMENDATION 9.2

The definition of direct discrimination in the* Disability Discrimination Act 1992 *(s.5) should be amended to:

- ***clarify what constitutes circumstances that are 'not materially different' for comparison purposes***
- ***make failure to provide 'different accommodation or services' required by a person with a disability 'less favourable treatment'.***

Indirect disability discrimination

Indirect discrimination occurs when a person is required to comply with a rule or requirement 'with which a substantially higher proportion of persons without the disability comply or are able to comply' (the so-called 'proportionality test'), the requirement is 'not reasonable' in the circumstances, and the person with the disability does not or is not 'able to comply' (see chapter 4). In summary, this definition requires a complainant to establish four separate elements.

1. The discriminator requires the aggrieved person to comply with a requirement or condition.

2. A substantially higher proportion of people without the disability can comply with this requirement or condition (the proportionality test).
3. The requirement or condition is not reasonable in the circumstances (the reasonableness test).
4. The aggrieved person cannot comply with the requirement or condition.

Inquiry participants said these requirements are problematic and confusing for potential complainants. The Equal Opportunity Commission Victoria said:

> Community feedback indicates that many people do not understand what indirect discrimination is. Staff across the Commission state that actual and potential respondents and complainants find the concept confusing and the definition unwieldy and difficult. (sub. 129, p. 27)

HREOC said a simpler set of criteria for determining indirect discrimination would:

> … assist people with rights and responsibilities under the legislation in understanding more readily what indirect discrimination involves. (sub. 143, p. 17)

Four specific issues were raised in relation to indirect discrimination:

- the proportionality test
- the reasonableness test
- the burden of proof on the complainant in indirect discrimination
- proposed acts of indirect discrimination.

These issues are discussed in turn below.

The proportionality test

Many inquiry participants were critical of the proportionality test for indirect discrimination. Some argued that it places an extra evidentiary burden on people with disabilities and adds little or nothing to the test (Anti-Discrimination Board New South Wales, sub. 101, p. 20) The Equal Opportunity Commission Victoria said:

> … the technical requirements of the definition may place too onerous a burden on complainants. … a complainant must first prove that they have been required to comply with a requirement or condition with which they cannot comply but which a substantially higher proportion of people without the disability would be able to comply. (sub. 129, pp. 27-8)

In one DDA case before the Federal Magistrates Service, Raphael FM went so far as to note that in establishing a suitable comparator:

> …it is for the applicant to prove his case and if that requires a complex, time consuming and undoubtedly expensive exercise in comparisons then it must be undertaken. (the Minns case, (2002) FMCA 605 *in* HREOC 2003b, p. 85)

HREOC said the proportionality element of indirect discrimination has not presented problems in practice:

> These issues of appropriate methods for comparison have not presented the same difficulties in applying the DDA as in applying sex discrimination law. There is no sophisticated mathematics required to determine, for example, that a requirement to enter a building or vehicle by stairs will disadvantage people who use a wheelchair compared to people who do not. (HREOC, sub. 143, p. 19)

Nevertheless, HREOC recommended simplifying this element of the definition.

Anti-discrimination Acts in the Northern Territory, Tasmania and the ACT, and some other federal discrimination Acts do not include a proportionality test. Instead, they use a concept of 'disadvantage' that is similar to the 'unfavourable' and 'less favourable' tests found in their (and the DDA's) definitions of direct discrimination (section 9.4). The ACT Act, for example, states that a person indirectly discriminates against another person if:

> … the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7. (s.8(1)(b))

The federal *Sex Discrimination Act 1984* was amended in 1995 to simplify the test of indirect discrimination. In this Act, indirect discrimination occurs when a condition or requirement 'has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person' (s.5(2)). The Anti-Discrimination Board of New South Wales (sub. 101, p. 21) recommended this section of the Sex Discrimination Act as 'an appropriate model' on which to base a simpler indirect test for the DDA. The Age Discrimination Bill, currently before Parliament, refers to 'disadvantage' to define indirect discrimination in a similar manner (s.15(1)).

The current proportionality test in the DDA places a further burden of proof on the complainant for little apparent benefit. To this end, the DDA's definition of indirect discrimination should be simplified by removing the proportionality test at section 6(a).

DRAFT FINDING 9.8

The proportionality test in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(a)) imposes an unnecessary evidentiary burden on complainants.*

The reasonableness test

In addition to the proportionality test, the definition of indirect discrimination in the DDA requires that the rule or condition also be 'not reasonable in the circumstances' (s.6(b)). This feature is common to many other discrimination Acts, including the *Discrimination Act 1991 (ACT)*, the federal *Sex Discrimination Act 1984* and the proposed federal Age Discrimination Bill.

Unlike these other Acts, the DDA does not include a definition or list of criteria to take into account in determining reasonableness in indirect discrimination. Instead, a set of criteria has developed through case law, based in part on established jurisprudence regarding the concept of 'reasonable' (Blind Citizens Australia, trans., p. 1690). This has been loosely described in relation to the DDA as:

> The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience … which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances must be taken into account. (Raphael FM in the Minns case, (2002) FMCA 60 *in* HREOC 2003b, p. 86)

HREOC has suggested non-exclusive criteria for assessing the 'reasonableness' of a requirement or condition in employment cases as including: the purpose of the rule; the importance of the rule; whether other means are available to achieve it; the nature and extent of the disadvantages it causes; and the effects of its removal on others (HREOC 2003f).

By contrast, the federal Sex Discrimination Act lists matters to be taken into account in determining 'reasonableness':

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice. (s.7B(2))

The ACT's Discrimination Act lists very similar criteria for judging whether an otherwise discriminatory action is reasonable in the circumstances (s.8(1)).

The Productivity Commission considers that the requirement for the discriminatory action to be 'not reasonable' in the circumstances should remain. It should be possible, for example, to include a reasonable requirement to have unimpaired eyesight in the job description for aeroplane pilots, or to prohibit students from harming teachers or other students, without causing indirect discrimination under the DDA.

However, this clause could benefit from clarification through the addition of appropriate criteria for determining whether a rule or condition is reasonable in the circumstances. These criteria could improve the clarity and consistency of the application of the indirect discrimination provisions in the DDA.

These criteria should be inserted into the DDA (rather than in guidelines or explanatory notes), so as to promote certainty and consistency in their legal application. The criteria in other discrimination Acts, and those that have emerged from DDA case law, could provide a model.

DRAFT FINDING 9.9

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(b)) does not provide sufficient guidance on how to determine whether a requirement or condition is 'not reasonable having regard to the circumstances of the case'.*

Burden of proving 'reasonableness' in indirect discrimination

The DDA is silent on the issue of who must prove 'reasonableness' in indirect discrimination. In the second reading speech presenting the Bill to Parliament, the then Minister said that 'the overall legal burden of proof, in proving discrimination unlawful, will remain with the complainant', except for proving the inherent requirements of a job or unjustifiable hardship to a person or business (Australia 1992, p. 2751).

As noted by inquiry participants and Raphael FM (HREOC 2003b, p. 86), this burden can be considerable. The Equal Opportunity Commission Victoria said the:

> … burden of proving that the requirement or condition is not reasonable … can be problematic for complainants, because the information necessary to make an assessment of what is reasonable, or to prove reasonableness, often lies with the respondent and is inaccessible to the complainant. (sub. 127, pp. 27-8)

The federal Age Discrimination Bill, currently before Parliament, places 'the burden of proving that the condition, requirement or practice is reasonable in the circumstances' on the alleged discriminator (s.15(2)). The explanatory memorandum for the Bill explains why this clause was added:

> … this is because the person who is imposing or proposing to impose such a requirement is in the best position to explain or justify the reasons for it in the particular circumstances. For example, where an employer's business context requires certain productivity standards for competitiveness or to meet external requirements, the employer understands the reasons for requiring those standards and is therefore best placed to show that they are reasonable. An employee or prospective employee, on the

> other hand, is less likely to have access to all the information about the overall needs of and demands on the business in question. (para. 20)

Other discrimination Acts, including the Sex Discrimination Act (s.7C), also place the burden of proving the 'reasonableness' of their actions on the alleged discriminator. The same issue of access to information that was identified in relation to the Age Discrimination Bill would apply in relation to the DDA.

The Productivity Commission agrees that the current arrangements place an additional burden on the complainant in proving they have been indirectly discriminated against. In the interests of reducing the (already significant) burden of proof on the aggrieved person, the burden of proving that an indirectly discriminatory rule or condition is reasonable in the circumstances should be placed on the discriminator (who is best placed to do so) as is required in some other discrimination Acts.

DRAFT FINDING 9.10

The burden of proving that a requirement or condition is 'not reasonable having regard to the circumstances of the case' in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(b)) falls on the complainant. This is neither appropriate nor efficient.*

Proposed acts of indirect discrimination

HREOC (sub. 143, p. 21) identified that 'as the result of an apparent oversight in drafting, proposed acts of indirect discrimination are not expressly covered in the DDA' in the same way as they are in the Sex Discrimination Act and other discrimination Acts. By contrast, the definition of direct discrimination in the DDA includes 'proposed treatment' of a person with a disability that is different from treatment of others (s.5(a)).

This means that a person with a disability must wait until a requirement or condition that indirectly discriminates against them is introduced before they can make a complaint, even if they can see beforehand that it will have a discriminatory effect. If a school or club, for example, proposed to introduce a dress regulation that would indirectly discriminate against a person with a disability, then the person cannot make a complaint until after the regulation is introduced.

In the Productivity Commission's view, this approach seems both inefficient and unnecessary. The anomaly that proposed actions are included in direct discrimination but not in indirect discrimination in the DDA should be addressed.

DRAFT FINDING 9.11

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6) does not include proposed acts of indirect discrimination. This is not appropriate.*

DRAFT RECOMMENDATION 9.3

The definition of indirect discrimination in the* Disability Discrimination Act 1992 *(s.6) should be amended to:

- ***remove the proportionality test***
- ***include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances of the case'***
- ***place the burden of proving that a requirement or condition is reasonable 'having regard to the circumstances of the case' on the respondent instead of the complainant***
- ***cover incidences of proposed indirect discrimination.***

9.4 Harassment and vilification

The DDA makes harassment against people with disabilities unlawful in some, but not all, of the areas in which it makes disability discrimination unlawful. It does not mention vilification of people with disabilities. Some inquiry participants said a vilification provision might be a useful addition to the DDA, following the model of Australia's racial vilification legislation and similar legislation overseas. HREOC stated that the federal *Racial Hatred Act 1995*, for example, makes it unlawful to commit:

> … public acts which are:
>
> - done, in whole or in part, because of the race, colour, or national or ethnic origin of a person or group AND
> - reasonably likely in all the circumstances to offend, insult, humiliate or intimidate that person or group. (HREOC 2003)

Vilification is to be distinguished from 'victimisation'. Victimisation refers to unlawful interference in the complaints process or harassment of a person who has made a complaint under the DDA (see chapters 4 and 11).

Definition and scope of harassment provisions

Under the DDA (ss 35–40), harassment of people with disabilities and their associates is unlawful in employment (by employers, commission agents and contractors only), education (by education staff only) and the provision of goods and services. The DDA does not define harassment.

Harassment is not unlawful in the other areas of activity to which the DDA applies, including accommodation, land, clubs, sport and administration of Commonwealth laws and programs. In some of these areas, harassment might constitute part of a discrimination complaint—for example, if harassment amounted to 'less favourable' treatment for direct discrimination, or if a company's or school's policies to address bullying and harassment were inadequate and constituted indirect discrimination.

DRAFT FINDING 9.12

The Disability Discrimination Act 1992 *does not make harassment unlawful in all of the areas of activity in which disability discrimination is unlawful.*

Inquiry participants' views on harassment coverage in the DDA

Few inquiry participants raised harassment, or the scope of the DDA's harassment provisions, as issues for this inquiry. HREOC said it receives few harassment complaints under the DDA (sub. 143, p. 29). The Attorney-General's Department (sub. 115, p. 10) noted that 'harassment is not separately defined in the DDA, and there appear to have been no cases considering the term as it is used in the DDA', but did not identify particular issues or problems associated with this arrangement.

However, Blind Citizens Australia (sub. 72, p. 8) said the lack of a definition for harassment in the DDA is 'not easy' to work with, and it 'would prefer to see the concept of a hostile environment introduced into the DDA to replace or further define harassment'.

Some inquiry participants wanted the scope of the harassment provisions increased, particularly in education and employment. Janet Hope (sub. 165, p. 63) was concerned about 'student to student harassment versus university to student harassment' and said the DDA's failure to cover this was 'an anomaly, a problem'. Denis Denning (sub. 109, p.2) also wanted harassment by other students addressed more directly in the DDA. On the other hand, the Association of Independent Schools (South Australia) (sub. 135) and other inquiry participants from the education sector pointed out that harassment by other students is normally

addressed in school and institution policies, and that this important issue in education is far from being ignored (see appendix B).

The Disability Rights Network of Community Legal Centres recommended extending unlawful harassment to:

> … students harassing teacher/staff with disability on the basis of the disability
>
> … no person in the workplace is to harass any other person in the workplace with a disability on the basis of the disability
>
> … no person in relation to the provision of goods and facilities should harass another person with a disability on the basis of the disability (sub. 74, pp. 3–4)

HREOC said:

> … there may be a need for more definition on what constitutes harassment and on an employer's duties in preventing harassment. (sub. 143, p. 29)

HREOC noted that the draft disability standards for education 'provide significantly more detailed compliance measures' than provided by the DDA, including 'the duty of schools to have effective policies and measures in place to prevent harassment'. HREOC was interested in feedback on extending this model to other areas of activity in the DDA (sub. 143, pp. 29, 63).

Options for improving harassment coverage in the DDA

One option for addressing these perceived gaps in the coverage of the harassment provisions would be to make harassment against people with disabilities unlawful in all areas of activity in which disability discrimination is unlawful. This change could be implemented either through a general section that makes harassment unlawful in all areas of the DDA in which discrimination is unlawful, or through specific sections that state the individual areas in which harassment is unlawful. This latter approach would be more in line with the current drafting of the DDA, which lists individual areas in which harassment is unlawful (ss 35-40).

Another option would be to make harassment unlawful in all facets of life in general. This Queensland Anti-Discrimination Commission (sub. 119) recommended this approach on the basis of its experience in administering a similar general harassment section in that State's discrimination Act.

In response to the Queensland suggestion, HREOC said it might not be feasible to adopt this approach for the DDA (sub. 219, p. 11). It said the Queensland option would require:

> … consideration of the constitutional basis of provisions applying beyond the employment relationship or similar occupational relationships, although in HREOC's

> view international concern regarding disability and human rights is sufficient for this purpose. There would also need to be consideration of what implications there might be for duties of employers regarding conduct by people in the workplace who are not employees. (sub. 219, p. 10)

This option would take harassment beyond the existing scope of the DDA, because the DDA applies to only certain (albeit very extensive) areas of activity. As a first step, it seems preferable to ensure the harassment provisions of the DDA match the coverage and scope of the existing discrimination provisions, subject to concerns regarding the Australian Government's Constitutional authority to legislate on this issue. The Productivity Commission is seeking legal advice on this question for the final report of this inquiry.

Vilification of people with disabilities

Some inquiry participants suggested vilification of people with disabilities should be unlawful under the DDA, following the model of federal racial vilification legislation and vilification clauses in the New South Wales' Anti-discrimination Act (Anti-discrimination Board of New South Wales, sub. 101, p. 23). Sane Australia said:

> Action against stigma and discrimination towards Australians with a psychiatric disability is held back by the limited nature of the DDA's terms, especially in relation to vilification and harassment. Offensive, stigmatising representation of this group in the media and advertising needs to be easier to prosecute as discriminatory. (sub. 62, p. 2)

One model for such a clause might be taken from the New South Wales Act, which was amended in 1994:

> … to make it unlawful to do any public act that is capable of inciting hatred, serious contempt or severe ridicule of people on the ground that they are, or are presumed to be, living with HIV or AIDS. (Smyth 2003, p. 3)

The New South Wales Equal Opportunity Tribunal has heard several complaints under this section of the New South Wales Act. In Marinkovic's case, the respondents were ordered to each 'pay $25 000 in damages, a total of $50 000, a public apology and costs of the proceedings' for publicly harassing and vilifying their neighbour on the basis of his homosexuality and HIV/AIDS status. Their behaviour had included subjecting him to verbal abuse and throwing objects at his residence (Smyth 2003, p. 3).

This approach to vilification may warrant legal investigation, to determine whether it would be feasible in the DDA. HREOC noted that it:

> … does not have a definite view at this point on whether such a provision would be within Commonwealth constitutional power and on how such a provision might operate but agrees that it merits further consideration. (sub. 219, p. 10)

As an alternative to amending the DDA, Gary Batch (sub. 189, p. 1) and the Disability Council of New South Wales (sub. 64, p. 3) suggested that vilification, stigma, harassment and discriminatory practices should be the subject of 'a public awareness campaign' (see chapter 7).

REQUEST FOR INFORMATION

The Productivity Commission requests further information on options for extending the scope of the harassment provisions and addressing the vilification of people with disabilities.

10 Defences and exemptions

The *Disability Discrimination Act 1992* (DDA) makes discrimination on the ground of disability unlawful in a large range of activities, including employment, education and the provision of goods and services (see chapter 4). However, in almost all of these areas, disability discrimination may not be unlawful in some situations, for a variety of reasons. These reasons include failure to meet the inherent requirements of a job (section 10.1), adjustments that would cause an unjustifiable hardship to the provider (section 10.2), insurance and superannuation decisions that are based on reasonable actuarial or statistical data or other relevant factors (section 10.3) and other exemptions in the DDA (section 10.4).

These defences and exemptions for actions that otherwise would be unlawful apply only in certain circumstances. These circumstances are discussed in this chapter. A few prescribed State and Territory Acts are also exempt under the Disability Discrimination Regulations (see chapter 12).

10.1 Inherent requirements in employment

The need to meet the 'inherent requirements' of an activity applies only to employment. The term appears repeatedly in division 1 of the DDA, 'Discrimination in work'. A similar concept applies to sport, whereby discrimination is lawful if a person 'is not reasonably capable of performing the actions reasonably required in relation to the sporting activity' (s.28(1)(a)) (see chapter 4).

Inherent requirements form the basis of an important exemption in the DDA. They mean that discrimination in employment on the ground of disability is not unlawful if a person is 'unable to carry out the inherent requirements of the particular employment' (s.15(4)(a)), even after the employer has provided different facilities or services that do not cause unjustifiable hardship.

The inherent requirements provisions of the DDA are similar to a provision of the *Workplace Relations Act 1996* which does not make it unlawful for employers to dismiss an employee due to a disability (or other attributes) if that disability means the employee cannot meet the inherent requirements of the position (s.170CK(2)).

The DDA does not define the term 'inherent requirements'. Based on its context, the term appears to refer to the activities that are essential to the satisfactory completion of the tasks required in a job. It can also extend to the manner in which the tasks are completed. The Human Rights and Equal Opportunity Commission (HREOC) explained that inherent requirements:

> … need to be determined in the circumstances of each job. They may include:
>
> - the ability to perform the tasks or functions which are a necessary part of the job
> - productivity and quality requirements
> - the ability to work effectively in the team or other type of work organisation concerned and
> - the ability to work safely. (HREOC 2003f)

Considerations of speed, precision, workplace harmony and team safety can thus form part of the inherent requirements of a job.

Legal interpretation of inherent requirements

Various court decisions have highlighted aspects of 'inherent requirements' in different employment contexts (box 10.1). HREOC (2003f) summarised the relevant factors for determining inherent requirements in employment, as identified in *Woodhouse v Wood Coffill Funeral P/L* (1998) HREOCA 12:

- the work required in practice for the particular position
- duties that might be required in an emergency or at periods of high workload
- the results to be achieved in the position (as opposed to the means for achieving the result)
- the circumstances in which the work must be performed
- applicable Awards and competency standards and mandatory requirements arising from other laws (such as occupational health and safety laws).

Some inquiry participants said the courts' interpretations of inherent requirements have been clear and appropriate. The Darwin Community Legal Service said it is 'reasonably comfortable with the interpretation the courts have given of inherent requirements'. It noted that a fairly narrow interpretation has been made to date, because:

> … to allow the requirements to extend to whatever an employer declares to be necessary or convenient or efficient for its operation would be basically to take any of the teeth out of the Act. (trans. p. 17)

Box 10.1 **Defining inherent requirements**

X v The Commonwealth HCA (1999) 63

A soldier, who was discharged from the army in 1993 after testing positive for HIV, lodged a DDA complaint with HREOC. HREOC upheld the complaint because it considered that the ability to 'bleed safely' in a combat situation was an 'incident of employment' rather than an inherent requirement of a soldier's job. On appeal, the Full Court of the Federal Court rejected HREOC's determination. The court interpreted 'inherent requirements' to include the health and safety of fellow employees and the physical environment in which the employee may occasionally find himself (the battlefield). X's appeal of the Federal Court's decision was dismissed in the High Court.

Cosma v Qantas Airways Ltd. FCA (2002) 640; FCAFC (2002) 425

The defendant was injured in the course of his job as a cargo handler for Qantas. Following a lengthy period of alternative duties and vocational training, the employee was retrenched because no alternative positions were available. The defendant took action in the Federal Court under s.15 of the DDA (discrimination in employment) but was unsuccessful. The Full Court subsequently rejected his appeal of that decision.

In its ruling, the Full Court of the Federal Court made a number of points in relation to the definition of 'inherent requirements'.

- When assessing a person's capacity to fulfil the inherent requirements of a position, only the requirements of pre-injury employment are to be considered, not those of alternative duties.
- 'A practical method of determining whether or not a requirement is an inherent requirement … is to ask whether the position would be essentially the same if that requirement were dispensed with'.
- The DDA should not be interpreted as requiring that an employer modify a job's inherent requirements in order to accommodate an employee with a disability. Rather, workplace adjustments are designed to allow a worker to meet those requirements (FCAFC (2002) 425).

HREOC raised the additional point that 'requirements contained in another law'—such as those arising from the Workplace Relations Act, occupational health and safety Acts—and qualification requirements 'may well be recognised as inherent requirements or at least recognised as reasonable requirements for indirect discrimination purposes' (sub. 143, p. 34, see chapter 9).

HREOC later added that 'the terms of applicable awards and agreements will be relevant to but not necessarily decisive of the inherent requirements of a job' (sub. 219, p. 33). The *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) specifies procedures for complaints of discrimination that arise under an industrial Award (see chapter 6).

Identifying inherent requirements

Distinguishing between the inherent and the non-essential requirements of a position requires a close examination of the duties involved in a job. The ability to perform certain duties in an emergency may be an inherent requirement for airline cabin personnel, for example, but not for the ticket sales staff who work for the same company. The definition of inherent requirements can be elusive in many cases. The Attorney-General's Department said each job must be considered carefully and individually:

> The reference to 'inherent' requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral … the requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work. (sub. 115, p. 8)

This approach requires a detailed knowledge of the nature and duties of each position in a business. Margaret Kilcullen said it is difficult for people seeking employment to identify the inherent requirements of a particular job:

> … part of the problem with the concept of inherent requirements is that it … imposes a hardship upon employees because it's not in fact standard practice for them to know what the inherent requirements of a job are before the interview. (sub. 165, p. 40)

This problem of limited knowledge (or 'knowledge asymmetry') in applying for employment would arise for all job applicants and not just those with disabilities. Ms Kilcullen added that the prospective employer too may not always have a clear and definite knowledge of the inherent requirements of a new or unfilled position, depending on the business and the circumstances (sub. 165, p. 40).

One inquiry participant questioned how work performance standards—that is, the quality of the results expected from each task or duty performed by an employee—relate to inherent requirements in the DDA, particularly in the context of employers' increasing adoption of 'broadbanding' and 'multiskilling' (Jason Gray, sub. 27, pp. 135–7). He claimed there is uncertainty about the types and levels of performance standard that can be regarded as an inherent requirement for the purposes of the DDA.

Similar uncertainties could arise from the trend towards 'credentialism' in the Australian and international labour markets, whereby employers ask for formal qualifications that are not required to do the job, or that are at a higher level than needed, as a screening method in recruitment (see, for example, Buchel et. al. 2003; Eraut 2001; Buon 1998).

However, any stated requirements for a position, including qualifications and work performance standards, must still meet the 'inherent requirements' test and/or the 'reasonableness test in indirect discrimination (see below and chapter 9). Court decisions (and the Frequently Asked Questions on HREOC's website, which are based on those decisions) state that the inherent requirements of a position can include productivity and quality standards.

Inherent requirements and indirect discrimination

HREOC explained that inherent requirements can be broader than the skills for one task or job only. Requirements for extra skills, qualifications or multiskilling during recruitment can be covered by the 'reasonableness test' in indirect discrimination (see chapter 9) instead of (or as well as) the inherent requirements provision:

> … inherent requirements are not the only permitted basis for decisions under the DDA. Other requirements are also permissible, in particular those which apply (or would apply) equally to people with or without the disability so as not to involve direct discrimination and which are reasonable so as not to involve indirect discrimination. For example, a requirement to be able to perform additional duties which are not part of a person's own job might be reasonable if performance of these duties is sufficiently important. (HREOC sub. 143, p. 33)

Under this interpretation, work performance standards, qualifications requirements and multiskilling that are not strictly 'inherent requirements' still need to meet the 'reasonableness test' in indirect discrimination (see chapter 9).

The explanatory memorandum for the Age Discrimination Bill 2003 explains the relevance of 'reasonableness' in this context. Like the DDA, the Bill does not define inherent requirements, but it gives examples of requirements—apart from inherent requirements—that could be considered reasonable in relation to indirect discrimination in employment:

> … If the level of fitness required by the fitness test was not reasonable for the job in question, this could be indirect discrimination. For example, a demanding physical fitness test would probably not be reasonable if the job was a standard office job. … On the other hand, it may be reasonable for an adventure tour company to require its tour leaders to do a demanding fitness test—even if that disadvantaged older people. This could be the case where a tour leader was required to lead long hiking tours and other physically demanding tasks.
>
> … Where particular productivity requirements are reasonable in a business, it will not be discrimination to require all workers, of whatever age, to meet those requirements.

Similar examples could be a useful way of explaining inherent requirements in the DDA, either in the Act or in guidelines or other advisory material (see below).

The Productivity Commission has not received any representations from employer organisations regarding the way in which the DDA's inherent requirements provision may or may not hinder enterprise flexibility and productivity. The Office of the Director of Equal Opportunity in Public Employment said:

> It is difficult to understand how meeting the inherent requirements of a job could be anything other than a positive indicator to encourage 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. (sub. 172, p. 5)

In relation to the inherent requirements provisions, HREOC said it:

> … is not aware of any evidence of counter-productive effects occurring to this point. Such effects might be expected from inflexible or unrealistic requirements, but the limitations provided for by the DDA on the basis of unjustifiable hardship and the inherent requirements of the job were intended to avoid this. (sub. 143, p. 60)

Options for clarifying inherent requirements

The inherent requirements provisions in the employment sections of the DDA appear to be appropriate and reasonable in their current form. No inquiry participants suggested removing or amending them, and the Productivity Commission has found no good reasons to do so.

Although some inquiry participants found no problems with the courts' interpretation of inherent requirements, others said that inherent requirements should be made clearer and easier to understand for the general public and employers.

There are several options for improving guidance on the meaning of inherent requirements in the DDA. One option is to define the term in the DDA. The Intellectual Disability Services Council (sub. 162, p. 4) said it would be 'advantageous' to define inherent requirements because 'every effort needs to be made to clarify the provisions'. However, unless the definition were long and detailed, this approach might not provide practical guidance on what is, and is not, an inherent requirement in employment. A practical, simple, single definition that covers all eventualities may prove difficult to develop.

A more practical approach could be to define the factors to be taken into account in determining whether a requirement for a job is an 'inherent requirement'. A list of criteria would be more helpful than a single fixed definition for identifying inherent requirements in practice. These criteria could be based on those already identified

by the courts and HREOC as being relevant (see above and box 10.1). There are three ways to implement such a list of criteria.

First, the DDA could list the criteria to be taken into account in identifying inherent requirements, as it does for some other important concepts (such as unjustifiable hardship, see section 10.2). Criteria listed in the DDA (as opposed to standards, guidelines or elsewhere) would have the advantage of being easily accessible to users of the DDA and legally certain. Examples of inherent requirements in different types of employment could be included to illustrate the criteria, much like the examples provided in the explanatory memorandum for the Age Discrimination Bill 2003.

Second, the criteria for identifying inherent requirements could be included in disability standards for employment or for aspects of employment, such as recruitment practices. However, there have been problems in developing disability standards for employment, and the standards appear unlikely to proceed soon (see chapter 12). Further, the protracted negotiations during previous attempts to draft a disability standard for employment illustrate the potential difficulties of attempting to draft a disability standard for inherent requirements.

Third, criteria to help identify inherent requirements could appear in explanatory material from HREOC, such as advisory notes or guidelines, based on case law and other material. HREOC already publishes such information in a number of formats, such as its 'frequently asked questions' on employment. If this existing material is not adequate for some users of the DDA (or if they are not aware of it), then further guidance might be required. Jobwatch (sub. 215) and Margaret Kilcullen (sub. 165) recommended inherent requirements as a suitable subject for guidelines. The Office of the Director of Equal Opportunity in Public Employment (sub. 172, p. 5) suggested such guidelines could 'draw heavily on resources arising from successful conciliation cases'.

The Productivity Commission recommends that guidelines on employment be developed for the DDA and updated as needed (see chapter 12). In relation to inherent requirements, these guidelines could draw on the 'frequently asked questions' that HREOC has published (HREOC 2003f), and on conciliation decisions and case law, as referred to in the 'frequently asked questions'.

DRAFT FINDING 10.1

The inherent requirements provisions in the employment sections of the Disability Discrimination Act 1992 *are appropriate and do not require amendment. Guidelines to explain how inherent requirements should be identified in practice could be useful.*

10.2 The unjustifiable hardship defence

Many of the DDA's substantive provisions—including those that address employment, education, access and goods and services—are subject to the defence of 'unjustifiable hardship' (see chapter 4). Discrimination in employment, for example, is not unlawful if a person with a disability, to meet the inherent requirements of a job, would require the employer to provide services and facilities that would impose unjustifiable hardship on the employer (s.15(4)(b)).

Rationale for an unjustifiable hardship defence

Some inquiry participants questioned the need for an unjustifiable hardship clause in the DDA or said it 'undermines the objectives of the DDA' (NSW CID, sub. 117, p. 8; Jack Frisch, trans.; Jean Young Smith, trans.; Carers Australia, sub. 32). The National Ethnic Disability Alliance (sub. 114, p. 14) said the unjustifiable hardship clause does not encourage discriminators to think more innovatively about what they can do to accommodate people with disabilities, or how they can address systemic discrimination problems.

Other inquiry participants pointed out that the federal racial and sex discrimination Acts do not have equivalent unjustifiable hardship clauses (Disability Council of NSW, trans. p. 1097). The Age Discrimination Bill 2003 also lacks such a clause.

However, the DDA differs from these Acts. First, adjustments sometimes needed to accommodate people with disabilities in work, education or other situations would not be required for a person of a different race or sex or age only. Second, these adjustments can vary considerably in both financial costs and their impact on the provider. In the second reading speech for the Disability Discrimination Bill 1992, the then Minister said that, in recognition of these potential adjustment costs, an unjustifiable hardship defence in the DDA would be:

> … very significant in terms of the overall effects of this legislation on service providers, businesses and employers. (Australia 1992a, p. 2751).

Internationally, other disability discrimination Acts contain provisions similar to the DDA's unjustifiable hardship provisions, and for similar reasons. The equivalent defence in the *Americans with Disabilities Act 1990* (ADA) is 'undue hardship' (s.101(10)), which is defined as 'an action requiring significant difficulty or expense'. In the Canadian *Employment Equity Act 1995*, 'efforts to accommodate' individuals with disabilities 'are required up to the point where the person or organization attempting to provide accommodation would suffer undue hardship' (LDAC 2003, pp. 1–2, see appendix F).

Some inquiry participants who disapproved of the unjustifiable hardship defence in principle, nevertheless acknowledged the variable and occasionally high costs of making adjustments for people with disabilities. They agreed that 'the exemption may need to remain in certain 'justifiable' circumstances', such as where the costs of adjustment are too great for the person or business on whom they fall (NSW CID, sub. 117, p. 8). Others said that an unjustifiable defence is necessary and appropriate (King, trans.; HREOC, sub. 143 and trans.; Australian Taxi Industry Association, trans.; Public Advocacy Centre, trans.; Anti-Discrimination Commission Queensland, trans.; Larry Laikind, trans.).

On balance, an unjustifiable hardship defence is important in encouraging the efficient and equitable application of the DDA. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting adjustments that impose unjustifiable costs or other hardships on individual providers or others in the community (see chapter 2).

DRAFT FINDING 10.2

An unjustifiable hardship defence in the Disability Discrimination Act 1992 *is appropriate. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting any requirements that would impose excessive costs on individual employers, service providers or others in the community.*

Scope of unjustifiable hardship

The defence of unjustifiable hardship is limited to situations specified in the DDA. As noted by HREOC (sub. 143, p. 20), 'unjustifiable hardship defences in substantive provisions do not cover all situations where such a defence might be relevant'. Although it is unlawful to discriminate in all aspects of employment (including job interviews, job offers, wage offers, training, promotion, transfers and termination), the unjustifiable hardship defence is available only with respect to job offers and employment termination. Similarly, in the education provisions of the DDA, unjustifiable hardship can be claimed in relation to refusing or failing to accept a person's application for enrolment, but not in relation to the post-enrolment aspects of education to which the DDA applies (see chapter 4).

This limited coverage has caused problems and created uncertainty for providers of goods and services to people with disabilities, particularly in education. It might also have had the perverse effect of encouraging discrimination in initial recruitment and enrolments, to avoid the risk of having to provide different services or facilities later on, when the unjustifiable hardship defence will not be available.

Disability standards for accessible public transport

As well as featuring in the DDA, the unjustifiable hardship defence can be included in disability standards. Unjustifiable hardship appears in the disability standards for accessible public transport (the only standards yet introduced, see chapter 12) and the draft disability standards for education (see below and appendix B).

The disability standards for accessible public transport (2002) include a list of criteria that may be taken into account, where relevant, in determining unjustifiable hardship (box 10.2). HREOC (sub. 143, p. 65) explained that these detailed criteria were necessary in the standards to clarify the application of unjustifiable hardship in public transport cases, because 'there have not been any court decisions under the DDA specifically regarding the application of unjustifiable hardship to transport issues'.

HREOC (sub. 219, p. 27) added that clarification of the unjustifiable hardship defence was necessary as a trade-off to enable a shorter timetable for the standards' implementation and to avoid 'adopting a lowest common denominator set of obligations and/or providing for extensive detailed exceptions'. Clarifying the unjustifiable hardship defence thus enabled a shorter timetable and higher requirements to be set elsewhere in the standards (see chapter 12 and appendix C).

Draft disability standards for education

Under section 22(4) of the DDA, it is not 'unlawful to refuse or fail to accept a person's application for admission as a student' if the student would require services or facilities, 'the provision of which would impose unjustifiable hardship on the education authority'. The DDA is silent on post-enrolment situations, which has been interpreted to mean that the unjustifiable hardship defence applies only to initial enrolment and not to other, post-enrolment situations that might require an adjustment (see, for example, *Kinsela v QUT* (1997) HREOCA 5).

Inquiry participants from the education sector regarded this gap as a major fault in the application of the unjustifiable hardship defence in education. HREOC said the gap should be regarded as 'an oversight' or 'drafting error' (trans. p. 1147).

The current draft of the disability standards for education proposes to address this gap by altering the application of unjustifiable hardship in two significant ways. First, it will extend unjustifiable hardship to post-enrolment situations. Second, it will augment the concept of unjustifiable hardship with the additional concepts of 'reasonable adjustment' and 'unreasonable adjustment', which are similar but 'not identical' (see below).

Box 10.2 **Unjustifiable hardship in the Disability Standards for Accessible Public Transport 2002 (s.33.7(3)–(5))**

33.7 (3) In determining whether compliance with a requirement of these Standards would involve unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including the following:

(a) any additional capital, operating or other costs, or loss of revenue, that would be directly incurred by, or reasonably likely to result from, compliance

(b) any reductions in capital, operating or other costs, or increases in revenue, that would be directly achieved by, or reasonably likely to result from, compliance

(c) the extent to which the service concerned operates, or is required to operate, on a commercial or cost-recovery basis

(d) the extent to which the service concerned is provided by or on behalf of a public authority for public purposes

(e) the financial position of a person or organisation required to comply

(f) any effect that compliance with the relevant requirement of these Standards is reasonably likely to have on the financial viability of a person or organisation required to comply, or on the provision of the service, or feature of service, concerned

(g) any exceptional operational, technical or geographic factors, including at a local or regional level, affecting a person or organisation's ability to comply

(h) financial, staffing, technical, information and other resources reasonably available to a person or organisation required to comply with these Standards, including any grants, tax concessions, subsidies or other external assistance provided or available

(i) benefits reasonably likely to accrue from compliance with relevant requirements of these Standards, including benefits to people with disabilities, to other passengers or to other persons concerned, or detriment likely to result from non-compliance

(j) detriment reasonably likely to be suffered by an operator, provider, passenger or other person or organisation concerned, including in relation to equality of amenity, availability, comfort, convenience, dignity, price and safety of services or effectiveness and efficiency of operation if compliance is required

(k) if detriment under paragraph (j) involves loss of heritage values—the extent to which relevant heritage value or features of the conveyance, building or other item concerned are essential, or incidental, to the transport service provided

(l) whether compliance may reasonably be achieved (including by means of equivalent access as provided for in sections 33.3 to 33.5) by less onerous means than those objected to by a person or organisation as imposing unjustifiable hardship

(Continued next page)

Box 10.2 (continued)

(m) any evidence regarding efforts made in good faith by a person or organisation concerned to comply with the relevant requirements of these Standards

(n) if a person or organisation concerned has given an action plan to the Commission under section 64 of the *Disability Discrimination Act 1992*—the terms of that action plan and any evidence regarding its implementation

(o) the nature and results of any processes of consultation, including at local, regional, State, national, international, industry or other level, involving, or on behalf of, an operator concerned, any infrastructure providers as relevant, and people with a disability, regarding means of achieving compliance with a relevant requirement of these Standards and including in relation to the factors listed in this section

(p) if a person or organisation seeks a longer period to comply with these Standards, or a requirement of these Standards, than is permitted by the preceding sections on Adoption and Compliance—whether the additional time sought is reasonable, including by reference to the factors set out in paragraphs (a) to (o) above, and what undertakings the person or organisation concerned has made or is prepared to make in this respect.

(4) If a substantial issue of unjustifiable hardship is raised having regard to the factors listed in paragraphs (3) (a) to (p), the following additional factors are to be considered:

(a) the extent to which substantially equal access to public transport services (including in relation to equality of independence, amenity, availability, comfort, convenience, dignity, price and safety) is or may be provided otherwise than by compliance with these Standards

(b) any measures undertaken, or to be undertaken by, on behalf of, or in association with, a person or organisation concerned to ensure such access.

(5) For these Standards: ***unjustifiable hardship*** is to be interpreted and applied having due regard to the scope and objects of the *Disability Discrimination Act 1992* (in particular the object of removing discrimination as far as possible) and the rights and interests of all relevant parties.

Source: Disability Standards for Accessible Public Transport 2002, s.33.7(3)–(5).

Inquiry participants from the education sector said the extension of the unjustifiable hardship defence to post-enrolment situations is desirable because students' educational needs can change significantly over time. The Association of Independent Schools (South Australia) said:

> Some Independent schools have found themselves in the dilemma of offering a place and then over time finding via ongoing review that they do not have the sufficient resources to meet the needs of the individual student as they develop and mature or their condition deteriorates. (sub. 135, p. 14)

In such circumstances, the current arrangements might create incentives for educators to avoid or discourage the enrolment of students with disabilities, in case those students might need adjustments that would impose an unjustifiable hardship later in their education. The Association of Independent Schools (Northern Territory) said 'schools should be encouraged to 'have a go' rather than claim unjustifiable hardship' as their first option (Alice Springs visit notes).

The availability of the unjustifiable hardship defence in post-enrolment situations might help to reduce this undesirable incentive to avoid enrolling students who might later need costly adjustments or assistance. Where students' circumstances change, schools would be encouraged to find the best educational solution for the student—including the possibility of transferring the student to a more appropriate educational setting—without fear of contravening the DDA.

The proposal to extend the scope of the unjustifiable hardship defence in the disability standards for education is significant. The drafters of the standards suggest that amendment to the DDA is likely to be necessary to enable this change. For reasons of transparency, consistency and clarity, the Productivity Commission considers that amending the DDA is preferable to attempting to address such an anomaly in the disability standards alone. If the DDA were amended, then an appropriate role for the disability standards for education might be to clarify the criteria for determining unjustifiable hardship in education, in much the same way as the disability standards for accessible public transport have done for that area.

Administration of Commonwealth laws and programs

The unjustifiable hardship defence is not available in relation to the administration of Commonwealth laws and programs. Virtually all Australian Government departments and agencies can be characterised as administering Commonwealth laws and programs. Other organisations, including State, Territory and local governments and private sector businesses, are also often involved in some way in administering Commonwealth laws and programs.

Australian Government departments and agencies can argue, however, that an adjustment is an unjustifiable hardship in employment situations, as the Government did in *Natasha Rees v AusAID (1997)* (box 10.3). The Government may not always win these cases (and indeed, in the Rees case, it did not), but the defence of unjustifiable hardship is at least available to it.

The omission of an unjustifiable hardship defence in the administration of Commonwealth laws and programs is often cited to be a special case. First, it is sometimes assumed that the revenue raising powers of the Australian Government

give it unlimited ability to fund all adjustments, regardless of their cost. However, the Government manages resources on behalf of the whole community and not for itself. It must decide where the community's resources should best be deployed. Resources spent on adjustments that benefit only some individuals will mean that fewer resources are available for Government programs that may benefit others, including other people with disabilities. The efficiency and equity implications of these choices need to be considered in a balanced manner and in relation to the whole community.

Second, it is often said that the Australian Government should set an example for the whole community in its conduct towards people with disabilities. The Government can demonstrate this commitment in a variety of ways, most directly through its laws and programs, and broad policies such as the Commonwealth Disability Strategy (see appendix E). Denying the possibility of an unjustifiable hardship defence under the DDA may not be the most effective or efficient vehicle for demonstrating the Government's commitment to administering its laws and programs in a non-discriminatory way, particularly if it might mean that fewer resources are available to implement Government programs that benefit people with disabilities, carers and other people in the community.

In addition to these arguments of principle, HREOC noted some practical reasons for allowing an unjustifiable hardship defence in the administration of Commonwealth laws and programs. First, the Australian Government would presumably face a high burden of proof to show there is unjustifiable hardship in any particular case. Second, competing public purposes would be considered equally on their merits, rather than some public purposes receiving a blanket exemption from the unjustifiable hardship provisions of the DDA but not other purposes (HREOC sub. 143).

Conclusions on the scope of unjustifiable hardship

Regarding all omissions from the unjustifiable hardship defence, HREOC said:

> The second reading speech introducing the Disability Discrimination Bill indicated an intention to apply the concept of unjustifiable hardship as a general limitation on the legislation, although the drafting of substantive provisions did not fully reflect this. (sub. 143, p. 28)

These gaps in the scope of unjustifiable hardship should be addressed. The unjustifiable hardship defence should be available on an equal basis in all areas in which the DDA makes discrimination unlawful. In education, it would also help to remove any unintended perverse incentives, whereby schools might claim

unjustifiable hardship before initial enrolment (and try to deny enrolment) because they know they cannot do so later if needed.

The Productivity Commission also recommends that the DDA clearly state that a failure to provide 'different accommodation or services' that are required by a person with a disability is a form of direct discrimination (s.5(2), see chapter 9). To ensure this aspect of the DDA operates in a balanced and equitable manner, the defence of unjustifiable hardship must be available in all situations requiring an adjustment that might impose an unjustifiable hardship.

DRAFT RECOMMENDATION 10.1

The* Disability Discrimination Act 1992 *should be amended to allow an unjustifiable hardship defence in all substantive provisions of the Act that make discrimination on the ground of disability unlawful, including education and the administration of Commonwealth laws and programs.

Determining unjustifiable hardship

The DDA does not define unjustifiable hardship. Instead, four criteria are to be taken into account, based on all relevant circumstances, in determining what constitutes an unjustifiable hardship in each case (s.11, see chapter 4). For public transport, the disability standards provide more detailed criteria (box 10.2). Based on the criteria in the DDA, unjustifiable hardship has been interpreted on a case-by-case basis by HREOC and the courts.

Inquiry participants had mixed views on the workability of the current case-by-case approach to determining unjustifiable hardship under the DDA. Some participants said case law, the legislation and HREOC guidelines provide insufficient guidance on the meaning of 'unjustifiable hardship' in employment, education and other areas (Disability Action Inc., sub. 43; Mental Health Coordinating Council, sub. 84; NEDA, sub. 114 and trans.; NSW CID, sub. 117; Jack Frisch, trans.; Association of Independent Schools South Australia, sub. 135; Association of Independent Schools Victoria, sub. 99; Australian Associations of Christian Schools, sub. 148; National Council of Independent Schools Associations, sub. 126; National Catholic Education Commission, sub. 86; Association of Independent Schools, Northern Territory (Alice Springs visit notes)). Jason Gray suggested the guidance provided in the US Americans with Disabilities Act and its accompanying documents, particularly on 'undue disruption to the work of other employees', is a good model for clarifying the DDA (sub. 27, p. 164).

Some participants expressed a strong—but possibly incorrect—perception that employers and others overly rely upon unjustifiable hardship, and that this defence is easy to prove (for example, Jason Gray, sub. 27)

Legal interpretations of unjustifiable hardship in practice

The courts (and until 2000, HREOC) have examined and decided on the issue of unjustifiable hardship in a number of cases since the DDA was created (box. 10.3). The Public Interest Advocacy Centre said there have been few problems in determining unjustifiable hardship in practice:

> … a significant body of jurisprudence has developed in relation to the principle of 'unjustifiable hardship' and the methodology whereby courts and HREOC evaluate the evidence required to apply section 11. In particular, the case law gives guidance to complainants and respondents on the type of evidence required, the format of the evidence and the weighting process involved in determining if 'unjustifiable hardship' arises. Courts are experienced at interpreting the weighing provisions and evaluating the type of expert evidence raised in these cases. Neither HREOC nor the Federal Court have had undue difficulty in applying section 11, proving it to be far from unworkable. (sub. 102, pp. 3–4)

ACROD said it preferred the courts to decide how unjustifiable hardship should be interpreted, because 'case-based reasoning is much safer than codified and inflexible rules of compliance and reprimand' (sub. 45, p. 2). HREOC expressed a similar view on the importance of flexibility (sub. 143, p. 22), but pointed out that unjustifiable hardship has 'been interpreted and fallen where we would have expected' in the courts (trans. p. 1138). Blind Citizens Australia said unjustifiable hardship 'does not require clarification' (trans. p. 1677).

However, Disability Action Inc. questioned the speed and adequacy of developing interpretations of unjustifiable hardship through case law:

> … the costs and risks associated with Federal Court action means that there is not adequate case law on many aspects of the DDA such as 'unjustifiable hardship' to give clarity to the DDA. (Disability Action Inc., sub. 43, p. 4).

Anita Smith claimed the interpretation of the unjustifiable hardship provision differs between HREOC conciliations and the courts (sub. 127, pp. 5–6). She argued that HREOC conciliations emphasise the financial implications of the accommodation (s.11(c)), but court hearings accorded more importance to the effects of the adjustments on the person with a disability and on any other persons concerned (ss.11(a)(b)). These differences in emphasis might have been appropriate in different cases. Such flexibility is the main advantage of a case-by-case approach.

Box 10.3 **Unjustifiable hardship in employment cases**

John Woodhouse v Wood Coffill Funerals Pty Ltd. (1998) HREOCA 12

HREOC accepted evidence that a pallbearer could not carry coffins safely because of his prosthetic foot. However, it found that his dismissal was unlawful discrimination under the DDA because he would have been able to perform this inherent requirement of the position if he had been given a small amount of training, and the provision of such training would not have been an *unjustifiable hardship* on his employer.

Natasha Rees v Australian Agency for International Development (1999) HREOCA 12

A public servant with occupational overuse syndrome affecting her ability to use a computer keyboard complained she had been discriminated against in being refused promotion to a senior officer position. HREOC found that data entry was a substantial part of the inherent requirements of the particular job (despite not being emphasised in the selection documents) but that the complainant could have performed this requirement if voice dictation equipment and software had been provided. The employer had not established that use of this software on its network would impose unjustifiable hardship. The assessment regarding unjustifiable hardship balanced detriments such as costs (one-off and ongoing) and possible disruptions to AusAID's information technology network, and the benefits accruing to the employee, her colleagues and AusAID's Australian and overseas customer base. In his decision, the HREOC Commissioner indicated that the uncertain likelihood of some detriments meant they could not amount to unjustifiable hardship.

Criteria for determining unjustifiable hardship

One inquiry participant argued that the ambiguity surrounding the definition of unjustifiable hardship undermined the effectiveness of the DDA, by reducing the incentive for employers to comply and employees to lodge complaints (Jack Frisch, subs 120, 196). He contrasted the emphasis on 'financial circumstances' in s.11(c) of the DDA with the broader 'social cost–benefit analysis' presented in HREOC's 'frequently asked questions' as an example of that ambiguity. Frisch claimed that the financial approach lacks objective criteria to determine 'unjustifiable' and 'capacity to pay', while the cost–benefit analysis approach lacks guidance on how to compare the costs and benefits accruing to 'any persons concerned' to those accruing to the person with a disability.

Frisch also argued that the weights to be accorded to the individual company's financial position relative to the economic costs and benefits to wider the community are not clear (sub. 120). A basic principle might be that any workplace adjustment that produces a net social benefit is desirable. Yet, at one extreme, a socially beneficial (but expensive) accommodation could still bankrupt the company

that must undertake it. Frisch argued that the 'unjustifiable hardship clause has effectively limited the scope of the DDA to non-competitive industries and non-profit organisations, including government and semi-government organisations' (sub. 120, p. 5). This occurs because, theoretically, companies in competitive industries cannot earn more than a normal rate of return in the long term. Moreover, they cannot pass on the costs of higher imposts to their customers or suppliers. It follows that they would most likely be able to successfully argue unjustifiable hardship (see chapter 8).

The non-financial criteria for determining unjustifiable hardship in the DDA (ss.11(a)(b)) have often been emphasised in education cases, especially regarding the effects on other students. In the case of *Finney v Hills Grammar School*:

> … the decisions make clear that consideration of unjustifiable hardship issues in education is by no means restricted to financial issues and in particular that any issues of educational benefits or detriments have to be considered. (HREOC sub. 143, p. 62)

Education providers participating in this inquiry commented on their difficulty in balancing the interests of one student with a disability against the interests of other students and staff. The Australian Education Union (sub. 39, p. 4) said consideration of unjustifiable hardship should 'go beyond the wishes of the individual parent and student', to include rights and resources for other students and teachers. ACROD (sub. 45, p. 2) placed a similar emphasis on considering 'to what extent may the rights of an individual infringe on the rights of others?' in determining unjustifiable hardship in education.

All of this evidence indicates that a large degree of flexibility is needed in determining unjustifiable hardship in different circumstances. Financial and non-financial factors will be relevant on a case by case basis. A strict definition or a codified formula for determining unjustifiable hardship therefore seems unsuitable. In all cases, potential (financial and non-financial) costs and benefits should be examined from both a community-wide and an individual or business perspective.

Options for improving the determination of unjustifiable hardship

The DDA states that 'all relevant circumstances' should be considered in a determination of unjustifiable hardship. It lists four broad, non-exhaustive criteria to be taken into account in determining unjustifiable hardship (s.11, see chapter 4). Other relevant circumstances can also be examined.

There appears to be some uncertainty about who should be considered relevant when examining benefits and detriments to 'any person concerned' for criterion (a). The courts have interpreted this criterion broadly, to the point of including the

whole Australian community (and even people overseas). This clause would benefit from clarification, to emphasise that in all cases, a community-wide cost–benefit approach is to be taken to determine whether the different 'facility or service' required by the person with a disability should be provided—that is, will the particular adjustment produce a net benefit to the community as a whole? If there is no net benefit then the adjustment should not be made (for example, if the adjustment will seriously inconvenience more people than it assists).

If (as is likely in many cases) the proposed adjustment will produce a net community benefit, then the financial and other circumstances of the individual or business who is being asked to make the particular adjustment (or provide the 'different accommodations') should be examined. Regardless of the benefits to the whole community, the financial circumstances of the person or business who would have to make the adjustment must be considered in assessing unjustifiable hardship.

These two questions regarding community-wide benefits and individual costs should not be regarded as alternatives, but rather, as a two-step test to evaluate whether or not a particular adjustment will cause an unjustifiable hardship for the community as a whole and/or for the individual concerned. This is likely to involve looking at different factors in each case, depending on the area of activity and the circumstances in which the adjustment is being requested. For example, a claim of unjustifiable hardship from a small school will involve very different considerations to a claim from a large employer. A fixed list of factors to be considered in each case is therefore unlikely to be helpful in determining unjustifiable hardship.

DRAFT FINDING 10.3

The concept of unjustifiable hardship does not lend itself to a generic definition. It is best determined through the broad criteria in the Disability Discrimination Act 1992 *(s.11) that can be applied flexibly to individual cases*.

If additional criteria are not provided in disability standards, then guidelines or advisory notes—with real-life examples drawn from HREOC conciliations and case law—could supplement the broad criteria in the DDA. This might help people to understand unjustifiable hardship better, particularly in relation to employment and education. In addition, the criteria in the DDA should clearly state that an assessment of both community-wide and individual costs and benefits is required in determining whether there is an unjustifiable hardship.

DRAFT RECOMMENDATION 10.2

The criteria for determining unjustifiable hardship in the* Disability Discrimination Act 1992 *(s.11) should be amended to clarify that community-wide benefits and costs should be taken into account.

Unjustifiable hardship and 'reasonable adjustment'

HREOC and others use the term 'reasonable adjustment' to describe adjustments that would not cause unjustifiable hardship (see, for example, HREOC guidelines and 'frequently asked questions').

However, the term 'reasonable adjustment' does not appear anywhere in the DDA. HREOC has instead interpreted section 5(2)—which defines disability discrimination (see chapter 9)—and section 15(4)—which defines discrimination in employment—and equivalent sections with regard to education, premises and the other areas in which the DDA makes discrimination unlawful, as implicit requirements for employers and service providers to accommodate the needs of people with disabilities (HREOC 2003f).

This interpretation of section 5(2) has 'not been totally accepted' in decisions on DDA cases. In *Commonwealth of Australia v Humphries* ((1998) FCA 1031), Kiefel J. found that section 5(2) does not place an implied obligation on the employer to make 'reasonable adjustments' and commented that 'I did not think the stated objects of the DDA go that far'. More recently, HREOC (2003b, p. 78) noted that 'a narrower approach to section 5(2) will be preferred' by the Federal Court regarding the implied duty to make 'reasonable adjustments' (see chapter 9).

The draft disability standard for education augments the concept of unjustifiable hardship by introducing the concepts of 'reasonable adjustment' and 'unreasonable adjustment'. These two concepts are not defined in the draft standard, except as being 'not the same as unjustifiable hardship' (s.10.1(2), see chapter 11 and appendix B). This approach appears to contradict the draft disability employment standard that says a 'reasonable' or 'appropriate' adjustment is simply one that does not cause an unjustifiable hardship (see below). In negotiating the draft disability standard for education, some States warned that confusion and problems might arise from this interpretation of 'reasonable adjustment' (see chapter 12 and appendix B).

HREOC indicated that it favours adding a 'reasonable adjustment' provision to each substantive area of the DDA. The wording of these provisions would vary with the area under consideration. For employment, HREOC appears to favour the definition proposed in an early draft of the disability standards for employment:

> Appropriate adjustments are workplace adjustments that do not cause unjustifiable hardship and are made for the following purposes:
>
> - providing an employee with a disability with equal opportunities to be considered on merit for selection, appointment, promotion, transfer or training;
> - enabling the employee to perform the inherent requirements of the job;
> - enabling the employee to perform other requirements related to the job;

- enabling the employee to enjoy equal employment terms and conditions with other employees in comparable circumstances; and
- enabling the employee to participate in and benefit from work related facilities, programs or benefits on equal terms with your other employees. (HREOC, sub. 143, pp. 24–5)

If the concept of 'reasonable adjustment' is a re-statement (or the inverse) of the implied DDA obligation to provide 'different accommodations' required by an individual with a disability (s.5(2)) unless such accommodations would cause unjustifiable hardship, then it is unnecessary and would probably add to, rather than resolve, any uncertainties.

The Productivity Commission is recommending that the DDA's requirement to provide 'different accommodation and services', up to the point of unjustifiable hardship, be clarified by ensuring:

- failure to provide 'different accommodations' (s.5(2)) constitutes direct discrimination (recommendation 9.3, see chapter 9) and
- an unjustifiable hardship defence is possible in all areas of activity in which the DDA makes disability discrimination unlawful (recommendation 10.1).

The Productivity Commission therefore considers that an additional section in the DDA to describe 'reasonable adjustment' would be superfluous. It would also produce confusion about the difference between 'unjustifiable' and 'unreasonable' in interpreting the DDA.

The Productivity Commission considers that the concept of a positive duty to take 'reasonable steps' to minimise potentially discriminatory situations in employment or other activities (see chapter 13) is a separate issue to the requirement to provide 'different accommodations' when requested by an individual with a disability (up to the point of unjustifiable hardship). A positive duty on employers to take reasonable steps would require, for example, non-discriminatory recruitment policies and practices to be implemented. However, this would not go so far as to promote 'positive discrimination'. The outcome of such recruitment policies would still depend upon merit (see chapter 13).

DRAFT FINDING 10.4

The absence of the term 'reasonable adjustment' in the Disability Discrimination Act 1992 *is appropriate. It is sufficient for the Act to require adjustments to be made up to the point where they cause an unjustifiable hardship.*

The term 'reasonable adjustment' causes confusion when used in guidelines and other explanatory materials for the Act.

10.3 Insurance and superannuation

Access to insurance and superannuation is a significant issue for people with disabilities. Denial of insurance can reduce opportunities to participate in areas such as employment or travel, as highlighted by many inquiry participants, including the Disability Services Commission (sub. 44), the Association for the Blind of WA (sub. 83), Michael and Denice Bassanelli (sub. 175), and Frank Fisher (sub. 200). The availability and terms of superannuation can affect a person's quality of life in retirement.

In certain circumstances, it is not unlawful under the DDA to discriminate in the areas of insurance and superannuation against people with disabilities (s.46). It is not unlawful to discriminate on the ground of a person's disability by refusing to offer, or by imposing special terms or conditions to, an annuity, life insurance policy, insurance policy against accident, other policy of insurance, or membership of a superannuation or provident fund or scheme if:

- the discrimination is based on actuarial or statistical data on which it is reasonable to rely, and 'is reasonable having regard to the matter of the data and other relevant factors' or
- 'where no such actuarial or statistical data [are] available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors' (s.46).

HREOC guidelines on insurance and superannuation list the following examples of lawful discrimination under the DDA, where reasonable and relevant cause can be shown:

- deferring approval, given an inability to quantify the applicant's risk at the time (although not deferring it for an unspecified or unreasonable amount of time)
- reducing or limiting the amount of insurance cover
- restricting the terms of liability or using exclusion clauses for pre-existing conditions or conditions to which the person is susceptible
- imposing an additional premium and
- denying cover, where the risk of making a claim can be shown to be unacceptable to the insurer or would cause an unjustifiable hardship.

Complaints and decisions

The application of this partial exemption has been contentious. Both aspects of the insurance exemption—actuarial and statistical data or 'other relevant factors'—have

been tested in the courts, most significantly in *Xiros v Fortis Life Assurance Ltd* and *Bassanelli v QBE* (box 10.4).

Box 10.4 **Legal decisions about disability discrimination in insurance**

***Cuna Mutual Group Ltd v Bryant, Nagy and HREOC* (2000) FCA 970.** In this case, two siblings of a deceased man complained of discrimination by an insurer on the ground of their brother's HIV status because it would not pay his life insurance policy to them. In 1999, HREOC decided that the beneficiaries of a deceased person's estate could complain of discrimination as associates of a person with a disability, despite the person's death. The Federal Court upheld HREOC's decision in 2000

***Xiros v Fortis Life Assurance Ltd* (2001) FMCA 15**. Xiros, who discovered in December 1995 that he was HIV positive, alleged discrimination on the ground of disability because he was denied payment several times between 1997 and 1999 under his mortgage protection insurance, which included death, and permanent and temporary disability cover. Conciliation was unsuccessful. In November 2000, the president of HREOC terminated the complaint. Two acts of discrimination were alleged: first, the provision of insurance with a HIV/AIDS exclusion; and second, the refusal of claim made under the policy. Fortis based its defence on actuarial evidence.

The Federal Court found that HIV satisfied the DDA definition of disability and that there had been discrimination under section 5 (direct discrimination). It also found, however, that substantial statistical data were available to suggest a reasonable basis for the exclusion in the policies offered from 1991 until 1996, 'when viewed against the risk of anti-selection', and to maintain rejection of the existing claim in 1999. It also noted that the incidence of HIV/AIDS had since declined, possibly putting into question whether an exclusion based on actuarial data could legitimately remain.

***Bassanelli v QBE Insurance* (2003) FMCA 412**. In 2002, QBE denied all travel insurance to Denice Bassanelli, after she disclosed that she had breast cancer on a travel insurance application. QBE's decision was not based on actuarial or statistical data. The company relied on the 'other relevant factors' component of the section 46 exemption. Michael and Denice Bassanelli commented:

> Denice was expecting the Insurer not [to] cover her for … cancer, a pre-existing illness … To exclude Denice from all policy items was considered by us to be disability discrimination. (sub. 175, p. 1)

A complaint was lodged in September 2002. It was not resolved by conciliation so HREOC terminated the complaint in February 2003. The case, the first to test this part of the exemption, was heard by the Federal Magistrates Service in Adelaide in September 2003. QBE argued it would be uneconomic to issue a policy excluding medical events, and that it was not standard policy. The magistrate, however, found that QBE had issued such policies in the past and that it currently issued 'effectively such a policy for a person in the position of the applicant', which he considered relevant to this case. He found that it was unreasonable for QBE to refuse to provide any policy and that no unjustifiable hardship would be involved in providing one. QBE indicated that it would appeal.

Sources: Michael and Denice Bassanelli, sub. 175.

DDA complaints about insurance that HREOC has conciliated have included cases about infertility treatment, post natal depression, death and disability insurance, HIV status, vision impairment, cancer, mental disorders, Tourette's syndrome and AIDS (HREOC 2003l).

There have been few DDA complaints about superannuation (see chapter 11 and appendix D). Now that superannuation is compulsory in Australia, people with disabilities cannot be entirely denied membership. Discrimination is still possible, however, in the terms and conditions on which superannuation is offered, or in relation to insurance offered as a component of superannuation. One complainant with a vision impairment was refused additional benefits cover on top of automatic entitlements. The complaint was settled through agreement that the company would provide additional benefits except for vision impairment or vision disorders (HREOC 2003d, p. 59).

Guidelines and explanatory material

HREOC and others have produced documents to help explain the application of the DDA in insurance and, to a lesser extent, superannuation. These include:

- HREOC guidelines for providers of insurance and superannuation, which explain the DDA in relation to life, disability and accident insurance, and death and disability cover under superannuation arrangements (HREOC 1998b)
- HREOC's 'frequently asked questions' on insurance, which emphasise that insurance is not wholly exempt from the DDA (HREOC 2003n)
- the Memorandum of Understanding between the Mental Health Sector Stakeholders and Investment and Financial Services Association (2003), which sets out principles for the insurance industry and people with mental health conditions.

It is not possible for disability standards to be implemented for insurance and superannuation. The Productivity Commission recommends that the DDA be amended to allow for disability standards in any area of activity covered by the DDA as well as in activities that are part exempt, such as insurance and superannuation (see chapter 12).

Actuarial and statistical data

The HREOC guidelines for insurance and superannuation state that a variety of Australian international actuarial and statistical data sources can be considered relevant, including (but not limited to) underwriting manuals, government statistical

studies, medical journals, international population studies and insurance studies. International data should be modified for Australian circumstances if necessary, and all data must be up to date or adjusted for changes in relevant medical or other technologies (for example, a medical condition that would have stopped someone from working in the past but may no longer do so).The guidelines also state that it is not reasonable to refuse insurance cover because of: the insurer's lack of data; limited availability of data; the company's 'historical practice'; or inaccurate assumptions about the person.

Investment and Financial Services Association (IFSA) noted that the need for an exemption based on actuarial and statistical data stems from a range of behavioural as well as medical factors that can affect a person's individual risk. It suggested the following sources are reasonable bases for insurance decisions: underwriting manuals used in the market; a company's standard practice where the risk (based on the manual) is deemed too great to underwrite; and published internal guidelines, if different life insurance companies offer the same person insurance on different terms (sub. 142, pp. 25–7).

IFSA conceded that the insurance industry has been slow to change its actuarial practices and that it continues to rely on underwriting manuals for which it has difficulties providing the supporting medical and clinical evidence:

> The industry has, admittedly, been slow to address the potential for reliance on the exemption to fall down because of an administrative deficiency for keeping a record of those medical clinical studies that have been reviewed for the purpose of 'rating' the risk in the published underwriting manuals. (IFSA, sub. 142, p. 27)

IFSA also indicated that in some circumstances, or in relation to some conditions, there may not be enough commercial justification to obtain detailed, specific data:

> As with all commercial undertakings, underwriting is subject to cost–benefit analysis. Does the cost of obtaining this information exceed the benefit obtained from it? If so, then there is no commercial justification for obtaining that information. (sub. 242, p. 3)

Other inquiry participants said data availability and quality have improved:

> … there was really poor quality actuarial evidence being used to justify some of their decisions, and that's changing now. I mean, they have got access to better information about disease progression, life spans, life expectancy, all of those sorts of things. (Lake, trans. p. 1537)

Other relevant factors

The HREOC guidelines for insurance and superannuation state that 'relevant factors include both those that may increase risk and those that may reduce it'. These can

include (but are not limited to) medical opinion, other professional opinions, actuarial advice, information about the individual and commercial judgment. Given that these factors can include personal information, HREOC added:

> … this necessarily means that reasonable requests or requirements for information or examinations to determine insurance (including workers compensation) or superannuation entitlements are permitted. (sub. 143, p. 34)

IFSA (trans., p. 1369) explained that a consideration of 'other relevant factors' often means looking at the lifestyle and financial circumstances of the individual—that is, personal factors that might affect an individual's risk rating. However, the cost of obtaining information about an individual's risk factors (relative to the commercial value of the insurance) is also a relevant 'other factor' itself:

> The decision points on when to obtain additional information and when to make a judgement call on the available information are other factors that are relevant in considering whether the discrimination is reasonable, particularly in those products where those decision points are set at very limited levels. (sub. 242, p. 4)

This means that sometimes it may not be worthwhile, from a purely commercial perspective, for the insurance company to spend much time gathering information about 'other factors', even if the factors are relevant to the individual's risk rating.

The Insurance Council of Australia (ICA) perceived this issue as a normal part of the risk assessment process undertaken for all insurance customers:

> An insurer who acts in accordance with s.46 is merely performing a normal and necessary part of the insurance process that includes the assessment of individual risks. (sub. 234, p. 3)

Nevertheless, Michael and Denice Bassanelli were concerned that the guidelines 'as to what is reasonable and relevant' factors are inadequate (sub. 175, p. 1). HREOC suggested 'further specification of what is reasonable, including potentially through standards or industry codes and procedures'(sub. 219, p. 13).

Other inquiry participants were concerned that allowing insurers to rely on 'other factors' in the absence of actuarial data allows them to rely on 'prejudicial assumptions related to disability' (Blind Citizens Australia, sub. 72, p. 5) or to make 'blanket decisions … without determining the functioning capacity of the individual applicant' (Disability Rights Network of Community Legal Centres, sub. 74, p. 2). The Mental Health Legal Centre (sub. 108, p. 5) submitted that this aspect of the exemption is used without justification for people with psychiatric disabilities. As a solution, Blind Citizens Australia (sub. 72, p. 5) recommended removing the 'other relevant factors' clause in section 46, so as 'to oblige insurance companies to obtain actuarial and statistical data to support exclusion or higher premiums'.

Conclusions on insurance and superannuation

Although this exemption is only partial, many inquiry participants called for its total removal. Others called for it to be amended or limited further (box 10.5). Some acknowledged that the unjustifiable hardship defence and the 'reasonableness test' in indirect discrimination (see chapter 9), without the partial exemption, would still be available to insurers in cases where actuarial evidence supports differential treatment.

Box 10.5 **Participants' suggestions for insurance and superannuation**

Suggestions to remove or amend the partial exemption

Inquiry participants who suggested removing the partial exemption included the Mental Health Coordinating Council of NSW (trans., p. 1466); the Northern Territory Disability Advisory Board (sub. 121, p. 1); the Physical Disability Council of New South Wales (sub. 78, p. 9) and the Physical Disability Council of Australia (sub. 113, p. 8).

Referring specifically to workers compensation and superannuation, the Northern Territory Disability Advisory Board (sub. 121, p. 1), suggested offering tax breaks or incentives to offset additional costs to insurers from the removal of the exemption.

The Physical Disability Council of New South Wales (sub. 78, p. 9) and the Physical Disability Council of Australia (sub. 113, p. 8) qualified their calls for the removal of the exemption by saying that 'in arguing for these exemptions to be ended we do not advocate 'blanket' application of unrealisable outcomes' but 'a shift of paradigm'.

Robin and Sheila King (sub. 56, p. 1) suggested different approaches for different types of insurance: no exemption in property insurance; life insurance to be assessed according to the individual's situation; and existing injury clauses to apply in medical insurance.

The Anti-Discrimination Board of New South Wales (sub. 101, p. 23) proposed an amendment to the exemption to address genetic testing, so discrimination would not be unlawful if 'based upon actuarial or statistical data which has been approved for use in underwriting by the relevant independent body'.

Suggestions to keep the partial exemption:

Inquiry participants who argued in favour of the current partial exemption included HREOC, IFSA and the ICA. HREOC (sub 219, p. 13) said most forms of insurance require 'reasonable distinctions' to be made and that the exemption 'needs to be maintained, rather than insurers being left to rely solely on an unjustifiable hardship defence'. IFSA (sub. 142, p. 25) argued that 'the continuation of the exemption in some form is fundamental to the continuation of the life insurance industry as we know it'.

As HREOC and other inquiry participants acknowledged, insurance is discriminatory by its nature. If the risks carried by an individual with a disability

renders the individual uninsurable or costly to insure, then insurance companies need to be able to vary the terms or conditions of their products or, in extreme cases, to refuse insurance altogether.

The ICA explained that the current exemption is justified mainly by the presence of 'asymmetric information' (that is, unequal availability of information between buyer and seller) in the insurance market, which can lead to:

- adverse selection, where one of the parties (the principal) is unable to observe (or take account of, as it may be) important characteristics of the other (the agent) or of the good involved in the transaction and
- moral hazard, where the principal is unable to monitor the actions of the agent following the decision to proceed with the transaction and where the agent has no incentive to act in the principal's interest. A pertinent example would be where a fully insured person might not then take appropriate risk reduction measures. (sub. 234, p. 3)

The ICA added that transaction costs would be higher without the exemption (for example, if each case had to be proven on the ground of unjustifiable hardship) and, because 'risk-based premiums are fundamental to the insurance model', insurers' ability to 'take account of relevant characteristics as variables for assessing risk' would be reduced (sub. 234). These issues could have the effect of increasing premiums for all insurance customers so as to cover people who have a higher risk of making a claim but who cannot be easily identified.

The Productivity Commission considers that an exemption is warranted for discrimination that is genuinely based on relevant, up-to-date statistical or actuarial data. However, as HREOC acknowledged, the DDA leaves much open to interpretation of what constitutes 'other relevant factors' on which to discriminate in insurance. Despite the existing guidelines, interpretation of 'other relevant factors' remains uncertain.

A stronger co-regulatory approach could also be taken. The industry could develop a code of practice or, if the DDA were amended to enable disability standards to be enacted in a wider range of areas, disability standards could be introduced to cover insurance and superannuation (see chapter 12).

Alternatively, the DDA could be amended to clarify the meaning of 'other relevant factors'. This amendment could be achieved, for example, by inserting criteria about types of information that insurance and superannuation providers should (or should not) consider to identify 'other relevant factors'. The current guidelines, HREOC conciliated outcomes and case law in this area could provide appropriate guidance for formulating the criteria for 'other relevant factors'. These criteria could make clear, for example, that insurance and superannuation decisions must

not be based on stereotypes about people with disabilities (or about other groups) or on unfounded assumptions about individuals' health or risk status. They could also make clear that 'other factors' and actuarial and statistical data should be considered in a balanced manner for each individual risk assessment.

DRAFT FINDING 10.5

A partial exemption for insurance and superannuation in the Disability Discrimination Act 1992 *(s.46) is appropriate, but its current scope is uncertain.*

DRAFT RECOMMENDATION 10.3

The* Disability Discrimination Act 1992 *should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:

- ***stereotypical assumptions about disability that are not supported by reasonable evidence***
- ***unfounded assumptions about risks related to disability.***

10.4 Other exemptions

Many activities other than insurance and superannuation are also expressly exempt from the DDA. As for insurance and superannuation, many of these exemptions are only partial. They include: special measures (that is, disability services intended to benefit people with disabilities); infectious diseases; charities; migration; combat duties in the armed forces; and peacekeeping by the Australian Federal Police.

In addition, actions taken under a small number of prescribed State and Territory Acts listed in the Disability Discrimination Regulations 1996 are exempt from the DDA (see chapter 12). Many other areas of activity are also exempt from the DDA because it is silent on them. The DDA does not cover, for example, relationships in private life. These exclusions are not discussed in this report (see chapter 1).

Combat duties, peacekeeping and the Australian Federal Police

The DDA exempts combat duties and peacekeeping by the armed forces (s.53) and peacekeeping services by the Australian Federal Police (s.54). However, the nature of these duties had to be prescribed in regulation, which was done in the Disability Discrimination Regulations 1996. Before the regulations, this exemption did not operate, and discrimination against people with disabilities in these activities (primarily in the form of exclusion) had to be defended using inherent requirements,

unjustifiable hardship or the 'reasonableness test' in indirect discrimination in the same manner as for other activities covered by the DDA. In the case of *X v the Commonwealth* ((1999) HCA 63), a person who tested positive to HIV was found to fail the inherent requirements for combat duty (box 10.1). In deciding on this case, the High Court observed that section 53:

> … would appear to have been incorporated into the Act precisely … to relieve the ADF from the necessity to conform with the Act in respect of such duties and services as specified, the 'combat duties' and 'combat-related duties' mentioned in s.53. (*X v the Commonwealth* (1999) HCA 63)

HREOC disputed the need for this exemption in the DDA (sub. 219, p. 15) on the ground that 'the concept of inherent requirements ought to be regarded as sufficient'. In its submission to the Senate inquiry into the Age Discrimination Bill 2003—which proposes an exemption for all Australian Defence Force positions rather than only combat-related positions as in the DDA (s.39(1) and schedule 1)—HREOC did not consider such a wide exemption appropriate or necessary. It recommended replacing it with non-discriminatory recruitment tests (HREOC 2003j, p. 17).

Without this exemption in the DDA, the defence forces would have to rely on the inherent requirements and indirect discrimination test of reasonableness. This approach could be costly and create uncertainty until suitable legal precedents have been established. If a whole class of positions are unsuitable for people with disabilities, then a general exemption such as this one provides certainty and eliminates the need for expensive litigation on a case by case basis, which would be likely to achieve the same result as achieved by the exemption (in this case denial of employment in combat and peacekeeping duties).

DRAFT FINDING 10.6

The limited exemptions in the Disability Discrimination Act 1992 *for combat duties and peacekeeping services in the Defence Forces (s.53) and peacekeeping services by the Australian Federal Police (s.54) are appropriate and do not require amendment.*

The Migration Act

Section 52 of the DDA exempts discriminatory provisions in the *Migration Act 1958* or any Regulations made under that Act or anything done by a person in relation to the administration of that Act or Regulations.

This exemption reinforces the role of the Migration Act as the primary legislative instrument for determining who is eligible to enter or migrate to Australia,

temporarily or permanently. Criteria for migration visa categories are often extensive and vary considerably across visa categories. Depending on the visa category, they can include, for example, qualifications, assets, age, dependents, health status and language skills.

Several inquiry participants argued that this exemption in the DDA is expressed too broadly, and fails to protect people with disabilities and their families against potentially discriminatory migration and visa decisions. Leichardt Council (sub. 75) and People with Disabilities WA (trans.) were particularly concerned to ensure people with disabilities can qualify for various migration visa categories on the same basis and criteria that apply to other people. NEDA said:

> … the Migration Act in particular … has had the effect that people with a disability are often ineligible to emigrate to Australia because of their disability. As noted in NEDA's submission—page 15, I've just made a point there—it is not uncommon for immigrant families to leave behind a relative with a disability. (trans. pp. 1433–4)

Blind Citizens Australia gave a similar example:

> Blind people who seek to migrate to Australia and who have business and professional skills that they could use productively in Australia, are consistently refused entry on account of their blindness, notwithstanding that they meet all other eligibility criteria for the visa for which they are applying and do and are able to give guarantees of financial independence. No doubt the same situation is true for people with other sensory or physical disabilities. (sub. 72, pp. 5–6)

Based on these allegations, Blind Citizens Australia recommended removing this exemption so 'the fact that the person has a disability or has a dependent family member or spouse with a disability should not operate to prevent migration' (sub. 72, p. 6). HREOC agreed this exemption should be reviewed (sub. 219, p. 15) and said:

> If these decisions are to remain exempt from the DDA, HREOC would like to see improved criteria and procedures within immigration law in relation to admission of people with disabilities. (sub. 143, p. 18)

The Age Discrimination Bill 2003 proposes a similar exemption for 'anything done by a person in relation to the administration of the *Migration Act 1958*, *Immigration (Guardianship of Children) Act 1946* and their Regulations'. In its submission to the Senate inquiry into this Bill, HREOC disagreed that all actions done under the Migration Act should be exempt. HREOC said that actions done in direct compliance of the law should be exempt, but discretionary acts done to administer immigration law (such as providing information or services to immigrants and applicants) should not, because to do so would be 'inconsistent with the general thrust of the provisions in the Bill in relation to Commonwealth laws and programs' (HREOC 2003j, pp. 21–2).

Options for improving the Migration Act exemption

A similar argument would appear to apply to the DDA—that is, that the exemption of *all* actions done under the Migration Act is inconsistent with the general application of the DDA to the administration of all other Commonwealth laws and programs. However, decisions and actions under the Migration Act can be usefully divided into two groups and considered separately.

On the one hand, an exemption of the criteria and decision-making processes for Australia's various entry and migration visa categories might be appropriate, given the need to consider other factors and public policies that might conflict with the DDA. Particularly relevant in this context are:

- public health considerations (for example, if a person carries an infectious disease)[1]
- health and welfare expenditure considerations (for example, if a person is likely to require ongoing medical services or social security support) and
- labour market considerations (for example, if the Australian Government gives priority to immigrants with some skills or qualifications, such as nursing or computer engineering).

These considerations arise in the assessment of applications for many types of migration visa. Such criteria are relevant to all applicants, not just those with disabilities—it is largely for public health reasons, rather than any intention to discriminate, that all people wishing to stay in Australia for longer than 12 months must:

> … meet Australia's health requirements to be eligible for a visa. This includes undergoing a medical examination, an x-ray (for those 11 years or older) and an HIV/AIDS test (for those 15 years or older). The examining doctor may ask you to undergo additional tests if necessary. (DIMIA 2003)

On the other hand, many general administrative decisions and actions are carried out under the Migration Act and Regulations. Examples include the provision of information, the operation of detention centres and the provision of language and other migrant services. The Productivity Commission can see no reason that these administrative functions should not comply with the DDA, in the same manner as other Commonwealth laws and programs must comply. Compliance would help to ensure, for example, that immigration information is available in alternative formats and migration services are provided in accessible venues for people with disabilities.

[1] , Measures to protect against infectious diseases are also exempt under s.48 of the DDA.

DRAFT FINDING 10.7

The scope of the Migration Act 1958 *exemption in the* Disability Discrimination Act 1992 *(s.52) is uncertain.*

DRAFT RECOMMENDATION 10 .4

The exemption of the* Migration Act 1958 *in the* Disability Discrimination Act 1992 *(s.52) should be amended to ensure it:

- ***exempts the areas of the Migration Act and regulations that are directly relevant to the criteria and decision-making for Australian entry and migration visa categories but***
- ***does not exempt more general actions done in the administration of Commonwealth migration laws and programs.***

Special measures

Special measures that provide services, programs or funds for the benefit of people with disabilities are exempt from the DDA (s.45). This exemption aims to protect beneficial measures for people with disabilities from being challenged by people from outside those groups.

Other discrimination Acts in Australia contain similar exemptions for special services. As noted by the New South Wales Law Reform Commission in relation to the that State's *Anti-discrimination Act 1977*, 'not every treatment that involves a distinction is discrimination', and not all discrimination is unlawful. In particular, 'benign discrimination', where a person's characteristics justify different treatment that is to their benefit, should not be unlawful (NSW Law Reform Commission 1999, para. 3.41).

HREOC argued that this provision is not necessary because a person cannot make a valid claim of being discriminated against if they d not have the particular disability identified as necessary to secure an opportunity or benefit. However, HREOC also said the special measures exemption helps to protect information requests that are necessary or reasonable to establish eligibility for a benefit or opportunity directed at people with a disability (sub. 143, p. 11).

HREOC expressed concern about the wide interpretation given to a similar provision in the ACT's *Discrimination Act 1991*. The ACT Administrative Appeals Tribunal found that a similar provision protected any act done in the course of

administering a beneficial program and not just beneficial acts (see chapter 9). The National Council for Intellectual Disability was similarly concerned, stating:

> … there have been decisions which have held that once a service is characterized as a service for the purpose of meeting the 'special needs' of people with disability or an affirmative action program, then nothing done by the service provider in the course of that program or service can constitute an act of discrimination on the ground of disability even if the same action would be an act of discrimination in a similar context of a person without a disability. (sub. 112, p. 12)

HREOC suggested that the appropriate test under the DDA is whether the action complained of was reasonably intended to be beneficial, not whether it occurred in the administration of a program or facility intended overall for beneficial purposes. Alternatively, the National Council for Intellectual Disability suggested looking to US legislation for an example of how to apply discrimination legislation to disability services:

> One alternative is to follow the US approach of legislating to require service providers to deliver their services in the 'least restrictive environment' and with 'maximum integration' within the community. (sub. 112, p. 12)

In response, HREOC (sub. 219, p. 7) said this idea could be useful, but noted the principles suggested—least restriction and maximum integration—are relevant to all goods and services and not just to special disability services. The National Council for Intellectual Disability's suggestion might be more relevant to service charters for disability services (such as those developed under the Commonwealth, State and Territory Disability Agreement, see appendix E) than to discrimination legislation.

The Productivity Commission considers that the reason for introducing this exemption—to ensure it is lawful to do things that are beneficial for people with disabilities—is still relevant but has been misinterpreted or misunderstood. The exemption could be clarified to ensure people with disabilities are not discriminated against in the *administration* of a special measures service. Premises for special services, for example, should be accessible to all, and information about special services should be available in accessible formats to people with all types of disability who want to find out about those services (see chapter 14).

On the other hand, the Productivity Commission considers it appropriate that the DDA does not apply to the establishment, funding or eligibility criteria for disability services designed to benefit particular groups in the community. The eligibility or availability of disability services is sometimes the subject of complaint by people with disabilities, but rarely on issues of disability discrimination (see chapter 9). The DDA is not designed to address matters other than discrimination. Issues of eligibility or availability of disability services should be addressed directly through

appropriate complaint mechanisms, such as those operated by State and Territory government departments, commissions and ombudsmen.

DRAFT FINDING 10.8

The scope of the 'special measures' exemption in the Disability Discrimination Act 1992 *(s.45) is uncertain.*

DRAFT RECOMMENDATION 10 .5

The 'special measures' exemption in the* Disability Discrimination Act 1992 *(s.45) should be clarified to ensure that it:

- ***exempts the establishment, eligibility and funding arrangements of 'special measures' that are reasonably intended to benefit people with disabilities but***
- ***does not exempt general actions done in the administration of 'special measures' that are reasonably intended to benefit people with disabilities.***

Charities

The DDA's charities exemption (s.49) is not a general exemption for charitable organisations and, in particular, does not give charities permission to discriminate as employers. HREOC stated:

> … this exception simply confirms what would have been the case under the DDA without such an exception: that it is lawful to establish and administer charitable instruments for the benefit of people with a particular disability. (sub. 143, p. 16).

Inquiry participants did not raise concerns about this exemption.

Infectious diseases

Section 48 of the DDA exempts measures that are reasonably necessary to protect public health where a person's disability is an infectious disease.

HREOC considered that this exception has operated appropriately. It suggested that action may be required in relation to assistance animals (for example, guide dogs), including interaction between the DDA and health and hygiene laws, and quarantine provisions. HREOC plans to issue a discussion paper soon on possible needs and options for legislative and/or regulatory action in this area.

Acts done under statutory authority

Under section 47(1(c)) of the DDA, it is not unlawful to discriminate against a person with a disability by paying them a capacity or productivity based wage, as long as this wage is consistent with an Award, a certified agreement or an Australian workplace agreement, and the person would otherwise be eligible for the Disability Support Pension.

Many workers with a disability who are employed either in the 'open' labour market, or in the 'supported employment' labour market (also known as 'business services' or 'sheltered workshops') receive wages lower than full wages, based on their assessed relative productivity. One scheme for assessing relative productivity is the federal Supported Wage System.

The Australian Government is currently developing a wage assessment tool as part of its Quality Assurance System reforms of disability services. This tool is intended to assist business services providers to meet National Disability Services Standards 9, which applies to the employment of people with disabilities (chapter 14). The tool will allow the business service providers to calculate the wages of their employees on the basis of productivity, competency and registered Awards or agreements. Once the wage assessment tool is introduced, its adoption by business services providers will be a condition of continued Australian Government funding after December 2004. However, the Government has stated that it is prepared to be flexible in this regard, so as not to disadvantage any person with a disability who is employed in business services.

A number of inquiry participants criticised the wages paid by business services providers (Jobwatch, sub. 90; NCID, sub. 112; NSW Council for Intellectual Disability, sub. 117; Disability Action Inc., trans., p. 929; Intellectual Disability Review Panel, sub. 207). They had four main criticisms.

- Wages are often not based on any Award or agreement registered by the Australian Industrial Relations Commission (AIRC).
- Productivity assessments are often not conducted by accredited, independent assessors.
- Even when agreements have been registered with the AIRC, employees are not in a position to make informed decisions regarding pay and conditions.
- The AIRC is not obliged to only make Awards or certify agreements containing a Supported Wage System clause.

Some of these issues have been raised in complaints to HREOC (under the DDA) and to the AIRC (under the Workplace Relations Act). However, there is some

uncertainty about how the DDA applies to these business services. Some inquiry participants considered that the specific provisions of section 47(1(c)) should govern productivity-based wages paid in the business services sector (Jobwatch, sub. 90, sub. 215; HREOC, sub. 143).

However, the Intellectual Disability Review Panel (sub. 207) argued that business services could be characterised as 'special measures' and so be exempt from the DDA under the special measures exemption (s.45).

The Productivity Commission considers that any uncertainty about the application of the DDA to business services should be clarified. It is a general principle of statutory interpretation that specific provisions take precedence over general provisions. Therefore, the specific requirements of section 47 governing productivity-based wages should take precedence over the general exemption for special measures in section 45.

Jobwatch (subs 90, 215) suggested that section 47 of the DDA be amended to prescribe the Supported Wage System wage assessment tool as the only method to be used by employers wishing to offer productivity related wages. Jobwatch also suggested that the DDA be amended to require the AIRC and State tribunals to only register Awards or agreements that include a Supported Wage System clause.

The Productivity Commission considers that it is not desirable either to prescribe a particular wage assessment tool within the DDA, or to include in the DDA a reference to the operation of the AIRC and the State tribunals. The AIRC is entrusted with applying the Workplace Relations Act, which contains a requirement to adhere to the principles of the DDA in industrial relations. The Productivity Commission shares HREOC's wish to move the issue of wages for people with disabilities into the mainstream (HREOC, sub. 219).

DRAFT FINDING 10.9

The current provisions of the Disability Discrimination Act 1992 *dealing with productivity-based wages are appropriate. However, there is some uncertainty about the interaction between provisions dealing with productivity-based wages (s.47(1)(c)) and the exemption for 'special measures' (s.45).*

DRAFT RECOMMENDATION 10.6

The* Disability Discrimination Act 1992 *should be amended to clarify that the specific provisions governing productivity-based wages (s.47(1)(c)) take precedence over the general exemption for 'special measures' (s.45).

Domestic duties in employment

Within some areas of activity listed in the DDA, there are small, specific exemptions. Domestic duties and partnerships in practices with only two partners are exempt from the employment provisions of the DDA. A similar exemption appears in virtually all Australian discrimination legislation, including the federal race and sex discrimination Acts and State and Territory anti-discrimination Acts.

Two inquiry participants questioned the need for the domestic duties exemption in the employment section of the DDA:

> Such an anomaly needs to be addressed as discrimination against an employee should be unlawful regardless of the 'type' or location of employment. Other employees within the home (e.g. contract workers, support workers and attendants) are covered under the Act, thus it is not merely the location but the 'type of duties' that are exempted. (Joe Harrison sub. 55, p. 8; Disability Council of NSW sub. 64, p. 20)

HREOC indicated that it does not know the underlying rationale for the domestic duties exemption in the Act (HREOC, trans., p. 1143) and that it favoured a review of the extent of this exemption (sub. 219, p. 13).

A similar exemption for domestic duties appears in the Age Discrimination Bill 2003. The explanatory memorandum for the Bill explains: that the exemption 'reflects the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised' (para. 45). This argument is likely to be relevant to disability discrimination also.

Conclusions on partial exemptions

The DDA contains a number of exemptions that mean disability discrimination is not unlawful in specified situations. The Productivity Commission recommends retaining the more significant of these exemptions. However, some clarification of their scope and application seems necessary (see above).

DRAFT FINDING 10.10

On balance, some exemptions from the Disability Discrimination Act 1992 *are appropriate. They 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.*

11 Complaints

The main mechanism for enforcing compliance with the *Disability Discrimination Act 1992* (DDA) is the complaints process established under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The complaints process is directly targeted towards achieving the first object of the DDA—that is, eliminating discrimination on the ground of disability. It also contributes to the second object—that is, ensuring equality before the law—by allowing people with disabilities to enforce their rights. Similarly, it contributes to the third object regarding attitudinal change, by promoting awareness of the rights of people with disabilities.

This chapter examines the effectiveness of the complaints system in responding to individual allegations of discrimination and in driving broad systemic change. It makes recommendations for improving the operation of the complaints system.

11.1 General strengths of the complaints process

The HREOC Act complaints process combines an initial conciliation phase conducted by the Human Rights and Equal Opportunity Commission (HREOC) with the option of proceeding to the Federal Court of Australia or the Federal Magistrates' Court if agreement cannot be reached (see chapter 4). The emphasis on relatively informal conciliation reflects the DDA's aim of changing attitudes and improving understanding of the rights of people with disabilities. Alternative models that rely solely on adversarial processes could aggravate negative attitudes and lead to resentment of people with disabilities (see chapter 7).

In addition, sometimes the existence of the complaints process can deliver benefits, even in the absence of a formal complaint. If a threat to make a complaint to HREOC is credible (that is, if it appears to the respondent that the individual is willing and able to go through with the complaint) and has a fair chance of success if taken to the federal courts, then an alleged discriminator might change their practices without a formal complaint being made. The NSW Disability Council acknowledged that there have been significant advances merely from the threat of a DDA complaint (sub. 64, p. 15).

Many inquiry participants acknowledged the benefits of conciliation as an alternative to the courts. The National Council of Independent Schools Association stated:

> Conciliated disputes result in outcomes for the specific person with a disability involved in the case and frequently generalised outcomes for other people with disabilities. In addition, conciliation procedures usually result in a faster outcome and far less expensive procedures for all parties. (sub. 126, p. 14)

The Investment and Financial Services Association commented:

> Generally, our industry experience with HREOC and some State jurisdictions is that efforts are made to conciliate complaints to great effect and with a minimum of cost. (sub. 142, p. 29)

The NSW Anti-Discrimination Board said:

> The investigation and conciliation process can provide redress for some complainants without the stress, delays and cost of court proceedings. Conciliation mechanisms are frequently less daunting to would-be complainants than the prospect of court proceedings. (sub. 101, att. 1, p. 21)

The complaints process attempts to balance education and awareness raising (through conciliation) with coercion (through the courts). If made accessible to people with disabilities, it can be a powerful force for change. However, many inquiry participants criticised the complaint process (box 11.1). The remainder of this chapter looks at the limitations of the process, along with possible improvements.

DRAFT FINDING 11.1

The complaints process, together with the threat of complaints, can be powerful tools for addressing discrimination on the ground of disability.

11.2 Limitations of the complaints process

The effectiveness of the complaints process depends to a large extent on its accessibility to complainants. The Victorian Equal Opportunity Commission summarised many of these barriers:

> … our estimate is that some 70 per cent of people who think they've had their rights abused, generally across the board, in fact elected not to bring a complaint. It might be because of fear of victimisation or the cost. Sometimes it's barriers, it's the nature of the process itself. They fear the legalism, they fear the cost, they fear the exposure that a complaint process can entail. (trans., p. 1895)

General barriers to access are discussed below. Barriers that relate more specifically to either conciliation or the court system are discussed in sections 11.3 and 11.4 respectively. Particular barriers to access for people with multiple disadvantages are discussed in chapter 5.

Box 11.1 **Inquiry participants' criticisms of the complaints process**

The complaint process is useful and should be retained. However, there are some limitations associated with the complaints process. For some people with disabilities, the process can seem too difficult, too complicated, too intimidating and too expensive. It seems inconsistent to develop legislation which aims to help people who need help because they are disabled, but which also expects them to have the knowledge, experience, financial resources, organisational ability and professional support necessary to be able to engage in a complex complaints process in order for the legislation to work. (Mental Health Coordinating Council, sub. 84, p. 2)

Lodging a complaint can be a daunting and laborious process for someone who may already be disadvantaged and as a consequence may not possess the necessary resources (including energy and motivation) to initiate such a process. (Queensland Carers in Carers Australia, sub. 32, p. 3)

The complaints process is currently so protracted that many people with disabilities choose not to lodge a complaint because it is considered that it would take too long to be heard while others refrain from complaining because proof of discrimination has to be so detailed and documented… Often the discrimination is manifested in such a way that the aggrieved is hurt or humiliated but is unable to put into the written word the actions that bought on this response. (Disability Council of New South Wales, sub. 64, pp. 3–17)

… even though in theory it's not supposed to cost you anything at conciliation stage, you're advised to get some sort of legal advice. Whether that's … the Disability Discrimination Legal Service or a community legal centre, they're incredibly under-resourced and will only take cases that meet certain criteria. So it depends on whether … you can cope with the stress, the costs and the time it's going to take, apart from everything else that's happening in terms of the discrimination. (Victorian Public Advocate, trans., p. 1650)

People are not inclined to make complaints about discrimination because of the fear of being ostracised or victimised. This is particularly important in a small community. There were also concerns about the cost, timeliness and intimidating nature of the process. A further reason for not making complaints is that its adversarial nature seems contradictory to the general objective of getting along with others. People want to fit in, not to make waves and draw attention to themselves. (Hume Regional Forums)

My experience is that somebody with a disability might have occasion to complain about lack of access, the way they're treated and so on, probably on at least half a dozen occasions each and every day. So if you complained about everything that you were discriminated against on an individual basis you'd be exhausted after a week. (ParaQuad Victoria, trans., p. 1859)

Costs of making a complaint

Although there is no fee for lodging a complaint with HREOC, the process still involves financial and non-financial costs. Additional costs are likely if the complaint is heard formally in the Federal Court.

- There are the general costs of learning about the complaint process. People unaware of their rights can face difficulties and incur costs in finding out whether they are entitled to lodge a complaint and how they should proceed. Although some people might find it sufficient to ring HREOC or one of the State or territory anti-discrimination bodies, others might need assistance to understand the process, or advice from an advocate or lawyer.
- There are also the costs of preparing a complaint, such as travelling to conciliation conferences or organising childcare or a carer. These include the cost of the time required, which could be significant if the complaints process is drawn out.
- If a complainant requires legal representation and cannot receive government sponsored legal aid or *pro bono* (free) assistance from private law firms, then the costs can be substantial. Many people choose to have legal representation at both the conciliation and court stages of the complaints process. In addition, if the complaint goes to court, then the complainant faces the risk of having costs awarded against them (that is, having to pay for the other party's costs) if they lose the case.
- The complaints process can also involve significant 'intangible' (non-monetary) costs. It can be extremely stressful for both parties, but particularly for complainants unused to such processes. Many people with disabilities have conditions that stress can exacerbate.

Depending on the circumstances, costs will be more of a constraint for some people than others. Sometimes costs might be sufficiently high to prevent a person from making a complaint or from taking a complaint to court, undermining the effectiveness of the complaints process. In a survey conducted by HREOC in 2002,[1] 26 per cent of complainants whose complaints were not conciliated stated that the cost was the reason they did not proceed to the federal courts (HREOC 2002f, p. 19). Further, almost 30 per cent of complainants who settled despite being dissatisfied with the settlement terms did so because they thought the costs of court action would be too high (HREOC 2002f, p. 18). The issue of court costs is examined in more detail in section 11.6.

[1] The survey covered complaints made under all three Commonwealth anti-discrimination laws in 2001, but gives a broad indication of the views of complainants under the DDA.

The formalities involved

Many people find the complaints process complex, confusing and intimidating. The degree of literacy and comprehension required would constitute a considerable barrier for most people. For many people with disabilities, particularly those with cognitive or communication disabilities, and those from non-English speaking or Indigenous backgrounds, the complaints process can be even more difficult to access (Disability Council of NSW, sub. 64).

Given that a complaint sets a legal process in motion (see chapter 4), a degree of formality is inevitable if the principles of natural justice are to be followed.[2] The onus is on complainants to prove their complaint. They must collect and document information relevant to their case. This work can be difficult, time consuming and potentially costly. The Public Interest Advocacy Centre noted that it:

> … routinely advises people with disabilities that they must obtain evidence of their disability, evidence of the discriminatory conduct and expert evidence on the benefit to themselves and costs to the respondent before the merit of the application can be adequately assessed. (sub. 102, p. 10)

However, complainants often are not in a position to gather information about the internal operations or financial position of respondents. (The burden of proof in demonstrating 'reasonableness' in indirect discrimination is discussed in chapter 9.)

Complainants must also make important decisions at various stages of the process, including whether to lodge a complaint (and in which jurisdiction), whether to accept an offer in conciliation and whether to proceed with a terminated complaint to the federal courts.

HREOC plays an important role in providing information about peoples' rights and the process for complaints. It can assist complainants to lodge complaints but it cannot provide legal advice (other than to assess whether a complaint has sufficient substance to be formally accepted and referred for conciliation). Further, HREOC cannot recommend settlement of a complaint on specific terms—that is a matter for the parties concerned. Whether HREOC should take a more active role in assisting complainants is discussed in section 11.7.

The court processes are the most significant source of formality in the complaints process.[3] In a survey conducted by HREOC in 2002, 26 per cent of complainants

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2 The principles of natural justice are general rules that ensure that people subject to the law are treated fairly.

3 Although the HREOC Act states that the courts are not bound by 'technicalities or legal forms' in anti-discrimination proceedings (s.46PR), the Federal Constitution imposes unavoidable restrictions on the way in which the courts operates.

whose complaints could not be resolved by conciliation stated that they did not proceed to the Federal courts because the process 'would be complex and involve too much time and effort' (HREOC 2002f, p. 19). Almost 30 per cent of complainants who settled even though they were not satisfied with the settlement terms, did so for this reason, (HREOC 2002f, p. 18).

As part of a broader reform aimed at making the Federal Court of Australia more user friendly, the Federal Magistrates Service (also known as the Federal Magistrates Court) was created in June 2000 (box 11.2). Although it still has the powers of a court, the Federal Magistrates Service operates somewhat less formally. However, it is still more formal than the tribunals used in the States and Territories. A tribunal approach is not an option in the federal sphere where the Constitutional separation of powers means judicial matters cannot be heard in an administrative setting.

Box 11.2 **The Federal Magistrates Service**

The objective of the Federal Magistrates Service (also known as the Federal Magistrates Court) is to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts. The establishment of the Federal Magistrates Service complemented the Australian Government's initiatives aimed at encouraging people to resolve disputes through primary dispute resolution. The Service is able to call on a range of means to resolve disputes and there is no automatic assumption that every matter will end in a contested hearing. The use of conciliation, counselling and mediation is strongly encouraged in appropriate cases. The Service uses community-based counselling and mediation services as well as the existing counselling and mediation services of the Family Court and the Federal Courts, providing as wide as possible choice for clients of the court.

Source: Federal Magistrates Service 2003.

The Productivity Commission recognises that the complaints process can seem complex and daunting, particularly in relation to the federal courts. However, if Commonwealth anti-discrimination legislation is to be tested in law it must be heard in the courts. It is therefore important that the courts' processes are as accessible as possible. The introduction of the Federal Magistrates Service as an alternative to the Federal Court has thus been a positive step. However, the potential for costs to be awarded against unsuccessful complainants remains an issue (section 11.4).

The unavoidable complexity of the complaints process emphasises the importance of legal assistance for people with disabilities who are making complaints. This issue is discussed in section 11.5.

Fear of victimisation

Victimisation under the DDA includes subjecting, or threatening to subject, a person to any detriment because they have made (or propose to make) a complaint under the DDA. If complainants risk victimisation for making a complaint, then they will be less inclined to proceed. The fear of victimisation is real for many people with disabilities. The Anti-Discrimination Board of NSW noted:

> … the more vulnerable a community is to discrimination the more difficult it can be for members of that community to bring an individual action to redress that discrimination. This is often because of fears of victimisation … (sub. 101, p. 10)

The fear of victimisation can be greater in small communities or institutions where anonymity is rare and the consequences of social ostracism can be more significant than in an urban area (DDA Inquiry regional forums). People living in small communities and institutions can also find it difficult to make complaints because they are wholly or part dependent on the person or organisation about whom they would like to complain (Darwin Community Legal Service, sub. 110). Even if they do not fear active victimisation, people can be reluctant to complain when they know that their relationship with the alleged discriminator will change irrevocably.

The DDA provides some protection from victimisation. The fear of victimisation is one reason that the conciliation process is generally conducted confidentially (section 11.4). However, because the respondent knows who the complainant is, victimisation can still occur.

The DDA makes victimisation an offence, with a penalty of six months imprisonment. As an offence, the standard of proof is one of 'beyond reasonable doubt'. The DDA also makes harassment unlawful in many areas. Harassment includes humiliating comments, actions or insults about a person's disability (see chapters 4 and 9). The standard of proof for unlawful acts in 'on a balance of probabilities'. HREOC noted that the higher burden of proof meant that the victimisation offence might be less practically useful than a discrimination or harassment complaint on the same matter (sub. 219, p. 31).

The Productivity Commission considers that the fear of victimisation can create a significant barrier to people with disabilities using the complaints process. Increased awareness of the anti-victimisation provisions of the DDA is important, but victimisation can be insidious and difficult to prove, and its effects can be difficult to reverse. The current DDA protections do not appear to be working satisfactorily.

Alternative approaches, such as using representative complaints or HREOC initiated complaints where individuals fear victimisation, are discussed in sections

11.5 and 11.6 respectively. It is unclear whether these will be sufficient and further measures may be required.

DRAFT FINDING 11.2

Fear of victimisation can create a significant barrier to use of the complaints process. However, there have been no prosecutions under the Disability Discrimination Act 1992 *victimisation provisions (s.42).*

REQUEST FOR INFORMATION

The Productivity Commission is seeking further comment on how fear of victimisation could be addressed, for example, through improved awareness of the victimisation provisions, changes to the offence provisions or changes to the penalty.

The inequality of resources of complainants and respondents

The basis for successful conciliation is that the two parties meet as more or less equals to reach agreement on how the alleged discrimination might be addressed. However, the bargaining positions of the two parties is rarely equal. Almost inevitably, respondents are better resourced and more capable of mounting a case than complainants. The Australian Association of the Deaf argued:

> … what the community wants is actually very clear and simple, … but around the negotiating table with lawyers and technical experts this simple situation becomes extraordinarily complicated and tied up in legal and technical jargon and skullduggery. It is very difficult for community representatives and for the ordinary man or woman on the street to have the knowledge and expertise to argue with that level of professionalism. (sub. 229, p. 7)

HREOC survey data of complaints under all anti-discrimination laws suggest there is a substantial imbalance in the legal resources of the two parties. With access to more resources, and in the knowledge that many people with disabilities might not be willing to pursue the matter to the courts, respondents may have an incentive not to negotiate in good faith at the conciliation phase.

In cases that were conciliated, despite being dissatisfied with the settlement terms, 22 per cent of complainants settled because they were concerned about needing and obtaining legal representation. No respondents gave this reason (HREOC 2002f, p. 18). In cases that could not be conciliated, 19 per cent of complainants gave this reason for not proceeding to court (HREOC 2002f, p. 19).

On the other hand, respondents can also face incentives to avoid going to court. HREOC's survey of parties to all anti-discrimination complaints in 2001 found that

51 per cent of respondents who settled, despite being dissatisfied with the settlement terms, did so because they did not want to defend the matter in court (HREOC, sub. 235, att. L, p. 17).

Overall, the Productivity Commission considers that the inequality of the parties can reduce the effectiveness of the complaints process. Complainants might not be in a position to present their case adequately against better resourced respondents. Concerns about court costs and legal representation can create incentives for complainants to accept less favourable settlements than they might otherwise accept. Respondents can face incentives not to negotiate in good faith. However, respondents also face incentives to avoid going to court.

The importance of access to legal assistance for complainants is discussed in section 11.5. Representative complaints by disability organisations are discussed in section 11.7 and HREOC's role in addressing inequalities between the parties is discussed in section 11.8.

DRAFT FINDING 11.3

People with disabilities can face significant barriers to using the Disability Discrimination Act 1992 *complaints process, which can reduce its effectiveness. Barriers include:*

- *the financial and non-financial costs of making a complaint*
- *the complexity and potential formality of the process (although the introduction of the Federal Magistrates Service as an alternative to the Federal Court has improved access)*
- *the evidentiary burden on complainants*
- *the fear of victimisation if a complaint is made (which can be greater in institutions and small communities)*
- *the inequality of resources and legal assistance between complainants and respondents.*

11.3 Human Rights and Equal Opportunity Commission processes

This section examines issues concerning the complaints process undertaken by HREOC.

Satisfaction with complaint handling

Inquiry participants had mixed views on HREOC's complaint handling in general and its conciliation process in particular. Many were complimentary—for example, the Public Interest Advocacy Centre stated that 'HREOC provides, in our experience, an efficient and effective conciliation process' (sub. 102, p. 10). Other inquiry participants were critical of HREOC's processes and staff (Trevor Oddy, sub. 58).

Data on this issue is collected by HREOC. HREOC successfully conciliates a relatively high proportion of DDA cases compared to those State and Territory anti-discrimination bodies that publish data on disability discrimination cases. HREOC noted that:

> For example, in 2001-02 HREOC's rate of conciliation across all Acts was 30 per cent and 37 per cent in DDA. [The Western Australian Equal Opportunity Commission] reported 17.2 per cent of their matters were conciliated; [the Tasmanian Anti-Discrimination Commission] reported 25 per cent resulted in a conciliated agreement; [the Equal Opportunity Commission Victoria] reported 21.5 per cent. (sub. 235, Appendix C, p. 2)

HREOC conducts an annual survey of complainants' and respondents' satisfaction with its general complaint handling processes. HREOC's stated performance target is for 80 per cent of parties to be satisfied with the complaint handling process. In 2002-03, 86 per cent of parties in DDA complaints were satisfied with the service (compared to 84 per cent for all anti-discrimination complaints). HREOC noted that 'survey responses from complainants and respondents involved in DDA complaints are generally more favourable than overall ratings' (sub. 235, att. A, p. 3).

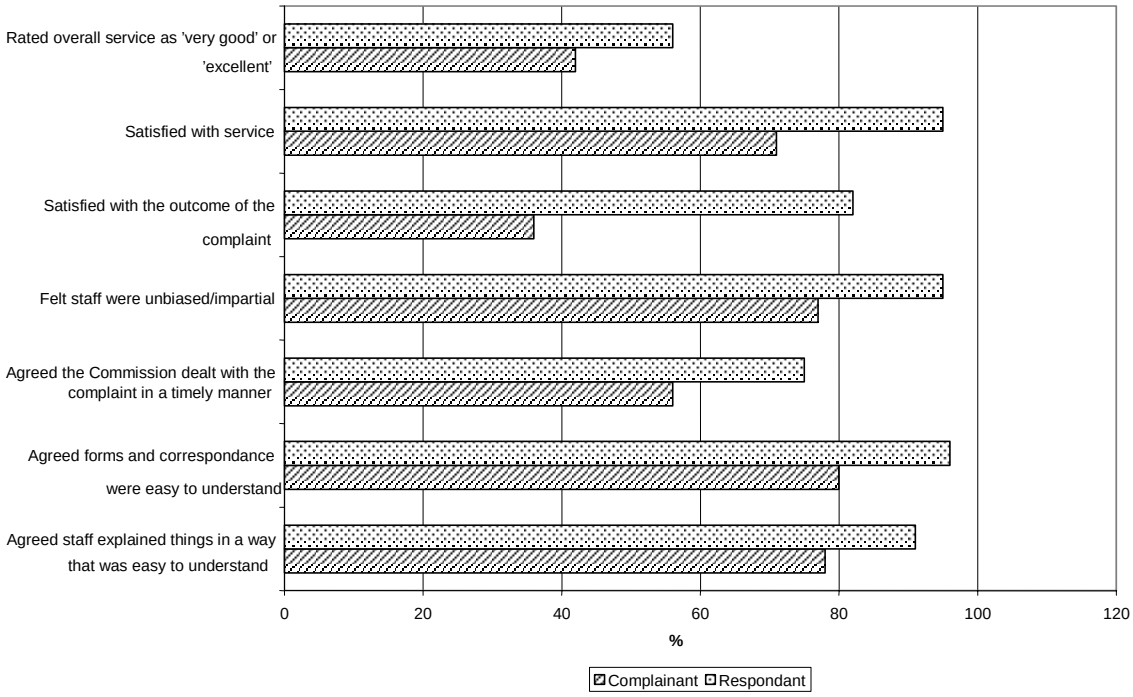
HREOC asks survey participants how satisfied they were with aspects of the complaints process (figure 11.1). DDA-specific ratings showed that respondents were more satisfied than complainants with all aspects of HREOC's complaint handling. There were large differences between complainants and respondents in both the 'forms and correspondence were easy to understand' and 'staff explained things in a way that easy to understand' categories. This finding is consistent with the presumed greater capabilities of respondents to deal with the complexities and formalities of the complaints process.

There was also a marked difference between complainants and respondents in satisfaction with the outcome of the complaint. Only 36 per cent of complainants were satisfied, compared with 82 per cent of respondents. This finding might reflect the fact that 65 per cent of survey participants were involved with a complaint that HREOC had declined or terminated. As HREOC stated:

Where complaints are terminated by HREOC, for example on the ground that the complaint is determined to be lacking in substance, it is likely that the complainant will be less satisfied with the outcome and the respondent more satisfied. This satisfaction or dissatisfaction with outcome is likely to influence overall service ratings. (sub. 235, att. A, p. 2).

Figure 11.1 **Satisfaction with HREOC complaint handling**

Percentage of DDA complainants and respondents satisfied by HREOC's handling of complaints, 2002-03



Data source: HREOC (sub. 235, att. A, p. 4).

A research project undertaken by HREOC in 2001 surveyed parties' perceptions of the conciliator and conciliation processes. Not surprisingly, parties involved in a successful conciliation appeared to have positive perceptions of the process. Ninety-nine per cent of both complainants and respondents stated that they understood the process, and 79 per cent of complainants and 73 per cent of respondents stated that the conciliator helped them reach agreement. Only 3 per cent of complainants and no respondents stated that the conciliator was biased against them.

Even in unsuccessful conciliations, where complainants in particular could be expected to be unhappy with the result, the majority of both complainants and respondents understood the process (83 per cent and 100 per cent respectively) and felt the conciliator was assisting the process (59 per cent and 73 per cent respectively). The same proportions of complainants and respondents in unsuccessful conciliations felt the conciliator was biased against them (3 per cent

and zero respectively). HREOC concluded that 'overall, these ratings paint a positive picture of HREOC's conciliation process' (sub. 235, att. A, p. 8).

The Productivity Commission considers that, despite the general reservations about the complaint process noted in section 11.2, most people who have been party to a complaint appear to be broadly satisfied with HREOC's complaint handling.

DRAFT FINDING 11.4

According to Human Rights and Equal Opportunity Commission surveys, both complainants and respondents appear reasonably satisfied with its complaints handling processes.

Timeliness

The benefit of a successful outcome from a complaint is eroded if the complaint takes too long to resolve. The Disability Rights Network of Community Legal Centres stated:

> Where [delay] occurs in education and employment matters the claimant has little chance of recovery of beneficial outcomes. An example of this is a case finally settled in Tasmania after 4 years. The child was by then at school leaving age. (sub. 74, p. 1)

The Anti-Discrimination Board of NSW noted that long delays can discourage people from making complaints:

> … delays in the handling of complaints are a disincentive to people lodging complaints in the first instance, and are a significant factor in complaints being withdrawn prior to resolution. (sub. 101, att. 1, p. 21)

In 2002-03, 17 per cent of DDA complaints were finalised in less than three months, and 43 per cent of DDA complaints were finalised in less than six months. Over 90 per cent were finalised in under 12 months, well above HREOC's target of 75 per cent and above the 84 per cent achieved for complaints under all Commonwealth anti-discrimination Acts. All DDA complaints were finalised within 24 months (HREOC, sub. 235, att. B, p. 2).

Despite these results, several inquiry participants criticised HREOC's timeliness. The National Ethnic Disability Alliance stated:

> Due to a lack of resourcing, the current waiting time for the processing of individual complaints is so excessive that many people with disability are deterred from even lodging a complaint. (sub. 114, p. 14)

Timeliness also received a relatively low satisfaction rating by parties to complaints in 2002-03, with a marked difference between complainants and respondents. Only

56 per cent of complainants felt HREOC had dealt with their complaint in a timely manner, compared with 75 per cent of respondents (figure 11.1). However, parties in DDA complaints were more likely to be satisfied than parties for 'all complaints' (73 per cent and 67 per cent respectively) (sub. 235, att. A, p. 3).

Mason argued that reforms of HREOC's complaint process in the late 1990s:

… mean that HREOC's complaint handling performance [in mid-2001] is much superior, both in timeliness and in outcomes achieved, to the mid 1990s and much superior to current performance of most State authorities. (Mason 2001, p. 14)

HREOC provided data comparing its complaint handling timeframes with those reported by Western Australian, South Australian and Victorian anti-discrimination bodies in 2001-02.[4] HREOC concluded that its timeframes are 'comparable with State discrimination bodies, where that information is available' (HREOC, sub. 235, att. B, p. 1). These claims are supported by the Public Interest Advocacy Centre, which stated that 'HREOC's processes have been far quicker and far shorter than in New South Wales' (trans., p. 1393).

Some inquiry participants suggested statutory limits on the time that HREOC would be allowed to take for particular processes. In other jurisdictions, limits apply to the time taken to decide whether to accept or decline a complaint. In the ACT, for example, the decision to commence an investigation must be made within 60 days (ACT Discrimination Commissioner, sub. 151, p. 7).

HREOC noted that it:

> … does not have a statutory time limit for commencing investigation as some jurisdictions do but in recent years complaint allocation within HREOC has met or bettered the statutory targets which exist in other jurisdictions. (sub. 219. P. 20)

HREOC's timeliness in accepting or declining complaints appears to be at least comparable to that of the States, without the imposition of statutory time limits. The speed of the process depends on the number and complexity of complaints and the available resources. A surge in the number of complaints, coupled with limited resources, could lead to lengthy delays. In such a situation, statutory time limits could create incentives to discourage complainants or terminate complaints prematurely (Australian Federation of Aids Organisations, sub. 88). The absence of formal time limits gives HREOC some flexibility in meeting fluctuating workloads.

No jurisdictions have time limits on the process of conciliation. Time limits are not considered appropriate, because the amount of time required for each conciliation

[4] HREOC noted that other jurisdictions do not report comparable timeliness information.

varies depending on the need for investigation and the requirements of the two parties. HREOC has some mechanisms for actively managing the conciliation process (section 11.6), but many causes of delay are outside HREOC's control.

Although statutory time limits are inappropriate, the Productivity Commission considers that administrative targets for case management purposes can assist performance monitoring and provide some guidance to parties to complaints.

DRAFT FINDING 11.5

The Human Rights and Equal Opportunity Commission's complaints handling timeliness appears to be comparable to that of the States and Territories. Uncertain case loads and investigation requirements make it inappropriate to impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

Enforcing conciliated agreements

Conciliated agreements are a contract between the parties. HREOC has no formal monitoring or enforcing role. If conciliated agreements are breached, they can be enforced like other contracts. Enforcement requires that the matter be taken to a court, which might reconsider the nature of the agreement and rehear the case, rather than focus on the breach only.

HREOC surveyed parties involved in conciliation in 2001. It found that:

- 82 per cent of both complainants and respondents expressed high satisfaction with the conciliation outcome (where the matter was resolved)
- 85 per cent of complainants and 96 per cent of respondents reported full compliance with settlement terms (sub. 235, att. A, pp. 7–8).

HREOC noted that full compliance might be somewhat higher than this finding, because some complainants might not be aware of the completion of all settlement terms by respondents (sub. 235, att. A, p. 8). It is also possible that compliance could be lower, if complainants cannot verify respondents' actions.

Despite the relatively high level of compliance found in HREOC's 2001 study, several inquiry participants criticised the lack of enforceability of conciliated agreements. Women's Health Victoria argued that this is a major deterrent to bringing a claim in the first place (sub. 68, p. 4).

The Productivity Commission has considered several alternative approaches to monitoring and enforcing conciliated agreements.

The first approach would be to maintain the current arrangements, with agreements enforceable in the federal courts as contracts between the parties. However, despite the HREOC 2001 study finding a relatively high level of compliance under current arrangements, the potential for even a small proportion of respondents to breach conciliated agreements with relative impunity is a significant issue.

The second approach would be to require compliance with the conciliated agreement before HREOC finalises a complaint. HREOC noted that this arrangement is included as a voluntary term in many agreements (sub. 235, att. A, p. 8). Although this approach does not give HREOC a formal role in enforcing the agreement, HREOC's continuing involvement might apply some moral suasion to tardy respondents. However, it would have implications for HREOC resourcing and could result in unfinalised complaints remaining open for considerable periods.

The third approach would be to register agreements in the Federal Court, as suggested by Robin and Sheila King (sub. 56, p. 8). A similar approach is adopted in some States and Territories. In the ACT, a conciliated agreement 'is enforceable as if it were an order of the tribunal' (s.85(4) of the ACT's *Discrimination Act 1991*).

The Productivity Commission considers that the third approach could provide a useful model for improving the enforceability of conciliated agreements under the DDA. However, some Constitutional problems would have to be addressed. Registering an agreement would give it the same status as a court order, and asking the Federal Court to register an agreement that it has had no part in devising might be inconsistent with the court's judicial obligations. Similar problems led to HREOC's original power to determine complaints being found unconstitutional (see chapter 4).

Finally, an alternative approach would be to allow an applicant to request the Federal Court to order that a conciliation agreement be enforced. Under this approach, the court would be asked to enforce a voluntary agreement that the parties willingly entered into, not to ratify a determination made by a non-judicial body. Unlike the current approach, the applicant would have to demonstrate only that they were a party to a valid agreement, rather than reopen the entire complaint.

REQUEST FOR INFORMATION

The Productivity Commission seeks further comment on whether the enforceability of conciliated agreements should be improved and, if so, what approach should be adopted.

Location of the Human Rights and Equal Opportunity Commission

HREOC's only office is located in Sydney, yet it must deal with complaints from around the nation. It relies heavily on FreeCall telephone numbers, faxes and the Internet to communicate with complainants and respondents. If a complaint requires conciliation outside Sydney, HREOC schedules a number of conciliations to occur at a given time and location and flies in conciliators.

Some inquiry participants argued that the location of HREOC is a barrier to complaints. The Mackay Regional Council for Social Development in Queensland noted that HREOC's location in Sydney inhibited people's capacity to lodge a complaint. HREOC was perceived as lacking understanding and recognition of the experiences of rural and regional Queenslanders. The need to communicate with a Sydney-based organisation was perceived as exacerbating costs and the communication, language and literacy barriers faced by complainants in 'remote' areas (sub. 87, p. 1).

The ACT Anti Discrimination Commissioner argued that the lack of a HREOC presence in the ACT is of particular concern given the importance of the Australian Government as an employer, where the ACT commission does not have jurisdiction (trans. p. 718).

HREOC argued that its geographic location is not a disadvantage in dealing effectively with complaints. Graeme Innes, the Deputy Disability Discrimination Commissioner, stated:

> I guess location is a factor which people may take into account in the lodging of complaints but I'm not sure how relevant it is really in the sense that if you can telephone or write to the person conciliating the complaint, and if the conciliation conference is held locally, I'm not sure how advantaged you are by there being a physical presence. (trans., p. 1175)

This view appears to be supported by an analysis of complaint information. If HREOC's location were a factor, then the data would be expected to show a disproportionate number of complaints originating from New South Wales. HREOC receives a large number of complaints from that State, but when the data are standardised by the number of people with disabilities in each jurisdiction, New South Wales does not appear to be over-represented in DDA complaints data (figure 11.2).

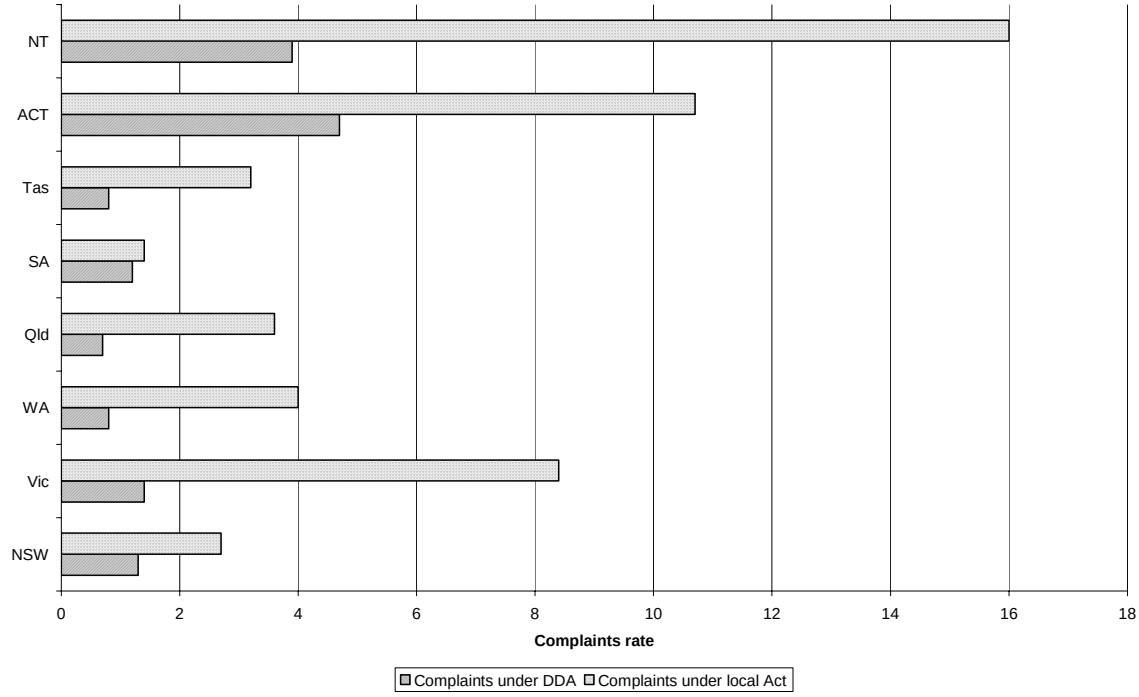
It is evident from figure 11.2 that in all jurisdictions, the majority of people with disabilities appear to favour their local anti-discrimination body over HREOC. There could be many reasons for this preference, including familiarity with the local organisation or commissioner, and the less formal approach and the lower cost of

Tribunals used by the States and Territories. The Tasmanian Anti-Discrimination Commissioner stated:

> … many people in Tasmania, in fact the vast bulk, want to come to the Anti-Discrimination Commission because it's a State body, it's located in this State; we travel out to the other parts of the State and they feel that they can communicate directly with people here rather than writing a letter or ringing up a body that's in Sydney. (trans., p. 312)

Figure 11.2 **Disability/impairment complaints under the DDA and State and Territory legislation, per 10 000 population with a disability[a,b]**

Complaints in 2001-2002, population with a disability in 1998



[a] Different counting rules in different jurisdictions mean that State and Territory complaint rates are not strictly comparable. [b] The ABS Survey of Disability, Ageing and Carers survey excluded some remote areas of Australia. This is likely to have underestimated the number of people with disabilities in the Northern Territory, in turn over-estimating the complaints rate.

Data sources: State and Territory anti-discrimination agencies annual reports; ABS 1999b cat. no. 4430.0; HREOC sub. 235, att. E, p. 1.

Complaints data do not indicate that HREOC's physical location has a strong influence on why a complaint might be lodged with one body and not the other. Other potential reasons include the legislation being more suitable, particular State or Commonwealth issues being involved, and differences in their respective complaints processes.

DRAFT FINDING 11.6

The Human Rights and Equal Opportunity Commission's location in Sydney does not appear to be a barrier to Disability Discrimination Act 1992 *complainants outside New South Wales. However, the majority of complainants clearly favour State and Territory based anti-discrimination bodies.*

Cooperative arrangements for complaint handling

As noted above, although HREOC's physical location does not appear to be a barrier to complaints, the majority of complainants favour State and Territory anti-discrimination bodies over HREOC. This preference might arise for a number of reasons, but improved cooperative arrangements with the States and Territories could enhance the effectiveness of the DDA.

As discussed in chapter 7, many people with disabilities and many disability groups are not aware that there are two systems in place—Commonwealth and State and Territory systems—and those who are aware are often unsure as to which system best suits their needs. The Equal Opportunity Commission Victoria noted:

> The existence of two overlapping statutes dealing with disability discrimination causes considerable confusion for many complainants. Most who know about both schemes do not feel confident that they know the differences between the two. It can be difficult for some people with disabilities to access advice about choice of jurisdiction, and it is probable that many elect jurisdiction without making an informed decision. (sub. 129, p. 36)

In the past HREOC has had formal and informal cooperative arrangements with the States and Territories to facilitate complaint handling. Only Victoria had formal arrangements covering the DDA. Others formally covered other Commonwealth anti-discrimination legislation, but not the DDA. Most arrangements involved the State or Territory agency informally providing advice or assistance to people in their jurisdiction who inquire about the DDA.

The last formal arrangement (with Victoria) ceased in February 2003 (Equal Opportunity Commission Victoria, sub. 129, p. 37). However, HREOC and the State and Territory anti-discrimination agencies argued that they continue to maintain informal links by:

- referring complainants to each other according to the circumstances
- sharing premises for conciliations (the State and Territory agencies commonly allow HREOC to use their premises to conduct conciliations)

- coordinating public information and education activities—for example, in 2003 all jurisdictions cooperated with HREOC to co-host the local release of *Ten Years of Achievements using Australia's DDA*
- regular meetings of Commissioners and officers to discuss common issues—for example, the establishment of the Australian Council of Human Rights Agencies in February 2003.

Some State and Territory anti-discrimination agencies argued that cooperative arrangements worked well in the past. The Queensland Anti-Discrimination Commission noted that 'as far as arrangements on the ground went it worked well' (trans., p. 255). Similarly, the South Australian Equal Opportunity Commission stated that its previous cooperative arrangement with HREOC 'was a really good system' (trans., p. 1004).

On the other hand, HREOC argued that the renewal of formal cooperative arrangements was not justified. It cited inconsistent methods for decision making, the generally higher costs of the States and Territories complaint handling processes, and the need to monitor all complaints as reasons for keeping the process in-house. HREOC also noted that the cessation of the cooperative arrangements was consistent with the 1999 amendments to the HREOC Act complaint process which, among other things, made the President of HREOC responsible for addressing complaints (sub. 143, p. 45).

The degree of similarity or difference between the respective State and Territory legislation and the DDA is an important practical issue. The Victorian Equal Opportunity Commission was not in favour of renewing cooperative complaint handling arrangements for this reason (sub. 129, p. 38).

The Productivity Commission considers that significant benefits could arise from formal cooperative arrangements between Commonwealth and State and Territory anti-discrimination bodies (see chapter 13). Legal aid and advocacy organisations can play an important role in assisting complainants, but cooperative arrangements with a presence in every jurisdiction to advise on both the DDA and the local anti-discrimination law would also help. The Productivity Commission considers that HREOC should enter into formal arrangements with the State and Territory anti-discrimination bodies to establish a 'shop front' in each jurisdiction. These shop fronts would provide an initial point of contact for people wishing to obtain advice or lodge a complaint under either the Commonwealth or State and Territory system.

Concerns about the consistency of advice should be addressed through staff training and support materials jointly provided by HREOC and the relevant jurisdiction. As in any 'purchaser–provider' model, contract specification can address concerns

about the cost and quality of services provided. However, it would not be appropriate for different complaint handling processes to apply to DDA complaints in different jurisdictions. HREOC should thus remain responsible for accepting or declining DDA complaints and for conducting conciliations.

The Productivity Commission acknowledges that HREOC could face additional costs in establishing and monitoring cooperative arrangements. However, there should also be scope for some administrative efficiencies and savings—for example, in travel. Most importantly, some of the confusion about the complaints process should be reduced for people with disabilities. Issues of HREOC resources are discussed in chapter 14.

DRAFT RECOMMENDATION 11.1

The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction. This would reduce confusion for people wishing to obtain advice or lodge a complaint. The Human Rights and Equal Opportunity Commission should retain responsibility for accepting or declining complaints and for conducting conciliations.

Confidentiality

The DDA's effectiveness in eliminating discrimination should be judged against its ability both to redress individual cases of discrimination and to achieve systemic change. However, its effectiveness in achieving systemic change is limited by the confidential nature of most complaints settled through conciliation. As Disability Rights Victoria stated:

> Conciliation of a claim of discrimination and the confidentiality arrangements attached to such out of court settlements ensure that precedents are not set that support systemic change. (sub. 95, p. 2)

There is no legal requirement in the DDA or HREOC Act for all aspects of a complaint to be kept confidential. HREOC has discretion over disclosing details of a complaint (s.14). However, if HREOC decides to hold a compulsory conference, then that conference must be held in private (s.46PK(2)). If a complaint is terminated, then the President of HREOC may make a written report on the complaint to the Federal Court or the Federal Magistrates Court, but the report must not set out anything said or done in the course of the conciliation (s.46PS).

In practice, the parties are left to agree how confidential they want to keep the details of the complaint and the conciliation outcome. Not all respondents desire confidentiality. Some have publicised reforms that they have committed to during

the conciliation, turning a negative situation into a positive one (Disability Rights Network of Community Legal Centres, trans., p. 388).

In most cases, however, HREOC investigates disability discrimination complaints in a confidential fashion and publishes conciliation outcomes in a 'confidentialised' form that does not identify the parties. Complaints are investigated openly in two situations: first when HREOC decides to investigate a complaint through a public inquiry; and second, when a terminated complaint is taken to the federal courts for public hearing.

The confidentiality of individual complaints preserves the privacy of complainants and respondents. This might encourage more complaints to be brought forward. Participants such as the Equal Opportunity Commission Victoria noted the importance of confidentiality for some complainants:

> It is not appropriate to expect people who have experienced discrimination to expose their personal circumstances through a more public process if they do not want to. Nor is it appropriate to expect such people to undertake a longer or more complex complaint-resolution process if their primary concern is to have their own problem dealt with. The [Equal Opportunity] Commission acknowledges that the confidential nature of the complaints-handling process enables swifter and more satisfactory resolution of many complaints than would otherwise be possible. (sub. 129, p. 15)

By avoiding possible negative publicity for respondents, confidentiality might also encourage better outcomes in the conciliation process. Blind Citizens Australia argued:

> Individual complainants are more likely to achieve a result if the outcome of a conciliation remains confidential. Confidentiality is one of the carrots complainants can use to improve the outcome. Confidentiality also encourages frank disclosure during the conciliation process. (sub. 72, p. 16)

However, confidential conciliation has a trade-off in limiting the opportunity for systemic change. Respondents are shielded from public scrutiny that might encourage future compliance with the DDA; the opportunity is lost for others to see the results of the complaint and be induced to comply with the DDA (Robin and Sheila King, sub. 56, p. 9). Information on the action taken and the solution achieved may not be available for others—both for people with a similar grievance and respondents wishing to conciliate—to learn from (Small 2001).

However, some of these benefits can be obtained without breaching confidentiality. Blind Citizens Australia (BCA) stated:

> Where possible, particularly in cases where the conciliated outcome is likely to benefit other blind people, BCA pushes for a confidentiality clause which protects the respondent against any negative publicity but enables the dissemination of information regarding any change in the way services are going to be delivered. (sub. 72, p. 16)

There appears to be scope for improving the dissemination of 'confidentialised' outcomes. The Northern Territory Disability Advisory Board argued:

> Without the publicity of outcomes, the deterrent evoked by the DDA is absent. Complaints should be de-personalised so that the complainant remains unidentified. The adoption of this systemic change could encourage others to come forward and initiate action, and provide a raising of awareness to the whole of the community. (sub. 121, p. 5)

The Productivity Commission recognises that confidentiality can encourage: complainants to come forward; the parties to contribute frankly to conciliation; and respondents to take remedial action that they might resist if it meant publicly admitting to discrimination. On the other hand, confidentiality can limit the spread of useful information, and details of the conciliation cannot be passed on to the court if conciliation fails. On balance, the Productivity Commission considers that the parties should determine the level of confidentiality, but that HREOC should give as much publicity to outcomes as possible while maintaining that confidentiality.

DRAFT FINDING 11.7

There are net benefits from allowing parties to conciliation to determine the level of confidentiality, but for the Human Rights and Equal Opportunity Commission to publicise outcomes as widely as possible subject to maintaining that confidentiality.

11.4 Court determinations

This section examines the role of the courts in the complaints process. It discusses the transfer of decision making power from HREOC to the Federal Court, and examines three potential barriers to the court processes: first, the risk of cost orders against unsuccessful complainants; secondly, time limits on bringing an action; and finally, difficulties in obtaining legal assistance.

The Human Rights Legislation Amendment Act 1999

The *Human Right Legislation Amendment Act 1999* transferred the power to make binding determinations from HREOC to the Federal Court of Australia (see chapter 4). Many people were concerned that the increased formality and the potential for costs to be awarded against complainants under the new arrangements would discourage people from making complaints and from pursuing matters to determination.

It is not possible to compare the proportion of 'referred' complaints that went to hearing under the old arrangements with the proportion of 'terminated' cases that proceeded to court under the new arrangements. Apart from lack of data, the two situations are not comparable. Under the old arrangements only complaints with 'no reasonable prospect of conciliation' were referred to a hearing. Under the new arrangements, any terminated complaint can be taken to court.

However, the following findings were made in HREOC's survey of complainants and respondents under all federal anti-discrimination legislation in the first year of the change.

- There was no decrease in the number of complaints brought under federal anti-discrimination law (suggesting there was no significant effect discouraging people from approaching HREOC).
- Respondents were more concerned than complainants about losing at court and the public nature of the determination process.
- There was an increase in the proportion of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the proportion of complaints that were withdrawn. As noted above, it is not possible to compare the proportion of complaints that went on to hearings or to court.
- Costs generally 'followed the event' in the Federal Court. In the Federal Magistrates Service, successful applicants (complainants) were generally awarded costs and unsuccessful applicants were most likely to have no costs order made against them or parties were ordered to bear only their own costs (HREOC, 2002f, p. 2). (As discussed below, more recent cases suggest that the Federal Magistrates Service is now applying the 'costs follow the event' rule.)

DDA complainants' median settlement at conciliation decreased from $3000 in 1998 and $2875 in 1999, to $1500 in 2001 (HREOC, sub. 235, att. L, p. 12). This decrease could imply that complainants were willing to settle for less because they had concerns about going to court. However, it is difficult to make definite statements given the small number of settled complaints that included compensation. There was a significant increase in the average settlement under the *Racial Discrimination Act 1974* and little change in settlements under the *Sex Discrimination Act 1984* over the same period.

Acknowledging the short period considered by the review, HREOC suggested:

> … the procedural changes introduced by HRLAA [the *Human Rights Legislation Amendment Act 1999*] have not significantly impacted on the manner in which parties approach complaints before HREOC nor has it deterred complainants from bringing matters under Federal anti-discrimination law. (HREOC 2002f, p. 3)

The Productivity Commission considers that, to the extent that HREOC's conclusions (based on an examination of all anti-discrimination complaints) apply equally to people with disabilities, these conclusions suggest that the transfer of the determination making power to the Federal Court has not discouraged complaints being brought to HREOC. However, the transfer appears to have increased complainants' concerns about costs, encouraged greater legal representation and encouraged conciliation rather than the pursuit of claims to the determination stage. These effects are supported by the views of many inquiry participants.

DRAFT FINDING 11.8

Transfer of the determination making power to the Federal Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission.

Costs and risk of costs orders

The general rule in most court cases is that 'costs follow the event'—that is, the unsuccessful party pays the successful party's costs. However, the courts have discretion in how they award costs and, they may take into account the circumstances of individual cases.

As noted above, in the initial period of the courts hearing discrimination cases, some federal magistrates did not require unsuccessful complainants to pay the costs of the other party (box 11.3). In *Tadawan v State of South Australia* (2001) FMCA 25 and *McKenzie v The Department of Urban Services & the Canberra Hospital* (2001) FMCA 20, Raphael FM suggested that anti-discrimination cases were normally considered to be 'no costs' matters, as evidenced by the practice of State tribunals and the fact that there was no power in HREOC to award costs. However, he also noted that the Court could use its costs powers to discourage unmeritorious claims (Rapael FM in HREOC 2003b, p. 115). He did not order costs against the unsuccessful applicants. For a time other Magistrates adopted a similar approach.

HREOC reviewed the federal courts' unlawful discrimination jurisdiction over the period September 2000 to September 2002. It noted that the 'costs follow the event' rule was not always followed. However, it noted that by the end of the review period, the Federal Magistrates Service appeared to have accepted the principle that 'costs should follow the event … subject to any statutory modification and to the proper exercise of discretion' (*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2002) FMCA 71 in HREOC 2003b, p. 117).

In *Ball v Morgan & Amor*, Innis FM summarised what appears to be the current approach:

> It is not appropriate for courts to exercise a discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply. (*Ball v Morgan & Amor* (2001) FMCA 127 in HREOC 2003b, pp. 116-7)

Several inquiry participants were concerned that uncertainty about costs orders discouraged complainants from going to court. The Public Interest Advocacy Centre stated:

> … the ability of people with disabilities to pursue complaints beyond the conciliation stage is limited by the costs of litigation and the fear of an adverse costs order. (Public Interest Advocacy Centre, sub. 102, p. 10)

Similarly, the Disability Discrimination Legal Service argued:

> The prospect of unsuccessful application and a corresponding cost order discouraged many people with disabilities form pursuing their claims at the Federal Court. (sub. 76, p. 10)

As noted above, the transfer of the determinations power to the federal courts does not appear to have discouraged complaints to HREOC. However, incentives and outcomes at the conciliation stage of complaint handling appear to have been affected by the uncertainty about cost orders if the complaint goes to court. Some cases of unlawful disability discrimination are thus likely not being adequately addressed. This outcome is significant for individual instances of discrimination, and may also have systemic effects if individuals are discouraged from pursuing complaints that could have broad social benefits (section 11.5).

DRAFT FINDING 11.9

Uncertainty about cost orders in the federal courts affects incentives and outcomes at the conciliation stage of complaints handling. It is likely that some cases of unlawful disability discrimination are not being adequately addressed.

Three broad options for addressing this issue are: first, making the courts cost neutral; second, capping costs; and finally, adopting guidelines for awarding costs.

Making the courts cost neutral

The Physical Disability Council of Australia suggested that discrimination cases should be cost neutral matters in which, unless an action is deemed mischievous, each party is responsible for their own costs and the Court bears its own costs (sub. 113, p. 13). The Public Interest Advocacy Centre suggested a variation on this

theme, whereby the Federal Magistrates Service would become a 'no costs' jurisdiction and the Federal Court would retain its cost discretion (sub. 102, p. 12).

A cost-neutral jurisdiction has advantages and disadvantages for complainants. Complainants would not face the risk of having to pay the other party's costs, but they would have to pay their own costs, even if successful. Further, a cost-neutral approach might encourage vexatious or trivial cases (although, as noted, complainants would have to meet their own costs). If these concerns are addressed, then this option becomes a variation of the broader option of setting guidelines for the award of costs.

Capping costs

The Villamanta Legal Service suggested that applicants should be able to apply to the court at an early stage of the proceedings to 'cap' the costs that they might be required to pay, to prevent well-resourced respondents from using costs as a 'bargaining tool' against less well-resourced applicants:

> Basically at the moment if the complainant applies to cap costs, the respondent can simply say no, and that's the end of the matter; whereas I think the court should really have some determinative power in that regard. After all, it can determine costs. So why should it not also determine to cap them at the beginning of a case, which would be done at a directions hearing early on. (trans., 1874)

As a general rule, costs are already 'capped' in court cases by a process called 'taxation of costs'. An officer of the court allows or disallows certain sums claimed by one party from the other. Unusual or unnecessary expenses might not be allowed. However, the suggestion by Villamanta Legal Services appears to go further, to place early in the proceedings a relatively arbitrary limit on the applicant's liability for costs, rather than relying on 'taxation of costs' at the end of proceedings.

Setting guidelines for awarding costs

The Disability Discrimination Legal Service and others suggested the DDA should provide clear guidelines on the circumstances in which federal magistrates and judges would use their discretion in awarding costs. Possible criteria are listed in box 11.3.

Changes to the arrangements for costs orders in the federal courts are likely to have significant effects for complainants, respondents and the complaints process in general. On one hand, reducing the risk of costs orders against applicants is likely to encourage more complainants to pursue their complaints to the courts. On the other

hand, increasing the ability of complainants to pursue their complaints to the courts might induce greater cooperation from respondents at the conciliation stage.

Box 11.3 **Criteria for costs orders in federal court DDA cases**

The Disability Discrimination Legal Service suggested including the following non-exclusive criteria in the DDA to guide costs orders in the federal courts.

(i) where there are no material question of facts and the court was called upon to decide on a question of law; or

(ii) where the complaint is a representative complaint and the applicant is seeking remedies other than financial compensation, or

(iii) where the respondent to a complaint does not dispute the discriminatory conduct and relies on the defence of unjustifiable hardship, or

(iv) where the respondent refuses to participate in the conduct of investigation by HREOC or its attempt to resolve the complaint by conciliation. (sub. 76, p. 11)

HREOC stated that the Federal Magistrates Service has considered the following factors in exercising its discretion in previous cases:

- the relevance of there being a public interest element to the complaint
- the relevance of the applicant being unrepresented and not in a position to assess the risk of litigation
- the successful party should not lose the benefit of their victory because of the burden of their own legal costs
- the courts should not discourage litigants from bringing meritorious claims and should be slow to award costs at an early stage
- the courts will discourage unmeritorious claims and will not award costs where the trial is prolonged by either party
- self-represented applicants are not entitled to any legal costs. (HREOC 2003b, p. 117)

Source: Disability Discrimination Legal Service, sub. 76; Law Institute of Victoria, sub. 81; HREOC 2003b.

However, removing barriers to complainants' participation in the courts must be balanced against the burden on respondents and the court system. Any change that encouraged frivolous or vexatious complaints would impose unnecessary costs on respondents and the court system. It is also important to ensure procedural justice for the respondent, and to ensure successful respondents are not overly penalised by having to bear their own costs.

On balance, the Productivity Commission favours the introduction of guidelines for the courts to consider in awarding costs. The Commission considers that the criteria cited in box 11.3 appear to have merit, but is seeking wider comment on the criteria that the guidelines should include.

DRAFT RECOMMENDATION 11.2

Subject to a review of the implications for other federal discrimination laws, the* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to incorporate grounds for not awarding costs against complainants in the Federal Court and Federal Magistrates Service.

REQUEST FOR INFORMATION

The Productivity Commission is seeking comment on the criteria to be included in guidelines for the Federal Court and Federal Magistrates Service in awarding costs in cases brought under the Disability Discrimination Act 1992. *Participants might like to comment on the criteria suggested by the Disability Discrimination Legal Service or factors considered relevant in previous discrimination cases.*

Time limits

Complainants have 12 months from the time of the alleged discrimination to lodge a complaint with HREOC. Once HREOC terminates a complaint, complainants have 28 days to lodge an application with the Federal Court or the Federal Magistrates Service. The HREOC Act allows for an extension of time if good reason can be shown, and the federal courts have granted extensions in the past.

Inquiry participants argued that, despite the possibility of an extension, 28 days is often not enough time for the complainant to decide whether to proceed, particularly given the need to obtain affordable legal assistance (see discussion below). On the other hand, a time limit on lodging a complaint with the courts limits the period of uncertainty for respondents about whether action will be taken against them.

Inquiry participants have suggested the DDA could be made more effective by extending the time limit beyond 28 days (Public Interest Advocacy Centre, sub. 102, p. 11). HREOC compared the 12 month limit for making an initial complaint with the 28 day limit for applying to the court, stating that the latter:

> … is more demanding in terms of legal process and in relation to the decision whether to accept the risk of a costs order. There might thus be merit in considering the proposal for extension on the time limit for lodgment of complaints with the court. (sub. 219, p. 19)

Other jurisdictions allow complainants a longer period. Under the Victorian Equal Opportunity Act, after being advised that their complaint could not be conciliated, complainants have 60 days to request the Equal Opportunity Commission Victoria to refer their complaint to the Victorian Civil and Administrative Tribunal.

An alternative to increasing the time limit would be to allow complainants to file a holding summons similar to that allowed in the NSW Court of Appeal (Public Interest Advocacy Centre, sub. 102, p. 11). Under this approach, the complainant would have a relatively short period (say 28 days) in which to lodge a holding summons, and a longer period (for example, three months) in which to lodge an application relating to unlawful discrimination.

The Productivity Commission considers that the benefits of allowing complainants more time to make such a crucial decision, particularly given the difficulties in obtaining legal assistance, appear to outweigh the longer period of uncertainty for respondents. The time constraint appears to be a general issue, rather than being relevant to only a few complainants. Requiring all complainants needing an extension to request a holding summons places an additional burden on them and is an inefficient use of court time and resources. Increasing the time limit for all complainants is more appropriate.

DRAFT RECOMMENDATION 11.3

The* Human Rights and Equal Opportunity Commission Act 1986 *(s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service.

Legal assistance

As noted in section 11.2, cost, complexity and other barriers to making complaints mean the accessibility of the complaints process can depend on the availability of adequate legal assistance. Although legal representation is not required at the conciliation stage of the complaints process, it is becoming more usual (HREOC 2002f, p. 2). Virtually all complainants who go to the Federal Court have legal representation.

People with disabilities have options for obtaining legal assistance, ranging from general advice from advocacy organisations to legal advice and representation from government sponsored programs (box 11.4). Particularly important is the Disability Discrimination Legal Services set up as part of the introduction of the DDA.

A 1999 review of Disability Discrimination Legal Services found that they 'attempt valiantly to keep up with demand, and identify a high level of unmet need for assistance' (Rush Social Research 1999, p. 16). Most services attempted to control their case loads by prioritising cases and balancing other outputs such as community development and community legal education. A focus on systemic or test cases meant less assistance for cases in which the individual concerned would reap the

benefits. The review identified inadequate access to legal assistance, particularly by people with disabilities in institutions, people in rural and regional Australia, some people with psychiatric disabilities, people with low education and Aboriginal and Torres Strait Islander people (Rush Social Research 1999, pp. 45–46).

Box 11.4 **Legal assistance available to complainants**

Options for legal assistance for people wishing to complain about disability discrimination include disability discrimination legal services, legal aid and *pro bono* assistance.

Disability discrimination legal services are a national network of community legal services that specialise in disability discrimination law. They offer free information, advice and assistance to people with disabilities experiencing discrimination.

A small number of other **community legal services** also provide free legal advice and assistance, but few have specialised knowledge about disability discrimination law and most prefer to concentrate on other areas of expertise.

Advocacy groups do not generally provide legal assistance. Advocacy groups and service organisations often form cooperative ventures with disability discrimination legal services on systemic complaints. The service organisation refers the case, then might then support the complainant while the disability discrimination legal service provides the legal professional. A small number of other disability sector organisations provide legal advocacy on disability discrimination matters, but they have very limited resources for doing so.

***Pro bono* assistance** is sometimes available from law firms. The expression comes from the Latin phrase *pro bono publico* meaning 'for the public good'. While most lawyers who undertake *pro bono* work in Australia contribute their time at no cost to the client, some *pro bono* work is not free, but is done at a substantially reduced fee. *Pro bono* schemes are often run through legal aid agencies or the courts.

Legal aid commissions provide legal advice and legal aid, and can represent eligible complainants in court on a broad range of matters. Legal aid is not free—the person assisted may be required to make a contribution. Because the demand for legal aid greatly outstrips supply, legal aid commissions generally apply a means test and look at the merits of each case. Many DDA cases do not qualify for legal aid.

Under section 46PU of the HREOC Act, a complainant (or respondent) can apply to the **Attorney General** for legal or financial assistance for proceedings in the Federal Court or the Federal Magistrates Service on the basis of facing hardship.

HREOC cannot assist complainants in the federal courts, apart from helping them to prepare the forms required to apply to the federal court. HREOC's role is limited to shaping the interpretation of the law through its role as *amicus curiae* (friend of the court). In this role, HREOC may assist the court on points of law but it is not a party to the proceedings.

Source: Rush Social Research 1999.

Inquiry participants indicated that the situation had not improved since the 1999 review. Disability Action Inc. described the inadequacy of resources to assist people with DDA complaints in South Australia:

> … there is only one dedicated DDA legal service (with less than two full-time equivalent staff). This service is stretched to capacity. The Legal Service Commission does not run DDA cases. While there are two advocacy services that can assist with making complaints, they cannot represent complainants in court. Adelaide is not large enough to have an active *pro bono* legal network or clearing house. (sub. 43, p. 3)

The Public Interest Advocacy Centre noted that the DDA's effectiveness would also be increased if the Attorney General's power to assist complainants were widely publicised, the application process for assistance were understood, and assistance were more readily available (sub. 102, p. 11). However, the Attorney General's power is rarely used, which appears to reflect a view that legal assistance to people with disabilities should be delivered primarily through the disability discrimination legal services.

The Productivity Commission considers that adequate legal assistance is essential for the effective operation of the DDA complaints process. Such assistance is also important for achieving equality before the law for people with disabilities (see chapter 6). The Australian Government recognised this importance when the DDA was introduced, by establishing and funding the Disability Discrimination Legal Services. These services continue to play a vital role. Advocacy groups can provide only limited legal assistance. People with disabilities making DDA complaints are unlikely to qualify for general legal aid, and the Attorney General's discretionary assistance is seldom used. Many inquiry participants argued that the disability discrimination legal services are inadequately resourced. Resourcing issues are discussed in chapter 14.

DRAFT FINDING 11.10

The Disability Discrimination Legal Services make an important contribution to the effectiveness of the Disability Discrimination Act 1992 *complaints process, and to ensuring equality before the law for people with disabilities.*

11.5 Achieving systemic change

Although largely based on individual claims of unlawful discrimination, complaints can lead to systemic changes. Complaints can create publicity, from which other people in similar situations can learn. Where cases are heard in the federal courts, complaints can set binding legal precedents. Complaints can also give rise to public inquiries or be used strategically by representative groups to drive broad change.

Individual complaints

Complaints under the DDA can be made by, or on behalf of, persons aggrieved by the alleged act of discrimination. In some instances, individual complaints have provided the catalyst for systemic change (box 11.5). Other examples are discussed in appendix D.

Box 11.5 **Individual complaints and systemic change**

In 2000, Bruce Maguire made DDA complaints against the Sydney Olympic Games Organising Committee (SOCOG) in relation to the availability of the Sydney Olympic Games ticket book and souvenir book in Braille and the accessibility of the Olympic Games website. The successful outcomes in these cases have been seminal to improving the ability of people who are blind or vision impaired to access information in their preferred accessible format. The outcome of the website complaint created an impetus for people to ensure the accessibility of their websites.

As a direct result of complaints under the DDA, State and Federal transport departments began developing integrated accessible transport systems. In 1994, transport Ministers recognised that accessibility needed to be addressed nationally and established a national taskforce. A set of national Disability Standards and Guidelines were developed under the direction of the taskforce to assist in the implementation of accessible transport across Australia. In June 1996, the Australian Transport Council approved these standards as a 'technically feasible' way of making public transport accessible. The standards were then subjected to a Regulatory Impact Statement (RIS) process. The standards were finally tabled in Federal Parliament on August 19, 2002 and became law on 23 October 2002.

Source: HREOC 2003d, p. 30.

Despite the examples in box 11.5, individual complaints generally have limitations in achieving systemic change.

- It is difficult for an individual to complain when discrimination is proposed but has not yet occurred.
- It is not sufficient for a person to have a 'purely moral or in principle grievance'.
- There might not be sufficient incentive for an individual to complain, even though the complaint could create benefits for society as a whole.

Although the DDA's definition of direct discrimination includes 'proposed' discrimination (s.5(1)), it can be difficult to identify an 'aggrieved person' when discrimination has not yet occurred (for example, in the design of a new building). In addition, the DDA does not cover proposed acts of indirect discrimination (s.6). The definitions of direct and indirect discrimination are discussed in chapter 9.

Some inquiry participants were concerned that the focus on an aggrieved person can limit the DDA's effectiveness as a tool to address systemic discrimination. Joe Harrison stated:

> At present, if a person unable to drive due to a disability sees such a position advertised as requiring a driving licence when it is not required to do the job … they are unable to raise a complaint of discrimination unless they wish to apply for the job and can demonstrate that, without the criterion, they would be able to fulfill all requirements of the position. Thus the DDA is not effective as a tool to address the existence of the discriminatory practice but is merely an avenue of redress for an aggrieved individual. (sub. 55, p. 7)

One important reason that individual complaints cannot be relied on to achieve systemic change is that complaints with wider societal benefits (or spillover effects) might not be pursued because no single individual has sufficient incentive to make a complaint.[5] There are many examples where individual complaints can have positive spillover effects. If a complaint results in a policy change by an organisation, for example, this change reduces the likelihood of other people with disabilities facing discrimination by that organisation. Similarly, cases that test the application of the law and create important precedents provide certainty for others in similar situations.

Several participants noted this 'incentive effect'. Jack Frisch argued:

> … the likelihood of an individual making a complaint in most cases is low, and the likelihood of a complaint being taken to court is even lower. This suggests that even when the aggregate social cost of the discrimination is high and at least as great as the cost of overcoming the discrimination, the discrimination will not be eliminated because in most cases the DDA will not provide a sufficient mechanism for eliminating the discrimination so long as its only mechanism is complaint-based. (sub. 196, p. 34)

Although some individual complaints have had important systemic effects, the Productivity Commission considers that limitations to the complaints process constrain their ability to achieve systemic change.

DRAFT FINDING 11.11

In some circumstances, individual complaints can lead to systemic change. They have been effective in areas involving physical and communication barriers. However, there are limits on the extent to which the individual complaints system can achieve systemic change.

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5 Spillover effects occur when people other than those directly involved are affected. For example, one person complaining about lack of access can lead to improved access for many other people.

Inquiries

HREOC has specific powers under the HREOC Act to hold public inquiries where individual complaints have systemic implications. HREOC has used these powers to inquire into a small number of complaints — for example, to investigate captioned television, captioning in cinemas and self-service petrol stations. Examples of inquiries that have had systemic effects are given in appendix D.

The open and public process for an inquiry can involve a range of community and industry participants, increasing the likelihood that the resolution of the complaint will have a systemic outcome. The Deafness Forum of Australia supported holding public inquiries into complaints:

> More has been achieved when complaints have been dealt with via a public inquiry process than by individual complaint resolution. There also has been very little achieved by way of cases taken to the courts. (sub. 71, p. 2)

HREOC's ability to hold public inquiries into complaints depends on the resources available and the existence of relevant complaints that raise systemic issues. HREOC resourcing is discussed in chapter 14.

Representative complaints

The HREOC Act allows representative complaints to be made 'on behalf of one or more other persons aggrieved by the alleged unlawful discrimination' (s.46P(2)(c)). A representative action can be brought on behalf of a class of members, without having to name the members of the class, specify the number of members or gain their consent (s.46PB).

If a complaint to HREOC is terminated, then any 'affected person' may apply to the federal courts (s.46PO(1)). An 'affected person' means a person on whose behalf the complaint was lodged. Under the *Federal Court of Australia Act 1976*, representative proceedings are allowed, but to bring a representative action, a person must have 'a sufficient interest to commence a proceeding on his or her own behalf' (s.33D).

Some inquiry participants disagreed about the interpretation of these sections of the HREOC Act. Many disability organisations appeared to consider that they are not entitled to initiate representative complaints in their own right. The Equal Opportunity Commission Victoria stated that 'representative complaints in their current form require affected individuals, or their carers or support persons, to initiate action' (sub. 129, p. 21). Several disability organisations argued that the legislation should be amended to allow them to initiate complaints (Blind Citizens

Australia, sub. 72, p. 15; National Ethnic Disability Alliance, trans, p. 1388). This view implies that they believe that they are not currently entitled to do so.

On the other hand, HREOC argued that, despite disability organisations having made 'only limited use of the ability to make representative complaints' to date, the DDA did not require amendment:

> There is already provision in the HREOC Act for representative complaints to be made on behalf of a class of aggrieved persons without needing to identify particular individuals. (sub. 219, p. 19)
>
> … some submissions really seem to be arguing for powers to be put into the Act which are already there, or for additional powers to make complaints to be put in when ones that are already there would seem reasonably equally applicable. (trans., p. 1164)

The Productivity Commission considers that the legal position is not clear, although one possible reading of the HREOC Act is that organisations can initiate representative actions with HREOC. This lack of clarity is likely to discourage organisations from making representative complaints.

In addition, organisations do not appear to be entitled to pursue a representative complaint to the federal courts. Not allowing the same party to initiate a complaint at both stages of the process is inherently unsatisfactory. It could lead to significant legal difficulties if a representative body wants to pursue a complaint to the courts. This issue is likely to discourage advocacy organisations from initiating complaints with HREOC, even if they are entitled to do so. Respondents would be aware that the complaint cannot proceed to the courts, which might affect their willingness to conciliate.

DRAFT FINDING 11.12

There appears to be some confusion about the ability of disability organisations and advocacy groups to initiate representative complaints with the Human Rights and Equal Opportunity Commission and with the federal courts. This is likely to have discouraged organisations from making representative complaints.

This confusion could be avoided if disability organisations were entitled to bring actions in their own right. Such complaints could still be regarded as representative complaints, because the organisations would be representing the interests of people with disabilities.

Representative complaints initiated by disability organisations or advocacy groups have the potential to achieve greater systemic change than can be achieved from individual complaints. There are fewer concerns about the confidentiality of the complainant, and disability organisations are more likely to have the experience and resources (although still limited) to tackle the complexities of the complaints

system. Many inquiry participants, in stressing the barriers to individuals making complaints, pointed to the potential benefits of representative complaints. The Victorian Equal Opportunity Commission argued that other vulnerable groups had benefited from representative complaints:

> …looking at representative complaints under the Racial and Religious Tolerance Act, many people feel very comforted and reassured by the fact that the complaint is being taken up by another body rather than them as an individual. It lessens their exposure. It lessens their isolation. It lessens their fear of victimisation and backlash. (trans., p. 1900)

However, some inquiry participants were concerned that allowing organisations to initiate complaints could disempower people with disabilities. ParaQuad Victoria stated:

> … there's always that whole conflict of not wanting to encourage dependency … of not wanting to go back to the old model … people with disabilities are always relying on an organisation or someone else to carry things forward for them. (trans., p. 1859)

Similarly, HREOC commented that there could be 'issues of how to ensure that outcomes of such [representative] complaints appropriately represented the views and interests of people affected' (sub. 219, p. 19).

The Equal Opportunity Commission Victoria supported representative complaints, but it argued that the ability to bring representative actions should be limited:

> … the capacity to bring representative complaints should only be available to bodies that have some connection with the issues involved. Given that, in the past, many have presumed to know and have dictated what is in the best interests of people with disabilities, it is particularly important to build principles of self-determination into the DDA. (sub. 129, p. 21)

In addition, HREOC noted that procedural issues might arise from allowing disability organisations to take complaints to the federal courts:

> Direct standing for organisations with an interest in disability discrimination issues in their own right rather than as representatives would raise some procedural issues requiring careful consideration, given that all areas of civil law impose some standing requirements to commence proceedings. (sub. 219, p. 19)

The Productivity Commission considers that greater use of representative actions could improve the effectiveness of the complaints process. However, some limitations on the right to bring representative actions would appear to be necessary to protect the interests and self-determination of people with disabilities. This protection could be achieved by limiting the right to initiate a complaint to organisations with a demonstrated connection to the subject matter of the complaint,

as is the case under the Victorian Racial and Religious Tolerance Act (Equal Opportunity Commission Victoria, trans., p. 1898–1899).

Any procedural issues would also have to be overcome. The Federal Court Act allows 'any affected person' to apply to the courts. An 'affected person' means a person on whose behalf the complaint is lodged. If disability organisations with a 'sufficient connection' to the matter of the complaint were included in the definition of an 'aggrieved person', then they would appear able to initiate a complaint with HREOC and to pursue that complaint to the Federal Court.

REQUEST FOR INFORMATION

The Productivity Commission requests further comment on the implications of allowing disability organisations with a demonstrated connection to the subject matter of a complaint to initiate a Disability Discrimination Act 1992 *complaint with the Human Rights and Equal Opportunity Commission and to pursue that complaint to the federal courts. In particular:*

- *What procedural issues would have to be addressed?*
- *How should disability organisations be defined?*
- *How should a 'demonstrated connection' be defined?*

11.6 Role of the Human Rights and Equal Opportunity Commission

Many inquiry participants raised issues about HREOC's role in the complaint process. Suggested reforms included HREOC making greater use of its investigative powers, acting as an advocate, and initiating complaints.

Investigative powers

The HREOC Act gives HREOC a range of powers in relation to complaints. HREOC can require people to provide information or documents (s.46PI) and direct people to attend compulsory conferences (s.46PJ).

As noted above, the complaints process places a substantial evidentiary burden on complainants, who must prove that discrimination occurred. Complainants are assisted in collecting evidence by HREOC's general practice of requesting information from respondents, assessing it and advising the complainant how the complaint will proceed (box 11.6).

Box 11.6 **HREOC complaint handling procedures**

The president of HREOC, with the assistance of HREOC's Complaint Handling Section, is responsible for the investigation and conciliation of complaints. Generally, a customised letter of inquiry is sent to the respondent, outlining the complaint and requesting particular information and documents in response to the allegations. There are very few instances when a response is not provided. HREOC stated that 'there are few occasions when the President would need to exercise his authority … to compel the production of a information or documents, and when necessary, those requests are generally complied with.'

The response is then generally sent on to the complainant, with an assessment of HREOC's view of the matter and an indication of how the matter will proceed. The complainant is given an opportunity to consider the response and provide comments and any further information.

Complaint handling procedures are outlined in a *Complaint Procedures Manual*, which is reviewed regularly and supplemented by other material, including the legislation administered by HREOC, case precedent, policy and training.

The Complaint Handling Section undertakes the customer satisfaction survey to obtain and assess feedback from a large number of people who have used the process. It then incorporates that feedback into a continuous improvement program of reviewing the process and, where appropriate and possible, adjusting it to meet the requirements of the parties using the process.

In addition, the Complaint Handling Section operates in accordance with a service charter which outlines the level of service that will be provided and the mechanisms available to people who have concerns about how their complaint has been handled.

Source: HREOC, sub. 235.

Some inquiry participants argued that HREOC should make more active use of its investigative powers to assist complainants. The Disability Discrimination Legal Service stated:

> There is a need to review the effectiveness of the investigative powers of the HREOC, particularly in requiring a respondent to a complaint to produce and submit documents or information to HREOC that may be used as evidence in court if the complainant decides to apply for a hearing. HREOC is not meant to act merely as a conduit of correspondence between the complainant and respondent to a complaint. A comprehensive and rigorous investigation at such stage would greatly assist complainants in weighing their options or accepting a compromise. (sub. 76, pp. 11-12)

The City of Melbourne Disability Advisory Committee stated:

> The DDA stipulates that the complainant has the responsibility (onus of proof) for collecting and detailing evidence to prove that discrimination has taken place. It is recommended that support to assist individuals with the provision of this information

> would empower and demystify the process, enabling more people to lodge complaints. (sub. 224, p. 4)

Similarly, Jobwatch stated:

> We further recommend that HREOC take a more active role in assisting parties to reach agreement within the conciliation process. One of the ways that this could be achieved is through a more vigorous investigation process. We suggest that both parties be required to produce relevant evidence and disclose all pertinent information. This would assist both parties to make a more informed decision about how to proceed with the matter. (sub. 215, p. 4)

The Productivity Commission is not in a position to assess the adequacy of HREOC's investigations. The Commission has noted that complainants and respondents are generally satisfied with HREOC's complaint handling (section 11.3). The need for investigation varies according to the complaint—some complaints require more investigation and assessment than others do. It is not appropriate to turn the investigation into a 'mini-hearing', because this would compromise HREOC's role as a neutral conciliator. However, it is important that HREOC is not reduced to acting as a 'letterbox' for conveying information from one party to the other.

The Productivity Commission considers that the existing statutory powers to request information, along with HREOC's practice of collecting and assessing information, are appropriate. HREOC also appears to be following good administrative practice, with well documented procedures and ongoing monitoring of performance.

Advocacy role

As discussed in section 11.3, many inquiry participants expressed concern about the inequality of parties involved in complaints. Several participants questioned why HREOC is restricted to a conciliating role and does not do more to assist complainants as an advocate. Trevor Oddy considered:

> … HREOC was designed to help people in similar situations to me but I have found that this not the case. As a complainant, you are left entirely to your own devices and constantly advised by HREOC staff 'you should speak to a solicitor'. (Trevor Oddy, sub. 58, p. 4)

HREOC recognised this concern:

> … many complainants approach HREOC with an expectation that HREOC will advocate for them and are therefore dissatisfied with impartial handling of the complaint. (sub. 235, att. A, p. 4).

Larry Laikind (sub. 70) noted that equal opportunity commissions in the United States, Canada and the United Kingdom can act as advocates for complainants. Further, in other Australian jurisdictions, some State anti-discrimination Acts grant their anti-discrimination agencies some advocacy functions (box 11.7).

Box 11.7 **Advocacy by the Western Australian Equal Opportunity Commission**

Western Australia's *Equal Opportunity Act 1984* specifies that the Equal Opportunity Commission must assist complainants who go to the tribunal and can meet the costs of the complainant. Where a complaint is referred to the tribunal and the complainant requests, the Commission must assist the complainant in presenting the case and may contribute to the complainant's costs (although conditions may apply and repayment is possible). In addition, where the case is appealed to the Supreme Court and the complainant requests, the Commission can arrange for the provision of legal representation. Again, this may be subject to conditions.

Source: *Equal Opportunity Act 1984* (WA).

The Physical Disability Council of Australia (sub. 113) suggested that HREOC or its complaints/legal section could cease to be a conciliator in DDA complaints and become the legal advocate for complainants. It suggested that HREOC should bear the costs of advocacy and, therefore, would consider the chances of success before acting on behalf of a complainant in the court system.

The HREOC Act makes some provision for addressing inequality of the parties. HREOC must assist a complainant who has difficulty formulating or writing a complaint. HREOC can conduct conciliations as the person conducting the conference sees fit (s.46PK(2)), but must hold them in private (s.46PK(2)).

In addition, an individual is not entitled to be represented at conciliation by another person, unless the person presiding consents.[6] An organisation is not entitled to be represented by a person other than an officer or employee of that body (s.46PK).

HREOC noted that 'complaint practice aims to be flexible and responsive to individual complaints' and that 'the conciliation process may take many forms depending on the circumstances of the complaint'—for example:

> Where there is a significant power imbalance or where one of the parties is emotionally vulnerable it may not be beneficial to conciliate the matter through a face to face discussion. (sub. 235, pp.5–6)

[6] Exceptions are made if an individual is unable to attend because they have a disability, or if the person presiding considers that an individual cannot participate fully in the conference because they have a disability.

However, the HREOC Act states that the conduct of conciliation must not disadvantage either the complainant or the respondent (46PK(3)). This reflects considerations of natural justice that require impartiality.

The Productivity Commission considers that HREOC should not be an advocate for all people making complaints, because this would create a potential conflict with HREOC's role as impartial conciliator. The HREOC Complaint Handling Section appears to be maintaining an appropriate balance between 'flexible and responsive' processes and the requirements of impartiality.

This is not to imply that complainants do not need support. As discussed above, the Commission considers that disability discrimination legal services play a vital role in providing legal assistance to people with disabilities. In addition, disability organisations could play a larger role in supporting individual complainants and making representative complaints.

Although the Commission considers that HREOC should not become an advocate for all complainants, the following section discusses whether HREOC should be able to initiate complaints.

DRAFT FINDING 11.13

The Human Rights and Equal Opportunity Commission's current complaints handling role is appropriate and should not extend to advocacy for individual complainants.

Initiation of complaints

Under the original DDA, HREOC was able to initiate complaints. Constitutional concerns meant HREOC never used this power, which was removed via amendments to the DDA in 1999 (see chapter 4). Many inquiry participants argued that HREOC should be allowed to initiate complaints (box 11.8). HREOC noted that 'a more active HREOC enforcement role could be provided for … by re-instating a revised version of HREOC's ability to initiate complaints itself' (sub. 143, p. 49).

HREOC noted that comparable powers are held by other agencies in Australia, including the Australian Competition and Consumer Commission, and by anti-discrimination agencies overseas (sub. 219, p. 19).

A slightly different approach is adopted in Victoria, where the Equal Opportunity Commission Victoria is empowered to investigate matters on referral from either

the Minister or the Victorian Civil and Administrative Tribunal. Under the *Equal Opportunity Act 1995* (Victoria), the power is limited to particular circumstances:

> A matter may be investigated … if—
>
> (a) it is of such a serious nature that it warrants the investigation; and
>
> (b) it concerns a possible contravention in relation to a class or group of people; and
>
> (c) the circumstances are such that the lodging of a complaint by one person only would not be appropriate. (s.157(1))

Box 11.8 Views on the Human Rights and Equal Opportunity Commission being able to initiate complaints

> In our view, the capacity for HREOC to initiate complaints should also be re-instituted. This would allow the Commission to direct its resources to matters of public importance or matters affecting a number of people. It would also allow HREOC to ensure settlements included systemic changes, where appropriate, as well as redress for individual complainants. (Queensland Anti Discrimination Commission, sub. 119, p. 12)
>
> 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. (Darwin Community Legal Centre, sub. 110, p. 4)
>
> In addition there should be appropriate powers and enforcement mechanisms vested in the HREOC to prevent and eliminate disability discrimination. Reinstatement of the power of the Commission to initiate a complaint could be one such mechanism. (NSW Anti Discrimination Board, sub. 101, p. 17)

Allowing HREOC to initiate complaints, or to investigate complaints on referral from the Attorney General, could assist both systemic change and individual cases of discrimination where individuals find it difficult to use the complaints process. However, as HREOC pointed out, reintroducing a power to initiate complaints would not be a panacea:

> A number of submissions support a role for HREOC itself in bringing complaints to the court as a response to this issue. It needs to be noted however that HREOC's current budget would not permit it to risk costs in more than a small number of cases in any year, and that HREOC does not see a complaint initiation power for HREOC as substituting for effective provision for and use of complaint procedures by and on behalf of people with disabilities. (sub. 219, p. 18)

The re-introduction of HREOC's power to initiate complaints could create a conflict of interest if HREOC were to be involved in both initiating and conciliating a complaint. The National Council of Independent Schools Associations argued that this would compromise HREOC's neutrality:

> Effective conciliation requires trust. … There is a potential for conflict of interest and diminished mutual trust between parties to a dispute if HREOC's power to initiate complaints was reintroduced. (sub. 126, p. 15)

HREOC noted:

> …some concerns are also expressed [in submissions] … regarding possible conflict of this role with the conciliation role. HREOC agrees that this concern would need to be addressed in considering reinstatement of a self-start power. (sub. 219, p. 19)

Other inquiry participants argued that any potential conflict of interest would be relatively minor. The NSW Office of the Director of Equal Opportunity in Public Employment argued that a more significant potential conflict of interest had been removed when the determination power was taken away from HREOC:

> 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 no longer exists. This power allows the Commissioner to ensure important matters are heard that might otherwise never be addressed. (sub. 172, p. 9)

Robin and Sheila King argued, given that HREOC is impartial and does not give any advice to either party, a conflict of interest will not arise as long as conciliation is conducted under strict and transparent guidelines (sub. 56, p. 9).

The Productivity Commission considers that there is a role for HREOC in initiating complaints. The Minister (in this case, the Attorney General) can request HREOC to undertake an inquiry into discriminatory acts or practices. This power should be extended to allow the Attorney General to request HREOC to initiate a complaint (similar to the Victorian Equal Opportunity Commission's position). However, the Productivity Commission considers HREOC's self-initiation power should be broader than this. HREOC is an independent statutory commission, whose areas of responsibility include some activities of government. Its power to initiate complaints should not be restricted to circumstances determined by Government.

That said, some limits should apply to HREOC's power to initiate complaints, to maintain HREOC's neutrality in conciliation as far as possible. HREOC should not become a policeman or Crown Prosecutor, but rather a 'complainant of last resort' to ensure complaints do not go unheard because no-one else can pursue them.

The Productivity Commission acknowledges the possibility of a conflict of interest between HREOC's complaint initiation and conciliation roles, but considers that there is less potential for conflict of interest in HREOC having a limited role in initiating complaints, than in taking a more active advocacy role in all complaints (see above discussion). The Productivity Commission considers that, given HREOC's complaint handling is limited to conciliation (not binding determinations), administrative separation of the complaint initiation and conciliation functions within HREOC would be sufficient. Currently, the Complaints Handling Service handles all complaints, under delegation from the president. The Disability Discrimination Commissioner or his or her delegate(s)

should handle the initiation of complaints, with 'Chinese walls' between this function and the Complaint Handling Service.

DRAFT RECOMMENDATION 11.4

The* Human Rights and Equal Opportunity Commission Act 1986 *(s.46P) should be amended to allow the Human Rights and Equal Opportunity Commission to initiate complaints under prescribed circumstances. Administrative separation should be maintained between its complaint initiation and complaints handling functions.

The Productivity Commission suggests the following circumstances might be appropriate for HREOC to initiate a complaint:

- when a potential unlawful act affects a class or group of people and no organisation is in a position to bring a representative complaint
- when a potential unlawful act affects an individual, but fear of victimisation or other circumstances prevent that individual from pursuing a complaint, and no organisation is in a position to bring a representative complaint.

Allowing HREOC to initiate complaints raises several related issues. First, under what circumstances should HREOC be able to initiate complaints? The Productivity Commission has suggested some circumstances above. The question also arises as to whether HREOC should be able to claim damages and/or costs from respondents. The Equal Opportunity Commission Victoria is limited to non-compensation cases.

REQUEST FOR INFORMATION

The Productivity Commission requests comment on the circumstances under which the Human Rights and Equal Opportunity Commission should be able to initiate complaints; and whether it should be entitled to claim damages or costs from respondents.

11.7 Conclusions

This chapter has examined the strengths and weaknesses of the DDA complaints process, including its response to individual allegations of discrimination and its contribution to broad systemic change. Although these functions can be mutually supportive, some aspects of the system that contribute to the resolution of individual cases of discrimination can detract from the system's ability to achieve systemic change, and *vice versa*.

Many inquiry participants acknowledged the benefits of the complaints process in resolving individual complaints, particularly the emphasis on conciliation before resorting to the courts. In addition, complainants and respondents (with some notable exceptions) appeared to be satisfied with HREOC's complaint handling and conciliation processes.

However, the Productivity Commission noted many potential barriers that could affect the effectiveness of the complaints process, including the costs and formality of the process, fear of victimisation and the inequality of resources available to the parties. The Commission has made a series of recommendations that aim to reduce some of these barriers.

Finally, there appears to be some confusion and misunderstanding about how the complaints process works. Many people with disabilities and disability organisations appear to be uncertain of how to enforce their rights, and the role of HREOC and the courts. HREOC could give further attention to promoting awareness of the complaints process.

The HREOC Act complaints process applies to complaints under the Sex Discrimination Act and the Racial Discrimination Act, as well as complaints under the DDA. Recommendations in this chapter therefore might have implications for the handling of complaints under the former two Acts, which are outside this inquiry's terms of reference.

DRAFT RECOMMENDATION 11.5

The Attorney-General's Department should investigate the implications of this inquiry's recommendations about* Disability Discrimination Act 1992 *complaints for other Commonwealth anti-discrimination Acts.

12 Regulation

Governments use a range of devices to influence the behaviour of individuals and organisations. The most explicit means of influence involves legislation or Acts of Parliament (or 'black letter law'), but that is not the only tool at governments' disposal. Governments may also use subordinate legislation and quasi-regulation to achieve regulatory outcomes.

The term 'regulation' encompasses a wide variety of instruments that can be used to influence behaviour. It includes primary legislation (such as Acts of Parliament), subordinate legislation (such as statutory rules), quasi-regulation (such as industry–government agreements and accreditation schemes), co-regulation and self-regulation, and international treaties (box 12.1).

The *Disability Discrimination Act 1992* (DDA) is a significant piece of Australian Government legislation. It contains several high level provisions, making it unlawful to discriminate against people with disabilities on the ground of disability. A variety of other regulatory tools (such as regulations, disability standards, guidelines and advisory notes) are (or can be) used to supplement the Act.

As a general rule, regulation of any form should be used only where it is the most effective way of addressing a problem and it imposes the least possible burden on those being regulated and the wider community. Good regulation should not be unduly prescriptive—that is, where possible, it should have specific performance goals or outcomes. It should be flexible enough to accommodate different or changing circumstances, and to enable those affected to decide how best to comply.

This chapter discusses the tools that are used to supplement the DDA, and attempts to assess their effectiveness in achieving the objects of the DDA.

Box 12.1 **Types of regulatory tool**

Explicit government regulation (or 'black letter' law) refers to both primary and subordinate legislation and is the most commonly used form of regulation. Primary legislation (Acts of Parliament) receives scrutiny and passage by Parliament. Subordinate legislation can be made in a variety of forms. The three main forms at the federal level are:

- statutory rules, which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples include the *Disability Discrimination Regulations 1996* and the *Income Tax Assessment Regulations 1997*.
- disallowable instruments, which are made by Ministers or government agencies and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples are the Disability Standards for Accessible Public Transport 2002.
- other subordinate legislation, which is not subject to Parliamentary scrutiny.

Co-regulation typically refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced. This is known as 'underpinning' of codes, standards etc. Sometimes, legislation sets out mandatory government standards, but provides that an industry code can override those standards. Legislation may also provide for government imposed arrangements if industry does not develop its own arrangements.

Quasi-regulation refers to a wide range of rules or arrangements which governments can use to influence businesses, but that do not form part of explicit government regulation. Examples include industry codes of practice, guidance notes, industry–government agreements and accreditation schemes.

Federal quasi-regulation can be broadly divided into two categories:

- industry arrangements where industry organisations play a critical role in formulating and/or administering codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory
- other Government initiated arrangements that use methods other than direct legislation to encourage compliance.

Self-regulation involves industry formulating rules and codes of conduct, and enforcing compliance with those rules.

Source: Commonwealth Interdepartmental Committee on Quasi-regulation 1997; ORR 1998.

12.1 Disability standards

The DDA was hailed as a significant step forward in addressing the discrimination faced by people with a disability. The anti-discrimination provisions of the DDA contain broad ranging requirements for achieving equality of access and opportunity for people with disabilities. The prohibitions are expressed in very general terms: for example, it is unlawful under the DDA to discriminate against a job applicant with a disability on the ground that that person might require some adjustments to the workplace.

However, the DDA does not prescribe the actions that an employer must take to avoid discrimination. As argued by Hastings (1997, p. 8), 'no legislation is going to be very effective if it is complied with only or mainly when compliance is ordered by a court or tribunal'. The problems of relying on such general provisions were discussed by the Human Rights and Equal Opportunity Commission (HREOC) in an issues paper released in 1993 (box 12.2). Many issues raised then—such as the uncertainty experienced by people with disabilities and service providers in how the general provisions will apply to particular areas—are still relevant.

The DDA was designed to address these issues through the power to introduce subordinate regulation in the form of disability standards. Section 31 of the DDA gives the Attorney General the power to formulate disability standards in certain areas: employment, education, public transport, access to premises, accommodation and the administration of Commonwealth laws and programs. These are disallowable instruments that the Federal Parliament must approve and that are subject to the formal regulation impact statement (RIS) process.[1]

Disability standards are able to address questions of deciding how, when and where services should be made accessible better than the DDA can because they:

- set out the requirements implicit in the DDA in a more immediately accessible format
- provide information on the steps necessary to comply with the DDA, and reduce uncertainty for potential complainants and respondents
- can provide timetables for complying with the DDA, ensuring changes occur within an appropriate period

[1] At the federal level, a regulatory impact statement contains a formal assessment of the costs and benefits of regulation. This process is mandatory for all reviews of existing regulation, proposed new or amended regulation, and proposed treaties involving regulation that will directly affect business, have a significant indirect effect on business or restrict competition (ORR 1998).

- allow input from all interested parties and specify the relationship of standards to other relevant sources of law
- encourage the use of voluntary action plans to meet the deadlines set by standards
- reduce the use of resources in litigation or complaint processes
- present, as part of the usual operating environment, measures that facilitate the access and participation of people with disabilities (HREOC 1993e).

Box 12.2 **HREOC's views on the shortcomings of the Disability Discrimination Act that standards could address**

HREOC identified the following shortcomings of the general provisions of the DDA as reasons for developing standards.

- The requirements of the legislation, and consequent rights and obligations, are not always readily apparent or understandable in particular circumstances. A person with a disability who has a valid complaint may, therefore, not be aware that the DDA is relevant to their situation.
- Similarly, a potential respondent who is not actively or consciously discriminating but who does not remove barriers affecting people with a disability may not think disability discrimination law is relevant until and unless a complaint is made. Even respondents who are aware of their obligations may be uncertain about how to comply with the DDA.
- The relationship between anti-discrimination legislation and some other relevant areas of law (such as the Building Code of Australia) is unclear, meaning potential complainants and respondents are uncertain about the nature and extent of their rights and responsibilities.
- Complaints that are settled by conciliation may offer little assistance in setting precedents if the outcomes are confidential.
- The complaints process might not be the most cost-effective way of establishing appropriate standards for equality of access and participation because it imposes costs on parties (which may be duplicated on a case-by-case basis) and the Australian Government (which must resource the process).
- Individual complaints targeting a specific group or area of discrimination may not be sufficient to instigate systemic change.
- The DDA gives no clear deadlines or guidance on the timeframe permissible for making changes to remove discrimination.
- The established model of anti-discrimination law may be perceived as casting people with a disability in a negative role, either as potential complainants presenting problems or as people seeking 'special' treatment.

Source: HREOC 1993b.

The Disability Standards for Accessible Public Transport, for example apply to public transport vehicles, conveyances, premises and infrastructure, and set out a timetable for adjustment by public transport operators over 30 years, with fixed milestones every five years. They list detailed accessibility requirements including access paths, ramps, boarding devices, allocated spaces, handrails, doorways, controls, signage, information provision and much more (see appendix C).

Many inquiry participants acknowledged the important role that standards play in addressing the discrimination faced by people with disabilities:

> The major intended advantage of standards … for both the disability sector and the potential respondents for whom they are relevant, is to provide clarity and certainty of rights and obligations. It should be easier to ascertain what constitutes discrimination in the particular area, so that complaints are easier to make and resolve but also so that greater compliance will be achieved without matters reaching the stage of a complaint. By providing certainty regarding what measures will be sufficient to achieve compliance, standards may also increase incentives to take those measures, particularly where substantial investments are required. (HREOC, sub. 143, p. 49)

The Public Interest Advocacy Centre noted:

> We believe that standards could be of substantial benefit to the regulatory framework as they could create objective measures against which questions of unlawful discrimination could be determined. Section 32 of the DDA makes it unlawful to contravene a disability standard. Standards would provide certainty and would thus assist those seeking to comply with the DDA as well as those regulating compliance. (sub. 102, pp. 9–10)

Similarly, the ACTU supported disability standards:

> Standards can help clarify the principles embodied in the Act. (sub. 134, p. 4)

However, inquiry participants did not unanimously support standards. Some were concerned about using disability standards to extend the scope of the Act. Some questioned the suitability of standards for some areas, while others suggested extending the ability to formulate standards to all areas covered by the DDA. Others were concerned with procedural issues, such as formulating, monitoring and enforcing standards. These issues are discussed below.

Consistency with the Disability Discrimination Act

General principles of administrative law require standards under the DDA to serve the same objects as the existing DDA provisions. They also have to fall within the scope of the DDA. Subject to those rules, however, HREOC argued that it can be legally valid for standards to:

- provide obligations greater than those which already exist
- prescribe obligations for persons who might not already be covered by the DDA
- provide defences or exceptions beyond those that already exist (HREOC 2003e).

HREOC bases its argument on sections 32 and 34 of the DDA. Section 32 states that is it unlawful for a person to contravene a disability standard. According to HREOC, this section implies that a standard may make something unlawful that is not already unlawful. Section 34 states that if a person acts in accordance with a disability standard, the existing unlawful discrimination provisions (set out in part 2 of the DDA) do not apply to the person's activity. HREOC interprets this section to mean that a standard may make something lawful that otherwise would have been unlawful, or potentially unlawful (HREOC 2003e). However, a simpler interpretation would be to read this section as preventing 'double jeopardy' by ensuring the same conduct cannot be subject to a complaint about non-compliance with the general provisions of the DDA and a complaint about non-compliance with the specific obligations of disability standards.

The Productivity Commission accepts that disability standards can make some things lawful that otherwise would have been unlawful. The standards' greatest benefit is thus that they create certainty where there was none. It will be lawful for public transport operators, for example, to discriminate against some people with disabilities because the transport disability standards require that only 25 per cent of buses and trains be made accessible by 31 December 2007. Similarly, the access to premises standards will specify a minimum door width. This specification might not fulfil the needs of every person with a disability, but it will not be unlawful. (This issue is discussed in more detail below.)

However, the Productivity Commission considers it inappropriate to use standards to extend the application of the DDA in a way that is inconsistent with the general provisions and objects of the Act. The draft education standards are a case in point. The unjustifiable hardship defence is limited to enrolment situations under the DDA (s.22(4)). The Draft Disability Standards for Education propose extending the unjustifiable hardship defence beyond the point of enrolment to include all education activities.

Although this issue has not attracted much attention in this inquiry, evidence presented to the Senate Employment, Workplace Relations and Education Reference Committee inquiry on the education of students with disabilities suggests at least one jurisdiction questioned the legal status of the draft education standards:

> The report prepared by the Standards Working Group for the July 2002 MCEETYA meeting sets out points of legal contention that were also reported to have delayed the adoption of standards. The report discusses a number of legal issues raised by one state

> government. In particular, it addresses issues to do with the legal basis of the standards, and whether some provisions seek to extend the application of the Disability Discrimination Act. (Senate 2002, p. 118)

By contrast, HREOC argued that limiting the defence to enrolment situations was a 'drafting oversight' (sub. 219, p. 35).

An alternative approach to addressing this issue would be to amend the DDA. HREOC argued that including the unjustifiable hardship defence for post-enrolment situations in the disability standards for education was preferable to amending the DDA because the defence is perceived as a part of a package of rights and responsibilities:

> Certainly some people in the community that we have spoken to have taken the view that it's preferable to do it in the standard as part of a package, that in return for accepting an expansion of unjustifiable hardship that they will get better definition of rights across the board, whereas if you just amend the act to expand unjustifiable hardship by itself then people might say, 'Well, what have we got out of that?' on the disability side of the equation. (HREOC, trans., p. 1147)

The Productivity Commission acknowledges this point of view but considers that important statements of law should be made in the primary legislation, not subordinate instruments. If the lack of unjustifiable hardship post-enrolment is a drafting oversight, then this oversight should be corrected in the primary legislation. Elsewhere in this report, the Commission has recommended amending the DDA to extend unjustifiable hardship to all areas covered by the DDA (see chapter 10).

DRAFT FINDING 12.1

It appears that the draft education standard might have the effect of altering the scope of the Disability Discrimination Act 1992 *provisions concerning discrimination in education.*

DRAFT RECOMMENDATION 12.1

The scope of the* Disability Discrimination Act 1992 *should only be altered via amendment of the Act, not via disability standards.

Flexibility

A clear advantage of standards is that they provide a degree of certainty for stakeholders who need to know what actions would be regarded as compliant behaviour under legislation. A potential shortcoming of standards, however, is that they can be inflexible, thereby imposing higher costs and requiring constant updating to keep them in line with technological developments. The costs to service

providers of complying with disability standards are discussed in chapter 8. This section discusses the costs that might arise if disability standards become too prescriptive and inflexible such that they unduly inhibit innovation.

Some inquiry participants criticised the inflexible nature of disability standards. Job Watch Victoria argued:

> '… [disability standards] can create a degree of inflexibility allowing for only narrow interpretations of sections and removing the broad scope of the Act and the creativity and adaptability needed in a changing work environment. (sub. 215, p. 5).

The Australian Taxi Industry Association also expressed concerns about the inflexibility of disability standards (trans.).

By their nature, standards will limit the flexibility with which service providers comply with the DDA and adapt to changing circumstances—that is the price of creating some degree of certainty through a legislative instrument. However, there are ways of minimising these costs and creating a balance between certainty and flexibility. For example, where possible the standards could use performance-based approaches that allow service providers to develop alternative ways of meeting the standard, and they could incorporate mechanisms for updating (without continually redrafting) the standards to meet changes in technology. These and other features should be assessed during the drafting process.

Only the transport disability standards have been enacted. The RIS prepared by the Attorney-General's Department assessed options for improving the accessibility of public transport against six criteria, one of which was the flexibility of the approach. It acknowledged that disability standards might be less flexible than other options, such as guidelines or the status quo, but the transport disability standards incorporate flexible elements (Attorney-General's Department 1999) (box 12.3). The draft disability standards on access to public premises (due to come into effect by the end of 2003) also encourage flexibility (box 12.3).

The Productivity Commission agrees that it is important for disability standards to be as flexible as possible, both promoting choice and being adaptable over time. As far as possible, these characteristics should be included when standards are formulated. The RIS process, which is designed to facilitate the introduction of good regulation, provides an opportunity to ensure flexibility is considered in the design and implementation of disability standards. This process appears to be working effectively, given that flexibility has been an important feature of the disability standards that have been introduced.

Box 12.3 **The flexibility of disability standards**

According to the Attorney-General's Department, the Disability Standards for Accessible Public Transport incorporate flexibility in three ways.

- The standards are essentially performance based. That is, generally they are not hardware specific but assume that a variety of solutions will satisfy any potential requirement.
- The standards allow operators and providers to comply with requirements, and thus the DDA, by following the specifications in the document or by providing an alternative means of 'equivalent access'. An operator may choose, for example, to provide equivalent access to bus services by using a high floor bus with a boarding platform rather than a low floor bus with a ramp.
- The DDA provides exemptions in cases where 'unjustifiable hardship' can be demonstrated. This provision allows added flexibility in those cases in which unjustifiable hardship exists.

Under section 34, the standards must be reviewed within five years of being introduced and then every five years. The review, to be conducted by the Minister for Transport and Regional Services in consultation with the Attorney General, must include:

(a) whether discrimination has been removed, as far as possible, according to the requirements for compliance set out in schedule 1; and

(b) any necessary amendments to these standards. (s.34(20))

The Draft Disability Standards for Access to Premises will initially comprise the access components of the Building Code of Australia (BCA) that have been revised to comply with the provisions of the DDA. Like the transport standards, the BCA is performance based. The acceptable performance requirements for buildings and other structures described by the BCA may be met using:

- deemed-to-satisfy provisions, which are detailed prescriptive technical requirements within the BCA about how to construct and equip buildings
- an alternative solution that can be demonstrated to meet the performance requirements by other means.

The public premises disability standards will be automatically updated when the BCA is updated. The BCA is amended each January and July to reflect changes in building practices, use and technology. The Australian Building Codes Board drafts a regulation document and a RIS for broad community consultation before recommending major changes.

Sources: Attorney-General's Department 1999; Australian Building Codes Board (sub. 153); ABCB 2001; Disability Standards for Accessible Public Transport 2002.

DRAFT FINDING 12.2

A rigorous regulation impact statement process is sufficient to ensure that disability standards reflect the characteristics of good regulation, including flexibility.

Effects on the rights of people with disabilities

Disability standards have been criticised for diminishing the rights of people with disabilities. The Disability Council of New South Wales summarised the argument of those critical of disability standards:

> There is a strong view held in the community that the standards as they apply under the DDA will actually diminish the rights of people with disabilities. Many believe that the Act as it stood allowed them the opportunity to lodge a complaint if and when they felt aggrieved. The introduction of standards will allow the service to be monitored for compliance against standards and to avoid an action if they meet specified conditions, despite the disadvantage to the person with a disability. (Disability Council of New South Wales, sub. 64, p. 17)

The Anti-Discrimination Commission Tasmania (trans.) and the Queensland Anti-Discrimination Commission (trans.) expressed similar concerns.

Compliance with disability standards will not address the needs of every person with a disability where short term tradeoffs are made to achieve better outcomes in the future. The phased introduction of the transport disability standards, for example, means that some people's needs will not be addressed initially, yet those people will have lost the opportunity to use the complaints process. However, because the standards recognise the costs of making public transport accessible and give service operators the opportunity to introduce changes over a 30 year period, the needs of a wider range of people with disabilities may be met in a shorter period than if those people had relied on each lodging a complaint under the general provisions of the DDA.

This point was argued by Hastings:

> Time spent waiting for the Really Big Complaint, that may be just around the corner and that will compel widespread compliance at a higher level than any negotiated set of standards, is time during which more inaccessible buildings are built, more inaccessible transport vehicles are put into service, more development of communications technology occurs without incorporating accessibility. It is also time wasted from the lives of people with a disability during which they might have enjoyed greater access and equality, rather than accepting continued exclusion as the price of an uncertain prospect of the achievement of an enthusiast's ideal vision of rights somewhere in the future. (Hastings, 1997, p. 8)

Bruce Young-Smith suggested that people with disabilities be given the right to lodge a complaint if the standards do not meet their needs (sub. 80, p. 2). HREOC objected to this suggestion, arguing that it would undermine the ability of disability standards to clarify the responsibilities of service providers and to provide certainty:

> For example, any standard on access to premises needs to specify a minimum door width. If standards are to be meaningful it is not feasible to add a requirement that it is also unlawful not to have a wider door if anyone requires it. (sub. 219, p. 27)

The Productivity Commission agrees that it is important for people with disabilities to have the facility to complain about discriminatory behaviour. Indeed, the complaints mechanism plays a pivotal role in encouraging compliance with disability standards. However, the Commission considers it appropriate that compliance with disability standards is a defence if a complaint is lodged. People with disabilities need to be aware of disability standards, their role and how they affect the general anti-discrimination provisions of the DDA.

DRAFT FINDING 12.3

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints.

Relationship with State and Territory anti-discrimination legislation

The Queensland Anti-Discrimination Commission questioned the relationship between disability standards, which are federal legislation, and State and Territory government anti-discrimination legislation:

> I also am interested in exploring a bit further whether constitutionally the standards are a complete defence to the question of disability discrimination. (Anti-Discrimination Commission Queensland, trans., p. 260)

Section 109 of the Australian Constitution states that federal laws displace the operation of State and Territory laws if there is any inconsistency. HREOC argues that disability standards, where they replace the general provisions of the DDA, would also be likely to displace the general provisions of State and Territory laws (HREOC 2003e).

The Queensland Anti-Discrimination Commission suggested it would like higher levels of compliance than required by disability standards in some areas. It argued that a service provider complying with a higher State-based standard would be meeting the obligations of the federal disability standards and the State legislation:

> Seems to me that it may be that you could comply with both requirements … they're not inconsistent. (Anti-Discrimination Commission Queensland, trans., p. 260)

The Productivity Commission is more concerned a service provider might comply with the federal disability standards but not the higher standard imposed by the

relevant State or Territory government. Allowing States and Territories to impose greater obligations on service providers than those contained in disability standards would create uncertainty for service providers.

One option for overcoming the uncertainty in this area would be for State and Territory governments to adopt the DDA disability standards. However, this is unlikely to occur in those jurisdictions arguing for higher levels of compliance. To the extent that there is any doubt about the primacy of disability standards over State and Territory legislation, an alternative approach would be to amend the DDA to clarify the status of the State and Territory legislation under federal disability standards. The Productivity Commission considers such an amendment to be the most likely means of addressing this issue.

All State and Territory governments are involved in negotiating disability standards. The Productivity Commission considers it to be generally inappropriate for them subsequently to impose higher levels of compliance than negotiated. Such inconsistent behaviour would undermine the certainty created for service providers. Any jurisdiction wanting to impose obligations greater than those contained in the generic provisions of the standards could negotiate to have these obligations appended to the standard. However, this approach should be avoided wherever possible. Many organisations operate across Australia, and the requirement to meet different standards in different jurisdictions would be costly and disruptive.

DRAFT FINDING 12.4

There is some uncertainty about the relationship between State and Territory anti-discrimination legislation and disability standards.

DRAFT RECOMMENDATION 12.2

The* Disability Discrimination Act 1992 *(s.13) should be amended to make it clear that disability standards displace the general provisions of State and Territory anti-discrimination legislation. Any jurisdiction wanting to introduce a higher level of compliance in an area should request that allowance be made for this through a jurisdiction-specific component in the disability standards.

Areas covered

The nature of disability standards will differ according to the area being addressed. Some areas, such as accessible transport or premises, lend themselves well to prescription and measurement. Others, such as employment and education, need a more procedural approach. Whether these areas need to be clarified through

statutory standards or can be adequately addressed through non-binding guidelines is an issue.

Some inquiry participants argued disability standards cover too few areas. The ability to formulate disability standards is set out in section 31 and limited to the areas of employment, education, access to premises, public transport, accommodation and the administration of Commonwealth laws and programs (table 12.1). The areas not covered are the provision of goods and services, the purchase and disposal of land, clubs, sport, and requests for information.

The Mental Health Legal Centre argued:

> … it is standards (or standard-like instruments) that have potential to give the Act clarity and maximally achieve its objectives. … We recommend that efforts to establish standards or similar instruments continue in all areas covered by the Act. (sub. 108, p. 2).

Table 12.1 **Areas in which disability standards may be formulated and the status of each standard, August 2003**

Area of discrimination	*Covered by DDA*	*Standard possible*[a]	*Status of standard*
Employment	ss15–21	✓	Draft not active
Education	s.22	✓	Second draft standard rejected by State/Territory Ministers; Commonwealth government to introduce standards unilaterally
Access to premises	s.23	✓	Draft and regulation impact statement in progress
Public transportation	s.23[b]	✓	Approved in October 2002
Provision of goods services and facilities	s.24	✗	..
Accommodation	s.25	✓	Draft not active
Purchase of land	s.26	✗	..
Clubs and incorporated associations	s.27	✗	..
Sport	s.28	✗	..
Administration of Commonwealth laws and programs	s.29	✓	Commonwealth Disability Strategy implemented instead

[a] Section 31 of the DDA lists the areas in which a standard is possible. [b] Public transport is indirectly covered by the access to premises section of the DDA, because vehicles and aircraft are defined as 'premises' (s.4). .. Not applicable.

Sources: DDA; DDA Standards Project nd.

The Paraplegic and Quadraplegic Association of Queensland put forward similar arguments:

> I'm just suggesting a recommendation to amend section 31 of the Act to allow HREOC to be expanded in order to allow it to develop DDA standards in all areas covered by the DDA. Presently we're literally only dealing with four standards. I'm suggesting that

> a mechanism be put in place through section 1 that simply allows HREOC to consider, to develop DDA standards for the other various things that are covered. (trans., p. 123)

The Equal Opportunity Commission Victoria also stated:

> … the EOCV considers that the capacity to create standards should be available in relation to all areas covered by the Act, including access to goods and services, access to clubs and to sport and the purchase of land. (sub. 129, p. 22)

The current Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, questions the limitation on the provision for standards. He suggests that progress towards equality and accessibility for people with disabilities would have been 'faster and broader' had the DDA allowed standards to be set in all areas (Ozdowski, 2002b, p. 8). Hastings (1997, p. 9) suggested that one factor influencing this decision was concern about the costs to government and businesses of imposing standards in all areas covered by the DDA.

There was no formal mechanism to assess the possible effect of new regulations on stakeholders when the DDA was introduced in 1992. In the absence of such a mechanism, the government appeared to address concerns about imposing high costs on service providers by limiting the areas to which disability standards could apply.

Now, all new legislation (including subordinate legislation such as the disability standards) is subject to a review mechanism through the RIS process. The Productivity Commission considers that this is the appropriate mechanism for deciding whether regulations are the most cost-effective means of achieving the objects of the DDA.

The Productivity Commission considers that there are potential benefits from allowing the possibility for standards to be introduced in any area covered by the DDA (including areas covered by exemptions such as insurance and superannuation), subject to the rigorous application of RIS processes and other safeguards. Rather than listing areas specified in the Act, the standard power could be expressed in a general sense to provide greater flexibility.

> HREOC supports provision being made for standards across the same range of matters as are covered by the general provisions of the DDA. This does not involve any conclusion that standards should necessarily be introduced in any particular area, only that it should be possible to make standards if and when this is decided to be appropriate … (HREOC, sub. 143, p. 73)

The Productivity Commission agrees.

The* Disability Discrimination Act 1992 *(s.31) should be amended to allow for disability standards to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standard making power should extend to the clarification of the operation of statutory exemptions.

Monitoring and enforcement

Section 67(1)(e) of the DDA requires HREOC to monitor the operation of standards and report to the Attorney General, but there is no separate enforcement regime for standards. Non-compliance with a standard is an unlawful act under the DDA in the same way as non-compliance with one of the existing anti-discrimination provisions. In each case, a complaint can be made by or on behalf of a person or class of persons aggrieved by the act of discrimination.

The lack of a specific enforcement regime for disability standards was a concern for many inquiry participants. The National Ethnic Disability Alliance argued:

> … there appears to be no legal compulsion for a provider to comply with a DDA standard once it is adopted and the obligation will still remain with the individual to prove a standard has not been met. (sub. 114, p. 16)

The Disability Council of New South Wales noted:

> The first practical difficulty is that there appears no actual (legal) compulsion for a provider to comply with a DDA standard once it is adopted. The complaints based focus of the DDA leaves the burden of proof that a standard is not being met with the complainant. (Disability Council of New South Wales, sub. 64, p. 17)

Similarly, Advocacy Tasmania commented:

> The successful implementation of Disability Standards of any type is problematic if there is not systemic regular monitoring … (sub. 130, p. 2)

Most participants commenting on this issue recommended that disability standards include monitoring and enforcement procedures (for example, the Mental Health Legal Centre, sub. 108; Advocacy Tasmania, sub. 130; the Equal Opportunity Commission Victoria, sub. 129; New South Wales Council for Intellectual Disability, sub. 117; and the Physical Disability Council of Australia, sub. 113). Some suggested that an independent authority be given responsibility for ensuring compliance with disability standards, while others suggested that HREOC should be resourced to undertake this role.

HREOC disagreed with this suggestion:

> HREOC does not regard these detailed monitoring roles as appropriate or realistically achievable for HREOC, other than through the complaint process as a backup to other regulatory and monitoring processes. In addition to issues of availability of resources for such a role, HREOC considers a more effective model involves responsibility for accessibility to be incorporated as far as possible into the responsibilities of mainstream regulatory bodies for each subject matter. (sub. 219, p. 28)

The Productivity Commission considers that compliance with disability standards should be incorporated into existing regulatory processes where possible. The draft building standard, for example, will be linked formally to the BCA and thus will be enforced by State and Territory building planning approval processes. Compliance with the transport standard will be monitored by a national Ministerial taskforce (see chapter 5). Although formal compliance is still enforced only through complaints, providers should have more incentive to comply and breaches will be easier to identify. HREOC's role should be limited to ensuring monitoring takes place and reporting on the operation of standards to the Minister.

DRAFT RECOMMENDATION 12.4

Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes. The Human Rights and Equal Opportunity Commission's role should be to report to the Attorney General on the operation and adequacy of those processes.

Development process

Aside from concerns about the concept of disability standards, many inquiry participants were also concerned about the process for developing standards. Most concerns related to the consultation process and the timeliness of standards.

Consultation

Consultation with people with disabilities is vital in developing disability standards that are effective in reducing discrimination. Many inquiry participants expressed concerns about the consultation process. In particular, they were dissatisfied with the level of consultation and suggested that it could lead to standards that compromised the needs of people with disabilities. For example, the National Ethnic Disability Alliance stated:

> … the resource imbalance between industry and the disability sector means that it is not an equal bargaining arrangement and there is a risk that Standards developed will actually reflect the interests of industry interest and not the rights of people with disability. (National Ethnic Disability Alliance, sub. 114, p. 16)

The Disability Council of New South Wales (sub. 64) expressed similar views.

The DDA Standards Project (funded by the Commonwealth Attorney-General's Department) coordinates disability community input into standards development. It is a network of organisations that represent people with disabilities throughout Australia. There is no formal membership, and membership has varied over the years. The current composition, objectives and beliefs of the DDA Standards Project are summarised in box 12.5.

Despite this broad consultative framework, Marrickville Council (sub. 157) and the Disability Council of New South Wales (sub. 64) criticised the ability of the DDA Standards Project to reflect accurately the needs of people with disabilities because it represents a narrow range of views and supports the introduction of standards against the wishes of the disability community. HREOC disputed these claims:

> Several submissions argue that the funding conditions of the Disability Standards Project have required it to support development of standards and not express contrary community views; and that consultation is restricted to national disability peaks and the National Disability Advisory Council. These comments are not accurate. Project representatives have put forward a range of community views in standards development processes including views opposed to adoption of particular standards. Consultation on standards to date has in fact been very much wider than peak level. (sub. 219, p. 26)

The Productivity Commission recognises that it is difficult to obtain unanimous support for disability standards from people with disabilities, given the diversity of their needs. The process of negotiating standards will necessarily involve tradeoffs, and consultation with the disability community gives the opportunity for feedback on where those tradeoffs should be made. It is important, therefore, that all sections of the disability community be involved in one way or another. Not everyone or every disability organisation can be represented on the DDA Standards Project Steering Committee, but they can provide input through its consultative processes.

Although consultation is important in developing better, more effective, standards, it is not an end in itself. Consultation is a means to allow different views to be expressed and advice to be sought, including from industry. It is almost inevitable, however, that translating those views into workable standards will mean that one or more groups will feel that their views have been inadequately addressed. All that can be hoped for is that the communication channels are kept as open as possible, that people are given the chance to participate and that the governments involved play a balancing role that accounts for the objects of the Act and the interests of the

broader community. The DDA Standards Project appears to play its part in this process.[2]

Box 12.4 **The DDA Standards Project**

The DDA Standards Project is headed by a Steering Committee made up of representatives of nine national peak bodies: the Australian Association of the Deaf, Blind Citizens Australia, the Deafness Forum of Australia, the Head Injury Council of Australia, the National Council on Intellectual Disability, the National Ethnic Disability Alliance, the Physical Disability Council of Australia, Women with Disabilities Australia and the National Indigenous Disability Network.

The objectives of the DDA Standards Project are to:

- elect disability sector representatives to standards development working parties
- educate people with disabilities about s.31 of the DDA and provide information about the different standards processes
- engage the disability sector in debate and discussion on specific issues around DDA standards, through consultation with people with disabilities during the development of specific DDA standards
- reflect all the views expressed by people with disabilities during consultations
- protect the rights of people with disabilities from erosion during standards development processes

The DDA Standards Project also endorses the following set of beliefs.

- While the process of developing Standards is lengthy and difficult, the complexity, importance and future benefit of clarifying rights under the DDA demand that it be undertaken.
- Any standards developed must not dilute any rights already enshrined in the DDA and must be consistent with the current laws of Australia.
- The process of developing standards should aim to achieve legally binding standards.
- If Standards are not acceptable to the community, the principles developed during the development process should form the basis of alternative methods to clarify rights under the DDA.
- Any alternative to standards should be endorsed and supported by the disability sector as a whole.

Source: DDA Standards Project nd.

[2] The Productivity Commission also notes that the DDA Standards Project prefers standards, but will support other regulatory approaches if the disability community deems them to be appropriate.

DRAFT FINDING 12.5

The disability community has sufficient opportunity to consult and comment during the development of disability standards. The Disability Discrimination Act Standards Project is a productive way of engaging people with disabilities in this process but it is not their only means for providing input.

Timeliness

Many inquiry participants were concerned about the timeliness of disability standards. The Public Interest Advocacy Centre noted:

> The development of the current disability standards has however proven to be time-consuming and costly to formulate. This has to some extent been a result of a political process which has been driven by competing needs of the various parties. (sub. 102, pp. 9–10)

Similarly, the National Ethnic Disability Alliance argued:

> … developing standards has been a painfully slow process with only one standard adopted and appended to legislation to date … (sub. 114, p. 16)

Only the Disability Standards for Accessible Public Transport (approved in October 2002) are in effect (see appendix C). The draft Disability Standards for Education have been in development for over seven years and are still not finalised. Two major drafts and the accompanying RISs have been released for public comment (in 2001 and 2003). The Ministerial Council on Employment, Education, Training and Youth Affairs has not agreed on the draft, although the Australian Government announced plans in July 2003 to 'move unilaterally to implement the standards' (Nelson 2003, p. 1).

Paraquad Victoria proposed amending the DDA to impose deadlines for developing disability standards, as was done in the United States (sub. 77). The Productivity Commission does not support this proposal for a variety of reasons. First, the absence of standards in an area should not be interpreted as an absence of activity. In relation to Commonwealth laws and programs, the Australian Government implemented the Commonwealth Disability Strategy (CDS) in 1994 (revised in 2000), which operates as a *de facto* standard for Australian Government departments and agencies (see appendix E). Similarly, Draft Standards for Access to Premises are well advanced (see appendix C).

Second, the lack of formal disability standards in some areas is a consequence of disagreements over the form that standards should take. As discussed earlier, many inquiry participants argued against disability standards for education and

employment. Imposing deadlines may result in the premature adoption of standards that are ill designed and do more harm than good.

Third, the time taken to formulate standards is also a consequence of the consultation process. As discussed above, many in the disability community are concerned about the lack of consultation. Imposing deadlines may limit opportunities for people with disabilities to provide meaningful input to the standards process, given the limited resources available for consulting with the disability community.

The Productivity Commission concedes that formulating disability standards has been a more protracted exercise than envisaged. This delay somewhat reflects a tradeoff between developing standards in a timely manner and developing standards that provide certainty for both people with disabilities and service operators. Any attempts to limit the time taken to develop standards may undermine this certainty. However, the Commission's recommendations to allow other regulatory approaches (discussed below) may also result in more timely regulations.

DRAFT FINDING 12.6

The development of disability standards has been very slow and only one set of standards—the Disability Standards for Accessible Public Transport 2003—has been developed to date. However, imposing deadlines could constrain the consultation process.

Some inquiry participants did not think standards were suitable for all areas covered by the DDA. Jason Gray argued:

> … one obvious difficulty with achieving progress in implementing discrimination law through standards is that not every area of discrimination lends itself readily to specification in advance of what the required level of accessibility or non-discriminatory result is. … In areas like employment or education, specification of results is more difficult because it is difficult dealing with the vast variety of disability issues that arise in employment. Practical examples of where a problem has been successfully dealt with in practice may be a much more important part in achieving change to ensure equal opportunity for people with a disability than official exhortation about how beneficial, and how compulsory, change is. (sub. 27, p. 58)

Most concerns were raised about disability standards for employment and education. Draft Disability Standards for Employment were prepared following consultations with industry representatives, people with disabilities and government between 1994 and 1998 (see appendix A). These draft standards are not proceeding towards finalisation because interested parties could not agree on the form that they should take:

> … while most participants in the process agreed that prescriptive standards were not appropriate, the principle based draft standards which were produced instead were not seen by all parties as delivering sufficient outcomes. (HREOC, sub. 143, p. 62)

Larry Laikind argued the employment standards only offered:

> … some clarification about certain concepts, these being unjustifiable hardship, reasonable accommodation and inherent requirements of a job … you merely have definitional material … rather than a situation that covers every disability and every employment situation and basically works the same way as the Access to Premises standard, which will cover every situation. (trans., p. 153)

Alternatives to disability standards include guidelines (discussed in section 12.3) and self-regulation or co-regulation (discussed below).

12.2 Self-regulation/co-regulation

Although the Productivity Commission has recommended that the power to make disability standards be extended to all areas covered by the DDA, disability standards might not always be the most appropriate form of regulation in some areas. There might be a role for self-regulatory or co-regulatory approaches that draw on greater industry involvement. HREOC stated that 'consideration should also be given to adding to the DDA more explicit provision for self-regulatory and co-regulatory mechanisms such as are provided in more recent Commonwealth legislation, for example in the area of telecommunications' (sub. 143, p. 52).

The Australian Bankers' Association's voluntary industry standards for Internet and phone banking, electronic funds transfer at the point of sale (EFTPOS) facilities and automatic teller machines (ATMs) are an example of self-regulation. The voluntary standards, which were developed following a HREOC inquiry into the accessibility of electronic banking services, provide details on how to design, install and operate electronic banking services to improve their accessibility.

Self-regulation can be a flexible, responsive and efficient way of governing the behaviours of an industry. Rules developed by an industry are likely to have a higher degree of ownership than that of rules imposed by government. However, self-regulation can also be perceived as ineffective if considered to protect one group at the expense of another, exclude new entrants or avoid formal regulation. The lack of legal sanctions make self-regulation difficult to enforce (ORR 1998).

Blind Citizens Australia submitted that it:

> … has seen through the *ad hoc* adoption and implementation of the Australian [Bankers'] Association's disability standards that these documents are often considered

> aspirational rather than mandatory. Moreover, there is no guarantee that industry standards will actually comply with the DDA. (sub. 72, p. 13)

Many other inquiry participants also objected to the use of self-regulation including Alexa McLaughlin (trans.), Peter Simpson (trans.), Bruce Young-Smith (trans.), the Northern Territory Disability Advisory Board (sub. 121), the Physical Disability Council of Australia (sub. 113), the Law Institute of Victoria (sub. 81) and the Physical Disability Council of New South Wales (sub. 78).

Others—such as the City of Melbourne (sub. 224), the Disability Services Commission (sub. 44), Janet Hope and Margaret Kilcullen (sub. 165) and the Mental Health Council of Australia and Beyond Blue (trans.)—suggested self-regulation guided and supported by a legal framework. This approach is a form of co-regulation.

The Investment and Financial Services Association noted the benefits of co-regulation and cited a recent example in the insurance industry:

> In response to concerns from the consumerist movement that there was a perception that complaints were not being independently reviewed, the industry supported the establishment of the Financial Industry Complaints Service (FICS). This is an independent body set up under the Federal Minister for Consumer Affairs and recognised by the Australian Securities and Investments Commission (ASIC), as an independent dispute resolution body, which satisfies the requirements for complaints handling under the obligations life insurance companies are bound to observe under the relevant provisions of the Corporations Law for Australian Financial Services licensees. (sub. 242, p. 21)

Co-regulation is also used in other Acts, such as the *Telecommunications Act 1997* and the *Broadcasting Services Act 1992* (box 12.5).

Under co-regulation, HREOC could register accredited codes of conduct developed by industry in consultation with people with disabilities, but either it or the Minister would have a reserve power to implement a compulsory standard if the industry code was deficient or if no code was developed. Like self-regulation, co-regulation can be flexible and responsive, especially if initiated by industry. A sense of ownership may encourage a greater willingness to develop and implement regulations. Backed by the possibility of 'black letter law', industry would have more incentive to comply with its own codes. However, co-regulation can also increase the regulatory burden of businesses, which may cause an industry backlash against the regulations. It may also create uncertainty if compliance obligations are not made clear (ORR 1998).

Box 12.5 **Examples of co-regulatory approaches**

Telecommunications industry

The Telecommunications Act provides that industry may develop and implement codes of practice for consumer protection matters such as the internal handling of customer complaints and the timeliness and comprehensibility of bills. If the industry fails to develop adequate codes, then the Australian Communications Authority (ACA) can either request that industry develop a code in a given timeframe, or develop a 'standard' that is binding on the industry. Compliance with the codes is voluntary, but the ACA has the power to direct a participant to comply.

Broadcasting industry

The Broadcasting Services Act gives the Australian Broadcasting Authority (ABA) powers to develop standards or to register codes of practice developed by industry on matters such as promoting accuracy and fairness in news and current affairs programs, and providing methods for handling complaints. In practice, the ABA has developed standards only where mandated by the Act; it relies on industry developed codes of practice for all other matters. Industry groups develop codes of practice in consultation with the ABA, which also monitors and enforces registered codes. A code is registered if it provides appropriate community safeguards, a majority of service providers endorse it and the public has had adequate opportunity to comment.

Sources: ORR 1998; PC 2000.

The Office of Regulation Review developed a checklist for assessing the suitability of different regulatory forms. It noted that quasi-regulatory approaches such as co-regulation should be considered where, among other conditions:

- there is public interest in some government involvement in regulatory arrangements, and self-regulation is unlikely to address the issue
- there are advantages from flexible, tailormade solutions and less formal mechanisms
- there is a threat of consumer or government action (ORR 1998).

The Productivity Commission considers that these features are relevant to the issue of eliminating disability discrimination. The benefits of co-regulation—particularly its flexibility to deal with a variety of different circumstances and changes over time—are compelling in the face of the concerns raised by inquiry participants. The reserve power to strike a disability standard if an industry code is deficient or not forthcoming provides security for people with disabilities.

Industry codes could have three degrees of recognition:

- evidentiary recognition—that is, adherence with an industry code could be considered if a complaint is lodged

- grounds for granting a temporary exemption from the provisions of the DDA
- the same status as a disability standard—that is, the specific obligations and responsibilities set out in the code would replace the general anti-discrimination provisions of the DDA.

Giving the Attorney General a reserve power to strike disability standards in an area if an industry code is not developed also requires imposing a deadline.

REQUEST FOR INFORMATION

The Productivity Commission is considering the potential for a co-regulatory approach under the Disability Discrimination Act 1992. *The Commission is seeking views on how a co-regulatory approach might be implemented, including:*

- *the status that should be afforded an industry-developed code of conduct*
- *appropriate deadlines for industry to develop a code of conduct in an area before a disability standard is imposed.*

12.3 Guidelines and advisory notes

HREOC may issue guidelines under the DDA to assist people and organisations with responsibilities under the legislation to avoid discrimination and comply with their responsibilities (s.67(1)(k)). Although not mentioned in the DDA, HREOC also produces advisory notes with a similar function. Unlike standards, these guidelines and advisory notes are not legally binding regulations:

> The purpose of guidelines or advisory notes … has been advisory and explanatory rather than to add an additional layer of regulation or to replace the general provisions of the DDA in the way that standards are able to. The aim has been to assist people and organisations with rights and responsibilities under the DDA to understand these rights and responsibilities and to put them into practice. (HREOC, sub. 143, p. 50)

Examples include the advisory notes on access to premises and on accessibility of world wide web pages. The advisory note on access to public transport was superseded when the transport disability standards came into effect. Similarly, the advisory note on access to premises will be replaced by the access to premises standard when it is introduced.

The main advantage of guidelines is their flexibility; their greatest weaknesses are that guidelines are not legally binding or certain. Service providers are not obliged to comply with the requirements and responsibilities set out in guidelines; even if they do, compliance with guidelines is not necessarily a defence if a complaint is lodged. The Investment and Financial Services Association noted:

> … because the law does not recognise the guideline in relation to evidence that supports an insurer's decision (that is, underwriting manuals, census statistics or local and international experience), its usefulness in assisting the sensible cost effective resolution of complaints may be limited. (sub. 142, p. 28)

Some inquiry participants argued that guidelines would be better than standards at clarifying the general provisions in the DDA relating to employment and education. The Association of Independent Schools of South Australia recommended:

> …that 'guidelines and best practice' be introduced instead of uniform standards to reflect the diversity of the education sector. (sub. 135, p. 45)

Similarly, the National Council of Independent Schools' Associations stated:

> Given the difficulties inherent in interpreting the processes outlined in the draft Disability Standards for Education, NCISA preference would be for a policy of guidelines rather than standards. (sub. 126, p. 14)

The Anti-Discrimination Board of NSW recommended that guidelines be developed for employment arguing:

> Guidelines provide a more flexible approach to providing guidance and are more amenable to regular updating as knowledge in this area is likely to change rapidly over time. (sub. 101, attachment 2, p. 13)

Presently, no guidelines exist in the area of employment, but HREOC has developed 'frequently asked questions' (FAQs). These have been criticised for providing little practical advice to employers:

> At present, 'frequently asked questions' serves as the educative material in the area of employment. This information is difficult to understand, provides little or no practical examples which an employer can relate to and is not at all user-friendly. The 'frequently asked questions' information should not take the place of guidelines in the employment area. … Job Watch favours the development of guidelines/advisory notes which provide a greater understanding and guidance about what is required by the DDA and retain the necessary flexibility for the proper application of the Act. (Job Watch Victoria, sub. 215, p. 5)

Given the views expressed by inquiry participants, the Productivity Commission agrees it is unlikely that broadly supported disability standards can be developed for employment in the near future. It is important, therefore, that guidelines be developed for employment. Although not legally binding, guidelines are explicitly recognised in the DDA; FAQs and advisory notes are not. They could carry more significance and potentially be more useful. Some potential complainants may be concerned that a lack of disability standards for employment would reduce certainty for people with disabilities. However, areas not covered by a standard will continue to be subject to the DDA's general anti-discrimination provisions and therefore open to complaints.

Elsewhere in this report, the Productivity Commission suggests imposing a positive duty on employers, requiring them to take reasonable steps to identify and eliminate barriers to the participation of people with disabilities in employment (see chapter 13). If adopted, this duty would also need to be addressed in the employment guidelines.

DRAFT RECOMMENDATION 12.5

***The Human Rights and Equal Opportunity Commission should replace the Frequently Asked Questions for employment with guidelines in order to provide more formal recognition under the* Disability Discrimination Act 1992.**

12.4 Voluntary action plans

Section 60 of the DDA allows service providers (including government departments, educational institutions, anyone who provides goods or services, and anyone who makes facilities available) to develop and implement a voluntary action plan. Such plans detail the actions that service providers intend to take to identify and eliminate discrimination.

The DDA provides only general indications of what a voluntary action plan should contain (box 12.6). HREOC has thus developed detailed guidelines for each sector and an 'action plan kit' to assist organisations with the process.

Once developed, a voluntary action plan can be registered with HREOC, which then makes it publicly available. In the event of a complaint, HREOC is required by the DDA (s.11(d)) to consider the organisation's action plan. The success of a action plan, in terms of eliminating disability discrimination and in being used as a defence against complaints, will largely depend on the effectiveness of the actions taken.

HREOC had registered 277 voluntary action plans as at 18 August 2003 (table 12.1). Most plans had been submitted by local governments (105), State, Territory and federal government departments and agencies (70), and tertiary education providers (41). Only one non-government school and one State education department (Tasmania) had registered action plans. No Northern Territory Government agencies have registered an action plan. Nationally, only 33 of action plans were registered by private businesses (table 12.2).

Box 12.6 **What's in an action plan?**

The action plan of a service provider must include provisions relating to:

(a) the devising of policies and programs to achieve the objects of the [DDA]; and

(b) the communication of these policies and programs to persons within the service provider; and

(c) the review of practices within the service provider with a view to the identification of any discriminatory practices; and

(d) the setting of goals and targets, where these may reasonably be determined against which the success of the plan in achieving the objects of the [DDA] may be assessed; and

(e) the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and

(f) the appointment of persons within the service provider to implement the provisions referred to in paragraphs (a) to (e) (inclusive).

Source: *Disability Discrimination Act 1992*, s.61.

Voluntary action plans have positive effects. They can:

- identify discriminatory practices and barriers to participation by people with disabilities
- identify and move towards implementing means of addressing discrimination/ access problems
- help expand the customer base and thus have financial benefits for businesses, as well as benefits for people with disabilities
- help create a more aware and inclusive society through consultation with people with disabilities (see chapter 7).

When implemented effectively, voluntary actions plans can be a proactive way of reducing the barriers that restrict opportunities for people with disabilities, without those people having to rely on the reactive complaints mechanism. When the National Australia Bank submitted its disability action plan to HREOC in 1997, Hastings (1997) referred to it as 'one of the most encouraging spontaneously developed action plans (that is, without the impetus of a complaint)'.

Table 12.2 **Number of voluntary action plans, by State/Territory and sector, August 2003**

Location	*Govt*[a]	*Local govt*	*Schools*	*TAFE*	*Universities*	*Non-govt*[b]	*Business*[c]	*Total*
NSW	12	36	0	1	6	..	..	54
Vic.	5	35	1	5	6	..	..	52
Qld	3	5	0	4	4	..	..	16
SA	13	18	0	5	3	..	..	40
WA	3	4	0	0	0	..	..	7
Tas.	2	5	0	1	1	..	..	9
ACT	1	0	0	1	2	..	..	4
NT	0	2	0	0	1	..	..	3
Federal	31	..	..	..	..	..	..	31
National[d]	..	..	..	1	..	27	33	61
Total	*70*	*105*	*1*	*18*	*23*	*27*	*33*	*277*

[a] Australian, State or Territory government. [b] Includes unions, employer associations, community groups, Skillshares, a folk festival and a church. [c] Includes private companies and a small number of government business enterprises. [d] Businesses or organisations that operate in more than one State. .. Not applicable.

Source: HREOC 2003h.

Some inquiry participants were very supportive of voluntary action plans. The National Australia Bank stated:

> … in 1997 the National recognised the need to demonstrate leadership and best practice within financial services to provide equal access … to banking and financial service, products, premises and also to employment opportunities … So we did in 1997 develop a disability action plan which was the first to be lodged with the Human Rights and Equal Opportunity Commission under the Disability Discrimination Act, and we still have that disability action plan in place today … (trans., pp. 1610–11.)

Disability Action Inc. commented:

> DDA action plans have been a valuable tool for facilitating change and changing discriminatory practices. … The development of a DDA action plan requires an organisation to spend focused time on considering how organisational practice and attitude might lead to discrimination. The very act of reflecting on organisational practice and attitude can lead to a raising of consciousness and attitude change. (sub. 43, p. 3)

Janet Hope and Margaret Kilcullen (sub. 165), the Leichhardt Council Disability Access Committee (trans.) and McDonalds (trans.) expressed similar views.

Others acknowledged the theoretical benefits of action plans, but questioned their usefulness in practice. Inquiry participants often regarded action plans as paper compliance—that is, service providers develop and lodge a plan but never act on it. The most commonly cited problems were:

- the small number of plans registered

- the quality of action plans and their consistency with the provisions of the DDA
- the lack of monitoring and enforcement of action plans lodged with HREOC.

Inquiry participants made recommendations to improve the effectiveness of action plans. It was suggested that action plans be made compulsory for certain types of organisation (like all Australian Government agencies or all businesses over a certain size) and that implementation of action plans be monitored and enforced. People with Disability Australia argued 'it would be much better that the action plan process was mandatory and that there was some monitoring agency established around it' (trans., p. 1324).

The Northern Territory Disability Advisory Board (sub. 121), the Physical Disability Council of Australia (sub. 113), the Association for the Blind of WA (sub. 83), Disability Action Inc. (sub. 43), the Disability Rights Network of Community Legal Centres (sub. 74) and Alexa McLaughlin (trans.) made similar recommendations. Many cited the action plan and monitoring arrangements for State Government agencies in Western Australia and New South Wales (arrangements introduced under the disability services Acts in those jurisdictions).

The majority of participants suggested that HREOC's powers and resourcing should be expanded to take on the role of monitoring and enforcing compliance with voluntary action plans. However, HREOC did not support this proposal; rather, it suggested that disability organisations should accept more responsibility in this area:

> … there is substantial possibility for monitoring and accountability of action plans now, in terms of community monitoring. The reason that we publish action plans when we receive them, whenever we can by means of putting them on our web site, is precisely for community accountability, so that people can see what service providers have said they're going to do and then can form their own views on whether they're doing it or not. … we don't think that more money and more power for us is the only way forward in this issue; that there are more possibilities for disability organisations to take up some of the running than they have. (trans., p. 1158)

Disability organisations were divided on the feasibility of monitoring service providers' use of and compliance with voluntary action plans. The Deafness Forum of Australia (trans.) recognised the merits of the proposal, but cited a lack of resources. Others, such as the TEDICORE (trans.), questioned the effectiveness of this approach.

A more fundamental question is whether this approach would be effective in eliminating discrimination. The requirement for Australian Government departments and agencies, for example, to lodge action plans with HREOC was removed following a review of the Commonwealth Disability Strategy. Federal

departments and agencies already had mechanisms for implementing change, such as workplace diversity plans, customer service charters, annual corporate planning processes and output-based budgeting and reporting processes. The evaluation of the Commonwealth Disability Strategy argued that these mechanisms should be used as the primary planning processes for improving the access and participation of people with disabilities (KPMG 1999) (see appendix D).

A focus on action plans incorrectly implies that only those organisations with a voluntary action plan are taking steps to eliminate discriminatory practices. Few education providers, for example, have prepared and lodged action plans, but they have made other significant attempts to reduce the barriers faced by students with disabilities, such as the guidelines adopted by private schools in South Australia (see appendix B). Similarly, government departments and agencies make action plans under State legislation rather than under the DDA. State Government departments and agencies and local government authorities in Western Australia, for example, are required to develop disability service plans that show how their services meet the needs of people with a disability (Disability Services Commission, sub. 44).

Some inquiry participants argued that mandatory action plans may be counterproductive. SPARC Disability Foundation Inc. (trans.) argued that compulsory action plans would foster resentment among service providers. It and other participants suggested using financial incentives to encourage service providers to develop and implement action plans. Currently, the only incentive for service providers to develop an action plan is that if a complaint is lodged, the assessment of unjustifiable hardship must consider any such plan.

The Productivity Commission does not consider that making action plans compulsory would be effective. Further, this approach would also be costly to comply with and administer. However, action plans might take on a new role under a proposal to introduce a duty for employers to provide and maintain an accessible workplace (see chapter 13). Employers could demonstrate their compliance by preparing and complying with a voluntary action plan. Action plans might also be used to demonstrate compliance with an industry code of conduct under a proposal to allow co-regulatory approaches (discussed earlier).

The DDA defines action plans in terms of service provision. HREOC (2003e) suggests the plans also include employment policies and practices in its advice to businesses and government organisations. The Productivity Commission considers that there may be benefits to formalising this advice, by amending section 59 to include employers.

DRAFT FINDING 12.7

Voluntary action plans are an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of businesses have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

DRAFT FINDING 12.8

The Disability Discrimination Act 1992 *(s.59) does not provide for registration of voluntary action plans by employers.*

DRAFT RECOMMENDATION 12.6

The* Disability Discrimination Act 1992 *(s.59) should be amended to clarify that voluntary action plans can be developed and registered by employers.

12.5 Regulations

The Disability Discrimination Regulations 1996 list the 'prescribed laws' referred to in s.47(2) of the DDA, which states that it is not unlawful under the DDA for persons to do something in compliance with a prescribed law. All of the current eight prescribed laws are from New South Wales and South Australia (see chapter 4). The Regulations also define combat duties and combat-related duties for the purpose of exempting these duties from complaints made under the DDA (s.53(2)).

HREOC supported the mechanism for prescribing laws, which it considered was

> … an appropriate means for determining when the DDA should give way to other laws, noting that this mechanism provides for scrutiny through provision for parliamentary disallowance as well as through consultation between governments. (sub. 143, p. 14).

By contrast, other inquiry participants were critical of the mechanism. The National Council on Intellectual Disability stated:

> … it is difficult to fathom how people with intellectual disability and their families are expected to seek an equal status in our community when those in power water down the very legislation attempting to eliminate disability discrimination. (sub. 112, p. 11)

Similarly, the Physical Disability Council of New South Wales recommended removing all exemptions, including actions taken under prescribed laws (sub. 78).

The Productivity Commission notes that the mechanism for prescribing legislation has been used selectively. New South Wales and South Australia are the only States

to have their legislation prescribed; the other jurisdictions have similar legislation, but have chosen not to have it prescribed. These governments might believe that their laws fall within other exemptions contained in the DDA, or that the unjustifiable hardship defence would apply to any potential direct discrimination or the 'reasonableness' defence would apply to potential indirect discrimination (see chapter 6).

DRAFT FINDING 12.9

Some State laws are currently exempted from the Disability Discrimination Act 1992 *by prescription under section 47, while similar laws in other States and Territories are not. There is no consistency in the prescription of laws under section 47.*

The Disability Rights Network of Community Legal Centres suggested that the list of prescribed laws be reviewed regularly or have a time limit (sub. 74). HREOC noted the advantages of this approach:

> It may be appropriate to consider whether the power to prescribe laws should be for five years at a time similarly to the temporary exemption power to ensure that the reasons for prescription remain current and that other laws provide for access and equity as far as is feasible (which may change over time including with technical developments). (sub. 219, pp. 13–14)

The Productivity Commission considers that the option for prescribing laws provides a useful mechanism for identifying when government considers other laws should take priority over the DDA. However, the current list of prescribed laws should be reviewed. Those currently prescribed should be delisted unless the States request otherwise.

DRAFT RECOMMENDATION 12.7

The laws currently prescribed under section 47 of the* Disability Discrimination Act 1992 *should be delisted unless the relevant States request their retention.

13 Broad options for reform

The terms of reference for this inquiry require the Productivity Commission to consider alternative legislative and non-legislative approaches to the *Disability Discrimination Act 1992* (DDA). They also require the Commission to determine a preferred option for regulation. In previous chapters, the Commission has made recommendations designed to improve the operation of the DDA. This chapter examines broader options that would more fundamentally reform the operation of the DDA.

Section 13.1 discusses options for implementing federal anti-discrimination legislation. These include the relationship between the DDA and the State and Territory anti-discrimination Acts; and the relationship between the DDA and other Australian Government anti-discrimination legislation.

Section 13.2 looks at options to improve employment opportunities for people with disabilities. It examines whether the Commission's recommendations are sufficient to address disability discrimination in employment, or if something more is required.

13.1 Implementation issues

Two general implementation issues have arisen during the inquiry. One is the relationship between the DDA and the State and Territory anti-discrimination legislation. The other is whether the DDA should be combined with other federal anti-discrimination legislation into an 'omnibus' anti-discrimination Act.

Australian, State and Territory Government legislation

Although all jurisdictions have adopted similar complaint-based legislation with conciliation as the core dispute resolution procedure, their Acts have important differences. This report has touched on many of these differences, including the definitions of disability and discrimination, the different coverage of organisations, and differently worded exemptions. This section looks at the advantages and disadvantages of having federal legislation covering the same field as covered by

State and Territory legislation, along with options for a national approach. It first highlights some relevant comments by inquiry participants.

Participants' views

Some inquiry participants indicated that there is confusion about the relative roles of the DDA and State and Territory laws. The National Disability Advisory Council stated:

> The relationship between federal legislation and State equal opportunity legislation also needs to be investigated. There has been some confusion or perceived overlap of responsibility that may have led to some State/Territory equal opportunity bodies giving a lower priority to disability discrimination in their area of responsibility, believing that it is covered adequately by the DDA. Confusion often arises over the jurisdiction in which a complaint should be lodged and whether action in one jurisdiction precludes action in another. Greater clarity over the relationship of federal and State legislation needs to be achieved. (sub. 225, p. 3)

Similarly, the Equal Opportunity Commission Victoria commented:

> The existence of two overlapping statutes dealing with disability discrimination causes considerable confusion for many complainants. Most who know about both schemes do not feel confident that they know the differences between the two. It can be difficult for some people with disabilities to access advice about choice of jurisdiction, and it is probable that many elect jurisdiction without making an informed decision. This may indicate a need for improved information to be made available regarding the differences between the DDA and relevant State or Territory legislation. (sub. 129, p. 36)

The Northern Territory Disability Advisory Board argued that the overlaps create problems, even though it could be assumed that having the Australian Government and the States and Territories in the same field keeps each of them on their toes and provides best practice:

> In reality, this creates unnecessary confusion for people with disabilities. It provides an avenue for the passing on of responsibility by levels of government. It is hard to imagine why we need separate commonwealth and territory/state legislation when we are dealing with the same target group. (sub. 121, p. 4)

Disability Rights Victoria commented on the choices and confusion facing potential complainants:

> For anyone considering how to proceed with a discrimination complaint in Victoria they have to way up the pros and cons of using one or the other. For many, the Equal Opportunity legislation provides a more accessible and expedient way of pursuing a complaint. While concerns about the compliance with rulings and capacity to enforce them also apply with the State legislation, the process is, on the surface, less intimidating and threatening than a process that can end in the Federal Court and award

> costs against the person making the complaint. However, there is confusion about which legislation is the most appropriate or effective. (sub. 95, p. 3)

Losing the right to make a complaint under the DDA if a complaint has been initiated under a State or Territory law concerned Carers Australia:

> The duplication and overlap of the DDA with State-based anti-discrimination/equal opportunity legislation can be confusing. It is not always clear when people should pursue a complaint at the State or federal level. Proportionally, more people choose to lodge a complaint at the State based level, forfeiting their ability to then make a complaint to HREOC. This confusion needs to be resolved to provide more clarity to people with a disability and their carers. (sub. 32, p. 5)

This can cause problems for complainants if options for the choice of jurisdiction are inadvertently closed off. Although there is scope for complaints to be referred from a State or Territory body to HREOC (or vice versa), problems can arise where HREOC cannot accept a referred complaint because it has already been accepted by a State or Territory body. This creates potential for complaints to go unheard, if a State or Territory body accepts a complaint, and then realises that the complaint should be handled by HREOC. Such situations have arisen in Tasmania (Anti-Discrimination Commission Tasmania (trans., p. 311).

On the other hand, HREOC claimed that choice of jurisdiction might give complainants more options or different coverage:

> HREOC is not convinced that choice of jurisdiction presents a major barrier to people lodging complaints, any more than consumer choice in markets should be viewed principally as presenting confusing barriers rather than opportunities. (sub. 219, p. 25)

Further, Blind Citizens Australia noted:

> One of the other advantages of the overlapping State and Territory and Commonwealth complaints systems is the ability to use the State's legislation in circumstances where the matter is clearly covered by State law and the remedy is enforced under State law. This is important given the limitations on the enforceability of HREOC's decisions as a consequence of Constitutional requirements for separation of executive and judicial powers. (sub. 72, p. 15)

Advantages of the current arrangements

Despite some inquiry participants' concerns about the overlap across jurisdictions, the Productivity Commission considers that there are advantages in both jurisdictions covering the same field. First, the States arguably have clearer Constitutional power than that of the Australian Government to legislate in this area. The Australian Government has no specific constitutional power in this area, but relies on various heads of power such as the external affairs and corporations

powers in the Commonwealth Constitution. State and Territory legislation therefore provides a valuable 'second line' of protection if the DDA were to face Constitutional challenge.

Second, the DDA can and does support State and Territory legislation by providing a national framework, and by providing coverage of federal departments and agencies. These were cited as two important reasons for introducing the DDA (see chapter 4) and remain valid.

Third, the current arrangements have symbolic value. State and Territory governments play a major role in many facets of people's lives. Anti-discrimination legislation at that level is an important statement about the human rights principles that underpin each government's view of society.

Fourth, in some areas, State and Territory legislation might be superior to the DDA—for example, in relation to senior State government appointments and complaints of discrimination on multiple grounds (including grounds that are not covered by federal discrimination legislation). As jurisdictions review their legislation over time, there is an opportunity for regulatory benchmarking and learning by example. These processes can encourage innovative solutions. The impact of benchmarking can be seen in the increasing convergence of anti-discrimination legislation in different jurisdictions. HREOC stated:

> … overlapping coverage of the DDA and State and Territory discrimination have lessened in recent years with most jurisdictions now having coverage and definitions very similar to those of the DDA. (sub. 143, p. 42)

This process of convergence is likely to continue. The ACT, for example, is proposing to change references in its Act from 'impairment' to 'disability' so as to improve its consistency with the wording of Acts in other jurisdictions (ACT Discrimination Commissioner, trans. p. 718).

Finally, the presence of two legislative processes enables users to choose which act best suits their needs. Some people believe that the tribunal-based state processes are more accessible to people with disabilities. They might prefer to make a complaint under the DDA, however, if the action to which they object has a national dimension (such as for interstate transport).

Disadvantages of the current arrangements

First, as inquiry participants' comments above attest, the presence of State, Territory and Australian Government legislation creates confusion in the minds of those who must comply and those who are discriminated against. The flip side of having a choice between state and federal law is the additional complexity created. Many people are not aware that they have a choice of jurisdictions in which to make

a complaint; even among those who are aware of their options, the subtle differences between the laws of a State or Territory and the DDA might not be evident to any but the most knowledgeable legal practitioners.

Second, there is a risk is that many people are making uninformed choices about the jurisdiction they use. Given that a complaint initiated under State or Territory Acts cannot be reheard under the DDA, people might make choices that they subsequently regret.

Third, the regulatory overlaps can add to the compliance costs for business, which must deal with different processes in defending a complaint and otherwise complying with two potentially conflicting statutes in any one State or Territory. This issue is exacerbated greatly for businesses that operate nationally and that might be vulnerable to challenge under nine different Acts (eight different State or Territory Acts and the DDA) according to where cases of discrimination need to be defended.

Finally, the administrative costs of operating parallel sets of State, Territory and Australian Government agencies are likely to be more substantial than they would be if a more integrated operation was established with the one legislative base. Other costs arise from the need to explain all of the Acts and from training advocates, conciliators and other staff.

A national approach

The Productivity Commission has considered whether a uniform national approach might address some of the above disadvantages. The Anti-Discrimination Commission Tasmania argued:

> … human rights are a federal matter, an Australian Government matter, an Australian parliament matter, and that's where they should be dealt with, properly and comprehensively and with broad scope. Other people would argue against that and say, 'Well, what we have to do is fight for really good legislation in the States', and if one state gets good legislation up, it has a flow-on effect to other States. (trans. p. 311)

There are several ways of establishing such a national approach: the States and Territories could adopt mirror or template legislation, so all State and Territory Acts are the same; the States and Territories could refer their powers in this area to the Australian Government; or the Australian Government could unilaterally move to take over the field. None of these approaches would be easy to implement.

In relation to the first approach, the Productivity Commission notes that governments have cooperated in other areas to introduce uniform legislation at the State and Territory level. This option might need to be complemented by an

abbreviated DDA that covers the federal level. However, it might be particularly difficult to negotiate an agreement on such sensitive legislation, for several reasons.

- Despite some convergence of the various Acts, they still contain notable differences. This is an historic accident in part, but differences might also reflect the genuine needs of those jurisdictions to tailor otherwise similar legislation to their own purposes. The fact that some State and Territory Acts rely on a comparator for defining direct discrimination and some do not presumably reflects real differences in opinion about which approach is best suited to the needs of that jurisdiction.

- The State and Territory Acts are all omnibus Acts that cover discrimination on a number of grounds. It would be impossible to negotiate a uniform approach to disability without including those other grounds. As this report has illustrated, there are some substantial differences in the way in which the different federal anti-discrimination Acts approach similar issues.

- Most State and Territory Acts significantly predate the DDA, some having been introduced during the 1970s when human rights were at the forefront of the political agenda (see appendix F). Although most of the Acts have been substantially amended over the years, some jurisdictions are likely to be reluctant to be perceived as giving up hard won advantages for their client groups. Achieving consensus in this environment would be difficult and could result in a lowest common denominator Act (one of the problems in negotiating standards).

- The Australian Government does not have the same bargaining strength in this field as it has had in others. It was able, for example, to obtain the agreement of the States and Territories to implement (relatively) uniform disability service Acts through the broader Commonwealth State Disability Agreement (CSDA) negotiations, which also included federal funding for disability services.

Assuming the Australian Government has Constitutional power to legislate in an area, it is possible for it to take over the field and extinguish the role of the State and Territory Governments in that area. Under section 109 of the Constitution, federal laws displace the operation of State and Territory laws to the extent of any inconsistency between the two. Inconsistency can arise either directly—where the two laws would lead to different results—or through the federal law being found to be intended to 'cover the field' and not leave any room for State laws to operate.

However, the DDA was never intended to 'cover the field'. It expressly states that it is not intended to displace State or Territory laws that deal with disability discrimination that are capable of operating concurrently with the DDA (s.13). This

approach would also put more reliance on the Constitutional power of the Australian Government to legislate in this area—an ability that is not as clear cut as it is for the States. Although the Australian Government might be able to act unilaterally, this approach would unnecessarily strain government relationships in an area in which cooperation and goodwill are essential ingredients of effective anti-discrimination policy. The Productivity Commission thus does not endorse this approach. A more cooperative approach would be for the States to refer their powers to the Australian Government, but as with the first option, there are impediments to negotiating a uniform national approach.

Conclusions

The problems of trying to negotiate a uniform national framework and the disruption that this effort would cause suggest that the best course of action is for both levels of government to continue to legislate in this area. It is important that the Australian Government retains the DDA. The Act implements the Government's obligations as a signatory to international agreements on the rights of people with disabilities, ensures a level of national uniformity in an important area of human rights, and covers the activities of the Government and its agencies (see chapter 5).

However, all anti-discrimination laws and programs must work effectively and not obstruct one another. Clarifying the relationship between the federal and State/Territory approaches to anti-discrimination, and improving cooperation across jurisdictions, will improve the efficiency and effectiveness of anti-discrimination laws and programs, and lead to better outcomes for people with disabilities.

The Productivity Commission has addressed some of the areas in which further cooperation could pay dividends. Given that all jurisdictions have similar goals, working together in education and awareness initiatives is encouraged (see chapter 7). The Productivity Commission recommends that the Australian, State and Territory governments improve cooperative arrangements at the 'shopfront' level, to provide a single point of contact for members of the public (see chapter 11). This approach would help address the unnecessary confusion among complainants about where to direct their complaint.

There is also some confusion about the impact of DDA disability standards on State and Territory legislation. As discussed in chapter 12, the Productivity Commission recommends that the DDA be amended to clarify that compliance with a disability standard (or recognised industry code) is a defence to a complaint under both the DDA and State or Territory legislation. Some States have expressed an interest in implementing standards that exceed the DDA disability standards, but the Productivity Commission argues that such variations should be resisted where

possible. Variations that are unavoidable should be accommodated in the DDA disability standards negotiations. This approach allows for some differences across jurisdictions, while preserving the benefits of certainty.

The development of DDA disability standards and industry codes in an increasing number of areas will drive further convergence of the DDA and State and Territory anti-discrimination legislation (see chapter 12). Over time, people with disabilities and businesses and service providers will benefit from increasing uniformity and certainty. It is possible, therefore, that a uniform national approach will emerge by default, as the disability standards become the overarching regulatory framework governing compliance by organisations.

DRAFT FINDING 13.1

There are advantages in retaining both the Disability Discrimination Act 1992 *and State and Territory anti-discrimination legislation. However, this places an obligation on all jurisdictions to work cooperatively to meet the needs of people with disabilities and minimise confusion about the two systems.*

An omnibus anti-discrimination Act?

The Australian Government has legislated separately for different grounds of discrimination (sex, race, disability and, under a proposed Bill, age). This occurred largely because the Government progressively introduced various discrimination Acts as it signed related international agreements. Linking each Act to specific agreements gives it greater protection from Constitutional challenge.[1] The States and Territories have no such constitutional limits in the area of anti-discrimination law. All have chosen to introduce omnibus legislation that covers discrimination on a number of grounds.

The advantages of an omnibus Act include a reduction in the volume of material that businesses and their advisers have to apply, and the removal of inconsistencies in the approach of discrimination laws passed at different times. These inconsistencies could include differences in definitions, coverage and defences, and in the functions or powers available to HREOC. There are also some advantages in administrative handling of cases involving discrimination on a number of grounds. However, inquiry participants tended not to support an omnibus anti-discrimination Act (box 13.1).

[1] The Australian Government does not have explicit power to legislate on human rights, but largely relies on the external affairs power to legislate to implement international agreements (see chapter 4).

Box 13.1 **Inquiry participants' views on an omnibus Act**

The Equal Opportunity Commission of Victoria stated that community members had mixed views. An omnibus Act would:

- more clearly acknowledge that some people experience discrimination on various grounds concurrently, and better reflect the intersection of types of discrimination and disadvantage as they impact upon people's lives; and
- be consistent with jurisdictions such as the United Kingdom and Northern Ireland, which have moved or are moving from distinct age, sex, race and disability discrimination legislation to a single equality statute.

However, strong views were expressed … in favour of retaining the DDA as specific disability discrimination legislation. These views were mainly based on the perception that the existence of disability-specific legislation is empowering for many people with disabilities. (sub. 129, p. 38)

The Anti-Discrimination Commission of Queensland supported the current approach:

The Commonwealth legislation has a high public recognition factor because it is individually titled. This is particularly important for many people with disabilities who may have less access to information than others. In State and Territory anti-discrimination legislation, disability is just one ground amongst many—often more than a dozen. (sub. 119, p. 5)

The Physical Disability Council of Australia saw no benefit in omnibus legislation:

Sex, race, disability, age and other forms of discrimination may share some antecedents and characteristics. But there are subtle (and not so subtle) differences. … we feel strongly that federal law should continue to apply the principle of horses for courses. Anti-discrimination laws should remain distinct and separate but share a common commitment to eradicate discrimination in whichever way it is made manifest. (sub. 113, pp. 8–9)

The Public Advocate in Victoria supported a stand-alone DDA:

The DDA is better known and understood precisely because it is not part of omnibus legislation. (sub. 91, p. 2)

The Disability Services Commission of Western Australia supported the current approach:

There are concerns that the disability specific focus and mechanisms of the DDA, which are so effective in redressing discrimination, would be lost if the Commonwealth adopted omnibus legislation similar to that used by the States. (sub. 44, p. 6)

HREOC argued that many advantages of the omnibus approach can be gained without the need for a single Act. An amending Act, for example, could harmonise provisions in separate anti-discrimination laws to whatever extent is justified, while leaving separate laws (sub. 143). This approach has occurred in relation to complaints, with the consolidation of complaints provisions into the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act).

HREOC also noted that the State and Territory omnibus laws, in most cases, are structured with separate divisions for the different grounds of discrimination.

Further consolidation of federal anti-discrimination Acts would be likely to follow a similar structure, which would not necessarily make using and understanding federal discrimination laws significantly clearer (sub. 143).

Although difficult to quantify, the symbolic importance of the DDA should not be underestimated. Many inquiry participants emphasised this point (box 13.1). Their views are well represented by the comments of Elizabeth Hastings, the first Disability Discrimination Commissioner:

> People who are accustomed to segregation into specialised services and facilities may not believe that a mainstream general anti-discrimination law actually is intended for their use. In this sense having a specifically named Disability Discrimination Act may serve in a way analogous to the access symbol on the door of a structure ... (Hastings 1997, p. 10)

The Productivity Commission considers that there are good reasons to retain the present suite of Australian Government anti-discrimination Acts. Perhaps most significantly, a stand-alone Act is a powerful symbol of the Government's commitment to people with disabilities. In addition, redrafting the Acts would require considerable resources for perhaps little gain. It is possible that the process of redrafting might lead to some watering down of rights contained in the individual pieces of legislation. (It is also possible that the process of redrafting might improve rights in some areas.) Finally, the Australian Government's powers to legislate in this area are not as clear as those of the States, and consolidating all grounds into one Act might make that Act more vulnerable to Constitutional challenge.

DRAFT FINDING 13.2

The advantages of a stand-alone Disability Discrimination Act 1992 *outweigh the advantages of a federal omnibus anti-discrimination Act.*

13.2 Improving employment opportunities

The Productivity Commission has examined the effectiveness of the DDA in achieving its objects. It concluded that disability discrimination in employment remains a significant issue, and that the DDA appears to have been relatively ineffective in this area (see chapter 5 and appendix A).

Non-discriminatory participation in the labour market is an important social and economic issue. Employment not only provides income to facilitate other forms of social participation, but also contributes to an individual's sense of self-worth and to others' perceptions of that individual. It is an importance source of social interaction

and networking. And, as discussed in chapter 8, there can be broad economic benefits from improving the employment opportunities of people with disabilities.

The Intellectual Disability Services Council commented on the significance of the 'employment paradigm':

> The employment paradigm is still fundamental to our society, and it retains its power to impact on people with disabilities. Employment is seen as the means of being 'productive' and being seen to be 'productive'. It is seen as perhaps the most important way of being a part of society, and as such is a powerful force for conformity. However, it is also the means of escaping, or at least minimising, the poverty trap of living on welfare allowances. Participation in the workforce is a means to many ends; adequate income facilitates a better lifestyle, easier access to the means of transport, greater opportunities for socialising and integration. (sub. 162, p. 3)

Given the importance of employment, and the limited impact of the non-discrimination provisions of the DDA, the Productivity Commission has considered alternative approaches to overcoming barriers faced by people with disabilities seeking employment.

The case for addressing this issue is accentuated by the increasing acceptance of the notion of 'mutual obligation', and by the Australian Government's proposed tightening of the conditions for obtaining the Disability Support Pension. Mutual obligation might result in less people being eligible for the Disability Support Pension and more people with disabilities looking for employment. To this end it increases the pressure to find ways to improve employment prospects for people with disabilities. The OECD has noted that mutual obligation offers a way of breaking the link between disability benefits and permanent withdrawal from economic activity. It cautions, however, that its implementation, while placing obligations on benefit recipients, also requires society to do more to help people with disabilities achieve reintegration (OECD 2003, p. 159).

Improving employment opportunities for people with disabilities is a controversial area of debate internationally. The OECD stated:

> The legislative approach to promoting the employment of disabled people is perhaps the most hotly debated issue in the context of disability policy. During the 1990s, with the introduction of anti-discrimination legislation in many OECD countries, this debate became even more intense. The difference between an approach based on civil rights and one built on obligations to employ people with reduced work capacity seems large. (OECD 2003, p. 104)

As noted in chapter 8, there are two different theoretical approaches as to who should meet the cost of social objectives, such as eliminating discrimination against certain groups. One argues that it is the primary responsibility of government, the other that it should be built into the cost of production of accessible goods and

services. But in practice, both approaches lead to a similar conclusion. In most cases, the costs of adjustments should be shared between government and business.

The role of the government is particularly important where, otherwise, costs would be imposed randomly on businesses, leading to an inequitable distribution of costs or impaired competition. This is more likely to happen under a complaints-based system. Government's contribution can also generate beneficial externalities, speed up the process of improving access and ensure socially desirable levels of production.

But employers are part of the community and have a responsibility to contribute to social goals—this is recognised in other areas such as health and safety and the environment. They could be expected to meet at least part of the cost of removing barriers to the employment of people with disabilities. In addition, employers are in the best position to identify and address these barriers. Requiring them to meet part of the cost encourages them to find low cost ways of improving opportunities, and limits incentives to ask the Government to pay for unnecessary adjustments.

Possible options for improving the contribution of government and employers to improve employment opportunities for people with disabilities are outlined below.

The role of government

Governments can improve employment opportunities for people with disabilities in several ways. They can provide disability employment services for people with disabilities, and wage subsidies and workplace modification schemes to offset, at least in part, costs faced by employers. These programs can complement anti-discrimination legislation by overcoming information failures and partly offsetting the costs of adjustments required to allow people with disabilities to take advantage of employment opportunities.

The Australian Government assists people with disabilities through community-based disability employment agencies. However, only around 3 per cent of employed people with disabilities got their jobs under these programs. A significant expansion in these programs would be required to make substantial inroads into overall disability unemployment. Although funding of disability employment programs is likely to be a helpful complementary exercise, the problem of discrimination in the open labour market would remain. Increasing resources devoted to disability employment agencies might not be effective if people with disabilities continue to face discrimination in the labour market.

Other government programs, such as 'business services',[2] assist people who are unlikely to be able to meet the 'inherent requirements' test for employment in the open market, and who would therefore fall outside the scope of the DDA employment provisions. Increasing resources devoted to these programs might provide employment for many more people with disabilities. But increasing resources in this area would produce markedly different outcomes to those that would result from lowering the level of discrimination.

Existing government incentives for employers include a wage subsidy scheme and a workplace modifications scheme. In addition, the Government provides financial and practical assistance to employers wishing to employ apprentices with disabilities. State and Territory governments operate their own schemes to facilitate public and/or private employment of people with disabilities.

The Productivity Commission sees particular merit in government programs that offset, at least in part, the costs to employers of hiring people with disabilities. As noted above and in chapter 8, government and business should share the costs of adjustments in employment.

The role of employers

Employers also have a role to play in improving the employment opportunities of people with disabilities. Many inquiry participants argued that some form of 'affirmative action' was needed to encourage employers to take a more active interest in reducing barriers to employment of people with disabilities.

Affirmative action

As discussed in chapter 2, there are different views on the meaning of affirmative action. UNESCO defines affirmative action as:

> … a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality. (UNESCO 2002, in ILO 2003, pp. 63-4)

The International Labour Organisation adds that 'these measures may consist of giving some advantage to members of target groups, where there is a very narrow margin of difference between job applicants, or of granting substantial preference to

[2] 'Business services' (previously known as 'sheltered employment') provide government subsidised employment for people who are unlikely to obtain employment in the open market.

members of designated groups' (ILO 2003, p. 64). Affirmative action measures might include:

- a commitment by employers to recruit more widely
- a legislative requirement to make workplace adjustments
- a commitment by employers to meet voluntary employment targets for minority groups
- a legislative requirement to recruit/employ fixed quotas of minority group members.

Inquiry participants expressed support for various forms of affirmative action. Some were in favour of disability employment quotas (Disability Services Commission, sub. 44; Disability Council of NSW, sub. 64; National Ethnic Disability Alliance, sub. 114; NSW Council for Intellectual Disability, sub. 117; Larry Laikind, sub. 70; Disability Action Inc., sub. 43). Other participants supported more flexible forms of affirmative action, such as voluntary targets applying to either the public sector or throughout the economy (NSW Office of Employment Equity and Diversity, sub. 172; Council for Equal Opportunity in Employment, trans.; Dennis Denning, trans.; Mark Hunter, trans.).

Some participants recommended the adoption of a 'positive duty', inspired by recent developments in Canada, Northern Ireland and the United Kingdom (box 13.2) (Equal Opportunity Commission of Victoria, sub. 129; NSW Anti-Discrimination Board, sub. 101; Anti-Discrimination Commission Queensland, sub. 119). A similar model already operates in the New South Wales public service (NSW Anti-Discrimination Board, sub. 101; NSW Office of Employment Equity and Diversity, sub. 172).

For some employers (typically public sector and large private sector employers), several countries have mandatory employment quotas for people with disabilities. However, the OECD (2003, p. 105) noted that quota fulfillment in all countries that have quotas is 'relatively low', due to problems with eligibility criteria, quota specifications and administration (see appendix E).

Of those inquiry participants who commented on this topic, only one opposed affirmative action policies, particularly those policies involving employment quotas (Australian Chamber of Commerce and Industry, trans., p. 694).

Box 13.2 Affirmative action in Canada, the United Kingdom and Northern Ireland

In **Canada**, the *Employment Equity Act 1995* aims to address disadvantage in employment experienced by women, visible minorities, Aboriginal people and persons with disabilities. The legislation imposes on federally regulated private and public employers of more than 100 persons a duty to achieve proportional representation of minority groups (that is, a quota), through the adoption of employment equity plans designed to remove barriers to employment participation. The Canadian Human Rights Commission has the power to audit employer performance to ascertain whether an employer is complying with the legislation. If the employer is not in compliance, then the commission can issue a compliance notice or, if non-compliance persists, ask a tribunal to issue an order of compliance.

In 2000 the Canadian Human Rights Act Review Panel conducted a review of the *Canadian Human Rights Act* and made 165 recommendations for reform. One reform proposed by the panel focused on repositioning the legislation to impose positive duties upon employers and service providers.

In the **United Kingdom**, the *Race Relations Act 1976*, as amended by the *Race Relations (Amendment) Act 2000*, places a general statutory duty on a wide range of public authorities to promote racial equality and prevent racial discrimination. The Commission for Racial Equality, any other organisation or an individual can apply to the High Court for judicial review of a public authority's failure to comply with the general duty. If the commission is satisfied that a public authority is not complying with its specific duties, then it has the power to serve a compliance notice requiring the authority to take action. If, after three months, the authority has not taken action as directed, then the commission can apply to a court to order compliance. The UK Parliament is considering a Bill extending the affirmative action provisions of the Race Relations Act to other minority groups (including people with a disability) and to designated private sector employers.

Affirmative action provisions in **Northern Ireland** are based in the Fair Employment and Treatment (Northern Ireland) Order 1998 and the *Northern Ireland Act 1998*., which legislate affirmative action to combat discrimination against racial and religious minorities in the private and public sectors. Employers have to adopt 'equality schemes' and review their employment policies periodically. Public authorities are also required to publish equality impact assessments detailing whether the work of the authority has had any adverse or positive impacts on the promotion of equality. The Equality Commission has the power to monitor compliance and to issue a legally enforceable direction in some cases.

Sources: Equal Opportunity Commission of Victoria, sub. 129; NSW Anti-Discrimination Board, sub. 101.

One possible approach—a limited positive duty

The impact of the anti-discrimination provisions of the DDA on employment has been disappointing (see chapter 5). The DDA currently imposes a 'passive' requirement on employers not to discriminate. But, as noted, employers are in the best position to identify and eliminate barriers that restrict employment opportunities for people with disabilities. There could be a case for converting the current passive requirement into a more active requirement to address barriers to employment of people with disabilities.

The Productivity Commission is considering the case for introducing a limited positive duty on employers. One possible approach is spelt out in box 13.3, under which employers would be required to take 'reasonable steps' to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities. In practice, 'reasonable steps' could include:

- examining recruitment practices for potential indirect discrimination
- looking at characteristics of current staff and reasons for any under-representation of people with disabilities
- considering access issues or undertaking an access audit
- developing a voluntary action plan.

This duty, to be prepared to provide an accessible workplace, free from discrimination on the ground of disability, would be analogous to existing occupational health and safety duties to provide a safe workplace.

The Commission makes the following points about a positive duty.

- Such a duty could be balanced by improved government funded programs to offset, at least in part, the adjustment costs of hiring employees with disabilities.
- The Commission does not favour extending this duty to require mandatory employment quotas or targets. Mandatory quotas are distortionary, blunt instruments and are susceptible to problems in definition and administration. Nevertheless, individual employers might choose to adopt 'affirmative action' policies.
- Employers should not be required to make all possible workplace adjustments 'just in case'. Rather, they would be expected to take steps to identify barriers and consider ways of eliminating those barriers in the future.
- Employers should only be required to do what was reasonable in their circumstances. This is likely to differ between large and small business and firms in different industries.

Box 13.3 **Employers' duty—a possible approach**

(1) An employer must take reasonable steps to identify, and be prepared to eliminate, barriers which prevent, limit or affect the opportunities of people with disabilities to participate in the same way as others in employment related areas of activity.

(2) Employment related areas of activity include but are not limited to:

  (a) pre-employment, including but not limited to, advertising employment, applying for employment and the offering of employment

  (b) employment, including but not limited to, terms and conditions of employment (including remuneration), promotion, supervision, training and transfer

  (c) the termination of employment, including but not limited to, performance management and review, discipline and procedures connected with termination.

(3) An employer may comply with the duty under this section by:

  (a) implementing reasonable steps to identify and eliminate those barriers mentioned in subsection (1) or

  (b) identifying the reasonable steps to be taken to eliminate those barriers and implementing those steps in relation to a particular person as and when those barriers arise.

(4) Examples of the areas that an employer might take reasonable steps, either immediately or as and when those barriers arise, in carrying out the duty imposed by this section include:

  (a) the modification of workplace facilities, practices, procedures or policies

  (b) provision of special services, facilities, equipment or assistance

  (c) adoption of affirmative action such as targets or quotas

  (d) lodgement, implementation and regular effectiveness review of action plans

  (e) regular training for the workforce about attitudes, behaviour and values

  (f) introduction of flexible working conditions

  (g) non-discriminatory recruitment policies, such as advising unsuccessful employment candidates of the outcome of the recruitment process.

(5) A breach of the duty imposed by this section constitutes unlawful discrimination in contravention of this Act.

(6) An employer does not have to comply with the duty imposed by this section in respect of a particular person if to do so would impose on the employer an unjustifiable hardship.

(7) An employer does not have to comply with the duty imposed by this section in circumstances where the Act does not make discrimination by the employer in those circumstances unlawful.

(Continued next page)

Box 13.3 (continued)

(8) The duty imposed by this section creates no liability or right apart from this Act.

(9) It is a defence to a claim of unlawful discrimination under this Act if the employer proves that the employer has complied with the duty imposed by this section in the circumstances of a particular case.

The exemption power would apply to this section. It should commence on a day to be proclaimed but, if it does not commence earlier, should automatically commence on 1 July 2005.

The Commission recognises that this duty would have both benefits and costs.

- A positive duty to take reasonable steps would place a greater onus of proof on an employer. If a complainant could demonstrate possible discrimination, then the employer would be required to demonstrate that they had considered and taken reasonable steps to prevent discrimination occurring. This would go further than the current requirement that an employer make out one of the defences under the DDA (inherent requirements, unjustifiable hardship or the 'reasonableness' test in indirect discrimination) although those defences would still be available (see chapters 9 and 10).
- It would possibly add to the compliance burden of all businesses. All employers subject to the duty would be required to take reasonable steps. However, the duty could reduce the 'surprise' element inherent in the current complaint based system. Employers could factor the cost and timing of future adjustments into their normal business practices. And the Productivity Commission has noted that the duty should be accompanied by increased government funded programs to offset, at least in part, the adjustment costs of hiring employees with disabilities.

A positive duty on employers could have a significant impact on business. The Commission is seeking views on compliance and other costs, as well as benefits of such a duty. It will also consider several outstanding implementation issues, discussed briefly below.

How would the duty be enforced?

As noted, individuals could use the duty to assist a complaint of unlawful discrimination in employment. In addition, the Productivity Commission has recommended that HREOC be granted a self-start power to initiate complaints (see chapter 11). HREOC could initiate a complaint if a number of complaints against an employer were difficult to substantiate individually, but collectively indicated the presence of a systemic problem.

Should the duty apply to all employers?

The Productivity Commission is required to 'minimise the compliance costs and paper burden on small business' (term of reference 3(I)). To achieve this, a positive duty on employers could be limited to government organisations and large employers. New South Wales applies a size limit (six employees) to the application of its anti-discrimination legislation. Size exemptions also apply in the United States (25 or fewer employees until 1994; 15 employees since 1994) and were until recently in operation in the United Kingdom (less than 15 employees).

Almost 30 per cent of people with disabilities are employed in businesses of fewer than five employees (compared to just over 20 per cent of all employees). This could imply that the duty is not required for small business, as they are already employing a higher proportion of people with disabilities than larger employers. However, the burden on small business would be minimised by the self-limiting nature of the duty. Employers would be required to take steps only to the point of unjustifiable hardship, which could be argued to imply less adjustment for a small employer than for a large employer.

What is the relationship between 'reasonable steps' and 'unjustifiable hardship'?

The limited positive duty implied by 'reasonable steps' would need to be clearly separated from the case-by-case assessment of unjustifiable hardship that might follow a specific complaint. However, it would be possible to take any 'reasonable steps' adopted by an employer into account when assessing unjustifiable hardship, in much the same way as voluntary action plans can be taken into account under current arrangements.

REQUEST FOR INFORMATION

The Productivity Commission seeks views on how the costs of adjustments should be shared between governments, organisations and consumers. The Commission would welcome comment on the adequacy of existing government funding schemes for such adjustments, and the advantages and disadvantages of extending particular arrangements (such as portable grants).

REQUEST FOR INFORMATION

The Productivity Commission seeks information on the potential impact on businesses and people with disabilities of introducing a limited positive duty on employers to take 'reasonable steps' to identify and work towards removing barriers to employment of people with disabilities, including:

- *the nature of the duty*
- *how it should be implemented and enforced*
- *the costs and benefits for business, including small business*
- *the costs and benefits for people with disabilities*
- *the role of government in sharing costs and maximising benefits.*

14 Other issues

Inquiry participants raised many issues that affect equality of opportunity for people with disabilities. Some of these issues cannot be addressed through amendment to the Disability Discrimination Act (DDA) in the same manner as the issues discussed in earlier chapters. They might nevertheless have an effect on the ability of the DDA to achieve its objectives. These issues include: funding arrangements for legal services, the Human Rights and Equal Opportunity Commission (HREOC) and disability services in education (section 14.1); access to disability services (section 14.2); government procurement policies (section 14.3); and copyright arrangements in Australia (section 14.4). Although some aspects of these issues fall outside the terms of reference of this inquiry, their impact on the DDA is discussed in this chapter.

14.1 Funding

Many inquiry participants noted a lack of funding in various areas as a particular concern. The major issues raised here concern funding for the Disability Discrimination Legal Services, HREOC and education providers. Section 14.2, which addresses access to disability services, also addresses some funding issues.

Funding of Disability Discrimination Legal Services

Adequate legal assistance for people with disabilities is essential to achieving equality before the law (chapter 6) and can influence the ability of people with disabilities to access the DDA complaints system (chapter 11). Disability Discrimination Legal Services in each State and Territory are the main source of legal assistance for people with disabilities for DDA issues, although many disability advocacy groups also provide legal advice to people with disabilities (see chapter 11).

Smith (sub. 127, p. 1) observed that funding of the national network of these services aims to ensure the community is aware of, and makes use of the DDA. Several inquiry participants commented on a perceived underfunding and understaffing of these services. Disability Action Inc. suggested the South Australian service was ‘stretched to capacity’ (sub. 43, p. 3) and Trevor Oddy

commented that the ACT service 'cannot even staff their office on a regular basis' (sub. 58, p. 4). The Victorian service, which receives some funding from the State Government in addition to its federal funding, commented that resource constraints meant it sometimes needed to turn people away, although it 'will always try and refer them to another organisation so that they are given assistance' (trans., p. 1756). It noted further that its:

> … capacity … to assist in a greater number of cases would be enhanced by funding levels, which accurately reflected the level of need … and the level of funding required … to offer a comprehensive Statewide service. (sub. 76, p. 3)

The need to prioritise cases does not automatically mean that current funding levels are inadequate or that an increase in resources is justified. The Productivity Commission agrees however, with the general principle that resources allocated to the legal services should reflect the responsibilities that the services are expected to assume. Moreover, given the important role of complaints in enforcing the DDA, inadequate legal support for people with disabilities can undermine the effectiveness of the DDA in achieving its objectives, particularly in addressing discrimination and equality before the law (see chapters 6 and 11).

DRAFT FINDING 14.1

Inadequate funding of Disability Discrimination Legal Services could undermine the effectiveness of the Disability Discrimination Act 1992.

Funding of the Human Rights and Equal Opportunity Commission

Many inquiry participants commented on the resource constraints faced by HREOC, with some suggesting these were among the main factors limiting the effectiveness of the DDA. The Disability Council of NSW, for example, argued:

> While HREOC is seen to have an educative role it is under-staffed and under-resourced. The lack of resources and the lack of power to enforce compliance with the legislation are two major factors affecting the effectiveness of the DDA. (sub. 64, p. 20)

Many referred specifically to the impact of cuts to HREOC's budget. Anita Smith, for example, commented on the impact of budget cuts in 1997-98 on the scope of HREOC's work:

> … had the effect of really removing most of the … policy development areas and it skimmed HREOC right back to just its legal complaints handling role … Whereas, earlier the commissioners had the ability to say, 'I want to conduct this inquiry,' and they would have available staff and they would have available resources, after that 43 per cent funding cut, none of that is there. (trans., p. 301)

Some inquiry participants, such as the Law Institute of Victoria (sub. 81, p. 1) and Anti-Discrimination Commission Queensland (sub. 119, p. 7), suggested the need to restore funding to at least the levels prevailing before 1997-98.

One reason for budget cuts that year was anticipation of the removal of HREOC's hearings functions (see chapters 4 and 11). HREOC also faced problems with cooperative arrangements with the States and Territories, which HREOC considered added to complaint handling costs. HREOC closed off these arrangements.

The Productivity Commission notes that HREOC needs sufficient resources to perform the functions expected of it. Many draft recommendations in this report—such as those relating to HREOC's roles in education and awareness (see chapter 7), complaints, and cooperation with the States and Territories (see chapter 11)—have potential resource implications. More effective use of existing resources, such as enhanced links with other organisations, can moderate the extent to which additional resources are required for these roles.

That said, any significant additions to HREOC's responsibilities, such as those recommended in this report, are likely to require additional resources for HREOC to undertake them effectively, particularly given HREOC's ongoing role in handling complaints. As noted in chapter 11, the Productivity Commission's preferred approach to reforming the DDA and HREOC's complaint handling process may also have implications for the administration of other Commonwealth anti-discrimination Acts. The full impact of the Productivity Commission's recommendations on resources for HREOC needs to be assessed in this broader context.

Funding disability services in education

Inquiry participants' concerns about funding arrangements in education related mainly, although not exclusively, to funding for students with disabilities who attend mainstream non-government primary and secondary schools. The number and proportion of students identified as having a disability increased in non-government schools in the 1990s, but remained well below the number and proportion of students identified as having a disability in government schools (see chapter 5 and appendix B).

Some inquiry participants said integration has been too fast and has not been supported with adequate government resources or training for education staff. They said that these issues have undermined the effectiveness of the DDA in reducing discrimination and improving access to mainstream education for school students with disabilities.

Funding issues for schools

Funding for adjustments, programs and services to support students with disabilities in mainstream schools is provided by federal, State and Territory governments through various programs. These programs have varying eligibility criteria and formulae for determining the amount of assistance available. Some government funding programs are calculated and paid to schools per student with a disability, while other programs are paid to the school or the sector (Catholic or independent) as a whole. Some funding is 'earmarked' for assistance to students with disabilities, while some may be used to assist individual students and/or for other purposes (such as capital works or building maintenance grants).

Individual students with disabilities and the schools they attend receive different levels of funding for adjustments, teaching aides and other services, depending on the sector in which they operate (government, Catholic or other non-government), the State or Territory in which they are located, and sometimes other factors, such as a regional, remote or low socioeconomic location.

The associations of independent schools from several States and other inquiry participants said that students with disabilities who attend independent or Catholic schools receive less special financial assistance from government than they would if they attended a government school. These inquiry participants were highly critical of government funding arrangements for students with disabilities in non-government schools and of the inability of the DDA to address perceived inequities in this area (Association of Independent Schools South Australia, sub. 135; Association of Independent Schools Victoria, sub. 99; Australian Associations of Christian Schools, sub. 148; National Council of Independent Schools Associations, sub. 126; National Catholic Education Commission, sub. 86; Association of Independent Schools, Northern Territory (Alice Springs visit notes)).

The DDA does not cover funding arrangements in education because, first, funding and eligibility arrangements for special education programs come under the 'special measures' exemption (s.45) of the DDA (section 14.2 and see chapters 4 and 10). Second, the students affected by these arrangements do not appear to be discriminated against on the ground of disability, as defined by the DDA. Rather, as described by inquiry participants, discrimination is based on the school sector that students with disabilities choose to attend.

Schools associations, disability groups and individuals emphasised that inadequate or inequitable government funding can reduce education choices for school students with disabilities and exacerbate disability discrimination. The Royal Institute for Deaf and Blind Children (sub. 97, p. 5) said its single biggest issue in education 'is the inadequacy of funding support … to allow students with disabilities … to opt

for integrated education in non-government schools'. Tom Byrnes (sub. 46, p. 2) commented that although students 'are not denied the right of choice under the present funding arrangements … they are certainly severely penalized' if they attend a non-government school.

Other inquiry participants suggested inadequate funding for students with disabilities is not just an issue in non-government schools. The Australian Education Union stated:

> The level of resourcing is generally totally inadequate. As a result, the needs of the student with a disability are not adequately met, and other students in the class or school also often suffer diminished resources. (sub. 39, p. 3)

Funding arrangements for disability services and programs in education are outside the scope of the DDA and outside the terms of reference of this inquiry. Funding arrangements, among many other factors, affect education choices for all students. However, to the extent that funding arrangements restrict choice more for students with disabilities than for students without disabilities, they reduce equality of opportunity for these students.

More significantly, if funding arrangements mean that schools are more likely to rely on unjustifiable hardship to lawfully exclude students with disabilities from enrolment or from certain education activities, then the arrangements might contribute to disability discrimination. Or, if funding for adjustments for students with disabilities is inadequate but schools provide adjustments anyway, fewer resources will be available for other students. A Senate inquiry examined funding and other issues for school students with disabilities in 2002 (see below).

DRAFT FINDING 14.2

Some inquiry participants expressed concern that current funding arrangements restrict education choice for school students with disabilities to a greater extent than students without disabilities. This could contribute to discrimination by increasing the likelihood that some schools would be able to claim unjustifiable hardship under the Disability Discrimination Act 1992.

Senate Inquiry into Education of Students with Disabilities 2002

Funding arrangements for special education measures in mainstream schools were considered, among other education issues, by the Senate Inquiry into Education of Students with Disabilities in 2002 (Senate 2002). The inquiry recommended the introduction of disability standards for education, with all governments to contribute to the cost of implementation. It also recommended that the Department of Education, Science and Technology explore a scheme to assist students to purchase

equipment. It did not, however, recommend changes to the level or distribution of Commonwealth funding for disability programs or services in schools or other education institutions.

Appropriate levels and distribution of Government funding among various education sectors are the subject of much debate. In its response to the Senate inquiry report, the Australian Government indicated that it would consider funding concerns for students with disabilities in non-government mainstream schools 'in the context of planning for the 2005–08 quadrennium'—that is, in the context of planning national education budgets and program funding for all schools (DEST 2003, pp. 4–5).

Both the Senate Committee and Australian Government responses highlighted the ongoing problem of shortages of specialist disability education professionals, particularly in regional areas. Like the funding issue, this shortage might affect the ability of schools to meet the needs of students with disabilities, regardless of the student's educational preferences or the school's DDA obligations. The National Council of Independent Schools Associations noted a possible implication of this:

> Given the likely on-going difficulties in accessing expertise … it may not be appropriate that every individual school be expected to meet the needs of students with disabilities, especially those requiring very specialist assistance. (sub. 126, p. 5)

In the interests of reducing discrimination and promoting integration in education, the Productivity Commission considers that a general objective of government education funding arrangements should be to ensure school students with disabilities have the same range of education choices that other students have. Their choice of school sector should only be subject to the same personal factors—such as location, income and education needs—as other students. This objective could be assisted by linking a greater proportion of special education funding to individual students, rather than to the school or the sector they attend. This would enable, for example, special program funding to 'follow' an individual student with a disability, if that student chooses to change schools.

On the other hand, it is probably more efficient to allocate funding intended to improve physical access (to buildings and facilities) to institutions rather than individuals, because such improvements are more likely to be 'one-off' adjustments. As noted by the Australian Government in its response to the Senate inquiry report, these funding decisions need to be considered within the context of planning and funding for the many competing demands across all areas of schools education.

Funding issues for tertiary education

Although issues raised by inquiry participants predominantly related to funding in primary and secondary schools, some related to the tertiary sector. Advocacy Tasmania, for example, commented on the problems people with disabilities in Tasmania who wish to attend TAFE or university face obtaining government funded personal care support. Janet Hope and Margaret Kilcullen (sub. 165, p. 6) referred to problems obtaining funding for 'personal devices' for courses that are not considered 'sufficiently' vocational (in Kilcullen's case a combined science/arts degree preliminary to a planned post-graduate diploma of education). Transparency of funding was questioned by Peter Young (sub. 199, p. 1), who noted that 'funding for the disabled at tertiary institutions comes in a non-transparent packet'.

ParaQuad Tasmania suggested that a 'physical disability cost of living allowance' and the provision of a 'home computer/software/Internet package' were required to help people with physical disabilities undertake further education for employment, given the problems they can face covering the costs (of transport and medical equipment, for example) of such education (sub. 106, p. 3).

In the 2001 Budget, the Australian Government announced the Additional Support for Students with Disabilities Programme, which is intended to assist Australian universities to support 'students with high support needs'. Funds are paid to the institution rather than to individual students (DEST 2002b, p. 94). As noted in relation to funding for schools, funding for support services might be more effective in promoting equity of choice for students with disabilities if it is paid to individuals rather than institutions. As a general principle, the Productivity Commission also notes the significant impact that funding for students with disabilities can have on those students' employment opportunities.

14.2 The Disability Discrimination Act and disability services

Many inquiry participants criticised arrangements governing the eligibility criteria, adequacy and appropriateness of services provided specifically to people with disabilities. Significant concerns among inquiry participants included institutional and community accommodation for young people with disabilities, and the sexual abuse of people with disabilities in institutions.

The Commonwealth–State Disability Agreement (CSDA) provides a framework for the provision of specialist disability services,[1] defining the roles and responsibilities of the federal, State and Territory governments in the provision of certain services to people with a disability. The Australian Government is responsible for the provision of employment services for people with disabilities, while the States and Territories are responsible for managing accommodation support services, respite care services and community access programs such as day programs (CSDA 1998).

Among other things, the CSDA aims to 'promote the rights of people with a disability as members of the community and empower them to exercise these rights' (CSDA 1998), and it contains measures to protect these rights. The National Disability Services Standards have been adopted by all jurisdictions as the basis of quality assurance for disability services (box 14.1), and section 6(4) of the CSDA requires each jurisdiction to ensure these standards are 'upheld and monitored'.

There is no automatic right of access to services under the CSDA. Eligibility for services is assessed on the level of disability and the need for services, and access is often subject to the availability of places in the required service. The Australian Institute of Health and Welfare estimated unmet need in 2001 of:

- 12 500 people needing accommodation and respite services
- 8200 places needed for community access services
- 5400 people needing employment support (AIHW 2003).

The Productivity Commission recognises the importance of access to disability services. These services play a significant role in enabling people with disabilities to take advantage of opportunities to participate in the life of the community.

However, the provision of such services can involve difficult decisions about the allocation of resources. The CSDA's objects recognise that government resources are limited and that services must sometimes be rationed. One object, for example, is to 'provide access to specialist government funded or provided disability services on the basis of relative need and available resources' (CSDA 1998). Similarly, section 3(2) of the federal *Disability Services Act 1986* refers to the need to have regard to limited resources and to 'consider equity and merit in accessing those resources'.

[1] The CSDA is the second in a series of agreements. Negotiations are underway on a third agreement: the Commonwealth, State and Territory Disability Agreement (CSTDA).

Box 14.1 **National Disability Services Standards**

First adopted by all jurisdictions in 1992-93, the National Disability Services Standards were amended in 1997. The current standards are as follows.

1 Service access. Each consumer seeking a service has access to a service on the basis of relative need and available resources.

2 Individual needs. Each person with a disability receives a service which is designed to meet, in the least restrictive way, his or her individual needs and personal goals.

3 Decision making and choice. Each person with a disability has the opportunity to participate as fully as possible in making decisions about the events and activities of his or her daily life in relation to the services he or she receives.

4 Privacy, dignity and confidentiality. Each consumer's right to privacy, dignity and confidentiality in all aspects of his or her life is recognised and respected.

5 Participation and integration. Each person with a disability is supported and encouraged to participate and be involved in the life of the community.

6 Valued status. Each person with a disability has the opportunity to develop and maintain skills and to participate in activities that enable him or her to achieve valued roles in the community.

7 Complaints and disputes. Each consumer is free to raise and have resolved, any complaints or disputes he or she may have regarding the agency or the service.

8 Service management. Each agency adopts sound management practices which maximise outcomes for consumers.

9 Employment conditions. Each person with a disability enjoys comparable working conditions to those expected and enjoyed by the general workforce.

10 Training and support (former standards 10 and 11 amalgamated). The employment opportunities of each person with a disability are optimised by effective and relevant training and support.

11 Staff recruitment, employment and training. Each person employed to deliver services to the service recipient has relevant skills and competencies.

12 Protection of human rights and freedom from abuse. The agency acts to prevent abuse and neglect and to uphold the legal and human rights of service recipients.

The National Disability Service Standards apply to all services receiving funding under the Commonwealth-State Disability Services Agreement. Jurisdictions can impose standards over and above these. Most jurisdictions enter service agreements with providers and link funding to the attainment of objectives closely related to the standards. All federally funded employment services are to be certified against the standards before 31 December 2004.

Source: FACS 2003, pers. comm., 9 September 2003.

The Productivity Commission considers that the CSDA arrangements provide a transparent mechanism by which governments make difficult decisions about eligibility criteria and the nature of services to be provided for people with disabilities. It also incorporates mechanisms for the protection of the rights of people with disabilities using those services. It is important, however, that those mechanisms are robust and accessible to people with disabilities.

Ministers with responsibility for disability services have endorsed five policy priorities to be implemented over the life of the third agreement—the Commonwealth, State and Territory Agreement (CSTDA)—other elements of which are still under negotiation). These priorities place greater emphasis on accountability, transparency and improved reporting requirements (box 14.2). In addition, the Australian Government has signed bilateral agreements with all jurisdictions (except New South Wales) agreeing to improve long term demand management processes and strategies for early intervention and prevention.

The Productivity Commission considers that the priority areas identified for the CSTDA will help improve the transparency and accountability of disability services. It considers that it is not appropriate to require HREOC or the courts to second-guess government resource allocation decisions by expanding the scope of the DDA to cover questions of the establishment, funding or eligibility criteria of disability services. It also notes that there are existing complaint mechanisms for disability services, including State and Territory disability commissions and ombudsmen (see chapter 10).

But all aspects of disability services should not be beyond the scope of the DDA. The DDA should apply to the administration of disability services. That is, if a person meets the eligibility criteria for a disability service, he or she should receive the same type and level of service given to other recipients, regardless of whether that person has some other, unrelated disability. Information on disability services, for example, should be available in alternative formats, and providers' premises should be physically accessible. HREOC commented on the DDA and the provision of disability services, and noted that:

- as anti-discrimination legislation, the DDA is concerned with ensuring that what is provided is provided in a non-discriminatory manner, not with ensuring services are provided in sufficient amounts to ensure equality of outcomes
- section 45 (the 'special measures' exemption) should not be interpreted as ruling out any discrimination complaint against service providers
- the quantity of services provided may be a matter for complaint if an appropriate comparator can be found and direct discrimination can be assessed
- further testing of DDA provisions in this area is desirable (sub. 143).

Box 14.2 **CSTDA policy priorities**

- *Strengthening access to generic services* enables people with a disability to participate further in their community—both economically and socially—and recognises that generic services complement specialist disability services. Initiatives to strengthen access to generic services include promoting the responsiveness and accessibility of general community services and facilities through legislation, partnerships, education and awareness, and access and inclusion initiatives. Initiatives also include promoting planning and implementation of action plans or similar mechanisms across government agencies and between government programs, and promoting a better understanding of the DDA and other relevant legislative requirements relating to people with a disability.
- *Strengthening across-government linkages* involves influencing the service system to enable people with a disability to have appropriate access to a range of services. It also involves improving collaboration and coordination between, and transition across, programs and Governments to ensure that people with a disability have opportunities to access and move to services at all stages of their lives.
- *Strengthening individuals, families and carers* enhances their wellbeing, contribution, capacity and inclusion. Initiatives to strengthen individuals, families, and carers involve developing supports and services based on individual needs and outcomes, and increasing the opportunity of people with a disability, their families and carers to influence the development and implementation of supports and services at all levels.
- *Responding to, and managing demand for, specialist disability services* means that as the demand for specialist disability services continues to grow, all jurisdictions need to improve long-term strategies to respond to and manage this increasing demand. This involves developing approaches that enhance prevention and early intervention outcomes, effective coordination across service systems, and clear and transparent decision making.
- *Improving accountability, performance reporting and quality*, as well as the transparency of specialist disability services, involves ensuring that performance information is provided within a nationally consistent, output/outcome based framework. This includes implementing consistent data collection items and coherent data systems linked to a national performance reporting framework.

Source: FACS 2003, pers. comm., 9 September 2003.

A recent tribunal decision in the ACT (under the ACT *Discrimination Act 1991*) suggests there may be some ambiguity in the application of the DDA to disability services.[2] In that case, the ACT Administrative Appeals Tribunal held that a provision that exempts 'acts that are reasonably intended to benefit people with a

2 *ACT Health & Community Care Service and Discrimination Commissioner Vella & Ors (Party Joined)* (1998) ACTAAT 286.

disability' (similar to the wording of section 45), means that whole programs or services are exempt, rather than specific actions performed for them. The scope of the s.45 exemption is discussed in chapter 10.

A number of inquiry participants cited problems in how government services and programs are administered. Some of these problems relate to difficulties some people with disabilities have meeting access requirements for social services. These included:

- problems for some people with complex communication needs, who can find it difficult to provide information in particular (for example, written) formats or to meet time limits applied to appointments with agencies such as Centrelink (International Society for Augmentative and Alternative Communication, Australian Chapter, sub. 182, p. 4).
- problems for some people with mental health conditions in meeting activity or participation requirements for welfare payments (Mental Health Council of Australia, sub. 150, pp. 17–18).

Other concerns relate to the impact of certain requirements on carers, such as the need to repeat paperwork every few years to ensure payments continue, even for those with 'permanent' disabilities (Jean Young-Smith, trans., p. 84), and a lack of help to fill in forms, which can be a particular problem for carers from non-English speaking backgrounds (Disability Coalition, trans., pp. 826–7).

The Productivity Commission acknowledges the need to have some standard processes and eligibility criteria for these services and payments. It may not be possible to eliminate the problems that these processes can create in particular cases. However, it seems desirable that some flexibility be incorporated into processes to better address the particular needs of these groups. In some cases, however, attempts to do so can be made difficult by people's non-disclosure of their disabilities.

DRAFT FINDING 14.3

It is the role of governments, not the Disability Discrimination Act 1992, *to determine the level of funding and eligibility criteria for disability services. It is, however, appropriate for the Act to apply to the administration of disability services.*

14.3 Government procurement policies

Some countries have used government procurement policies to try to improve outcomes for particular groups that face discrimination (ILO 2003). Such policies can be used to influence the supply of goods and services (accessible technologies, for example) or the behaviour of vendors as employers.

Influencing the supply of accessible goods and services

Government procurement guidelines in Australia are issued by the Department of Finance and Administration and were last updated in February 2002 (DOFA 2002). Their purpose is 'to provide a policy framework to assist and ensure that Government agencies achieve value for money in their procurement activities' (DOFA 2002, p. 4).

The guidelines do not refer explicitly to disability considerations. However, one section of the guidelines identifies 'additional Commonwealth legislation and policies that may have an impact on procurement decisions', which agencies 'should consider applying … to their outsourced service providers on a case-by-case basis'. It is noted that 'agency officials must have regard to the Commonwealth Disability Strategy in their procurement decisions' (DOFA 2002, pp. 17-18).

Some inquiry participants saw the current approach as inadequate. The National Information and Library Service (NILS) described the existing rule as 'wishy-washy' (trans., p. 1942), and Jolley (2003, p. 53) noted that 'such a tentative first step towards an inclusive procurement policy has been frustrating for consumer advocates'.

Inquiry participants suggested that the Australian Government adopt a procurement policy for information and communication technology (ICT) similar to that in place in the United States and proposed in some other countries (box 14.3) (NILS, sub. 206, pp. 1–2 and trans., p. 1942; TEDICORE, sub. 122, pp. 2–3;).

Jolley (2003, p. 100) noted that the US government 'uses the federal procurement process to ensure that technology acquired by the federal government is accessible'. He recommended:

> … HREOC … initiate discussions with the Department of Finance and Administration, and with other relevant organisations, towards an inclusive Federal Government public procurement policy, modelled on section 508 of the Rehabilitation Act in the United States. (Jolley 2003, p. 53)

It is argued that such a policy would improve outcomes for people with disabilities in the public sector, and have various flow-on benefits. As governments are large purchasers of goods and services (although less so in Australia than in the United States), they can exert significant market influence. Government procurement policies can promote the development of accessible technologies (Jolley 2003, pp. 52–3; NILS, trans., p. 1939) and lead 'accessibility efforts by private sector providers' (HREOC, sub. 143, p. 80). In Australia, according to NILS, large companies that have disability action plans are 'already sort of thinking along these directions and if they're advised that this is happening and that the products and services are available and this is what the government is doing, then … it will trickle out' to them (trans., p. 1942).

In addition, there are perceived benefits in:

- employment, through the potential to increase the productivity of people with disabilities, and even potentially increase the number of people with a disability who have access to employment (TEDICORE, sub. 122, p. 3)
- other areas, including education, telecommunications and personal computing, for people with sensory and physical disabilities (Jolley 2003, p. xxxi).

Both NILS (trans., p. 1940) and HREOC commented that this approach would facilitate more rapid systemic than would reliance on a complaints-based system. HREOC also suggested that this would be:

> … potentially at less cost (since it is generally cheaper if accessible equipment is acquired at the outset rather than equipment needing to be modified or replaced). (sub. 143, p. 81)

Some commentators have argued that, because other countries are adopting inclusive procurement policies, Australia should move along the same path. Some inquiry participants noted that this would prevent 'dumping' of 'substandard equipment or systems' in the Australian market (HREOC, trans., p. 1156). Jolley (2003, p. 53) commented that 'whilst it is difficult to provide evidence of endemic practices that justify this fear, the prolific use of inaccessible PDF files on government websites shows a widespread absence of disability awareness and lack of inclusive practices'.

NILS argued that it was also a way of encouraging smaller companies to develop accessible technologies for the domestic market. Because this is where these companies tend to focus initially, it can have a subsequent impact on their international competitiveness (sub. 206, p. 2; trans., p. 1938). NILS also suggested this issue might be included in Australia's free trade negotiations with the United States (trans., p. 1938).

Box 14.3 **Overseas public procurement policies**

United States. In 1998, the US Congress amended the *Rehabilitation Act 1973*, strengthening the access requirements for federal government electronic and information technology (EIT) (s.508). It covers technology such as office equipment, desktop computers, telecommunications equipment, and software, and requires that, unless an undue burden would be imposed:

- federal agencies develop, procure, maintain or use EIT that allows employees with disabilities to have access to, and use of, information and data that is comparable to the access and use afforded employees without disabilities
- members of the public with disabilities, who seek information or services from a federal agency, have access to, and use of, information and data that are comparable to that provided to those without disabilities.

The legislation directs the Access Board to develop access standards to form part of procurement regulations. Standards were adopted in 2000, based on the final report of the board's EIT Access Advisory Committee.

An increasing number of state and local governments are adopting these standards. Perceived benefits include: its influence on change in the information and communication technology sector, particularly given the purchasing power of the US Government; its promotion of awareness of what 'inclusive design' means, including in the private sector; and its potential worldwide flow-on effects.

Other countries. Inquiry participants commented that several other countries are working towards accessible procurement standards. In Europe, however, the Commission of the European Communities rejected amendments proposed by the European Parliament to include accessibility considerations for people with disabilities. Among other things, it stated 'the public contracts directive, the purpose of which is to coordinate procedures, is not the proper instrument for imposing an obligation to prescribe such features'.

Sources: CEC (2003); Jolley (2003); HREOC (sub. 143); NILS (sub. 206); TEDICORE (sub. 122).

The desirability of strengthening Australian Government procurement policies for accessible technology depends on several factors, including:

- the effectiveness of the current approach
- the extent to which changing the current approach would lead to positive changes, relative to the costs of doing so
- the range of other mechanisms through which these objectives could be achieved, such as voluntary action plans, industry codes or industry standards
- the type of technology that would be included in the policies
- whether the policies should apply more broadly than the public sector

- the role of HREOC, if any, in the change process.

These issues are largely beyond the terms of reference of this inquiry. The Productivity Commission notes, however, several potential issues with this type of approach. First, Australia tends to be an importer of information technology, and the Australian Government is not a large purchaser of these products by world standards. Its ability to influence the overall market through its purchasing decisions is limited. Australia could, instead, benefit from the increasing development of accessible technologies abroad (despite some concerns about the 'dumping' in Australia of inaccessible products). Second, there is a danger that using procurement policies to promote social goals could become *de facto* industry assistance.

Third, even viewed through an industry assistance perspective, encouraging local companies to develop products for the domestic market is not necessarily going to improve their international competitiveness. Fourth, procurement policies may not be the best instrument with which to impose accessibility requirements, as the Commission of the European Communities noted (box 14.3). The DDA already includes measures to oblige employers to make adjustments and the Australian Government to supply accessible information. Making better use of the DDA or encouraging the development of industry codes may, therefore, be more effective overall approaches.

NILS suggested that HREOC could play three roles to encourage change. First, HREOC could work with governments to raise the issue of requirements to purchase accessible products. Second, in conjunction with the Australian Government, it could work with the technology industry 'so that products and services are available that would allow the government to … purchase things that are accessible without just purchasing stuff from the US'. Finally, NILS suggested HREOC could play a role in educating the private sector on its responsibilities under the DDA in relation to providing accessible technologies, given that such technologies are now available (trans., pp. 1941–2).

The Productivity Commission considers that government procurement policies are not generally the most appropriate instrument for trying to improve the supply of accessible technologies for people with disabilities. Other measures, such as those in the DDA, or the development of industry codes, may be more effective overall approaches.

HREOC could, however, play a role in raising awareness about the potential impact of procurement decisions, both in the context of DDA obligations and in encouraging dialogue among various interested parties. The ultimate decisions on

whether and how such policies are implemented are for governments to make, after consideration of the relevant issues and problems.

Influencing the behaviour of vendors as employers

Melinda Jones commented that 'all government contracts should require compliance with the DDA [and] … all tender documents should state that this is one of the things that is being looked for' (trans., p. 1527). In general, however, inquiry participants did not comment on the potential use of procurement policies to influence the recruitment and other employment practices of vendors.

Such policies can take a number of forms, according to the nature of the requirement or preference to be encouraged, the type of contract or company to which they apply, the mechanisms through which they operate, and the stage of the tendering process at which they apply (Erridge and Fee 2001, p. 54). In the United Kingdom, for example, amendments in 2000 to the *Race Relations Act 1976* outlawed discrimination in all functions of public authorities (including procurement). The amendments imposed a positive duty on public authorities to eliminate discrimination, and race equality considerations had to be built into procurement decisions (Commission for Racial Equality nd). The Canadian Government has introduced the *Employment Equity Act 1986* (which applies to women, aboriginal peoples, 'visible minorities' and people with disabilities), as well as the Federal Contractors Programme, which:

> … requires contractors to implement employment equity measures to necessitate the identification and removal of artificial barriers to the selection, hiring, promotion and training of the designated groups. Further, contractors will take steps to improve the employment status of these designated groups by implementing special programmes and making reasonable accommodation to achieve appropriate representation of these groups in all levels of employment. (Erridge and Fee 2001, p. 58)

There are mixed views about the merits of such policies, in theory and practice. Erridge and Fee (2001, p. 53) suggested that 'contract compliance', as it is called in the United States, is 'an effective instrument of policy for bringing about significant improvements towards equality'. Suggested benefits to suppliers include influencing organisational change, providing access to a broader range of skills, enhanced employee morale and improved corporate image (Erridge and Fee 2001, p. 59).

However, concerns have also been expressed, relating to compliance and administrative costs, and potential problems in finding suitably-qualified workers from specified groups (potentially leading to 'bad' procurement decisions) (Erridge and Fee 2001, p. 60). Groups representing Canadian people with disabilities

claimed that procurement policy did not lead to significant progress for their members in its first few years (Erridge and Fee 2001, p. 60).

The way in which such policies are implemented can significantly influence their effects. However, it has also been suggested that few of the factors necessary for the success of such a policy—such as sufficient time and resources; understanding of, and agreement on, objectives; and perfect communication and coordination—are likely to be met in practice (Erridge and Fee 2001, pp. 65–6). Resource problems appear to have been a factor in Canada, for example, where a five-step process operates (certification, implementation, compliance review, appeal and sanctions). In Ontario, the cycle of winning a contract and doing a compliance review and audit is supposed to take two years, but takes three years, with resource constraints cited as a factor (Erridge and Fee 2001, p. 62).

Procurement policies do not appear to be the most appropriate instrument with which to try to improve employment outcomes for people with disabilities. Their use leads to issues such as the selection of disadvantaged groups to which the policy should apply, and the weight that would be given to particular disadvantaged groups. In addition, these policies can be costly and time consuming to administer, involve other costs (such as compliance costs for suppliers), and might not even produce desired equality outcomes. Other approaches, such as requiring positive duties (see chapter 13), could be a more effective means of influencing employment outcomes for people with disabilities.

14.4 Copyright

The availability of information in accessible formats is a particularly important issue for people with vision impairments, and it is vital in various areas of life (see appendix D). A particular concern relates to the timely availability of accessible course material in education, especially tertiary education. Problems in this area have been cited as contributing to course withdrawals, stress, depression and loss of self-esteem among people with vision impairments (HREOC 2002g; Blind Citizens Australia, sub. 72, p. 21). As noted in section 14.1, outcomes in education can also influence employment opportunities.

The *Copyright Act 1968* contains provisions to facilitate access to material by people with print (and intellectual) disabilities (box 14.4).[3] HREOC (2002g) and some inquiry participants suggested, however, that aspects of the current copyright

[3] Print disability is defined in the *Copyright Act 1968* to mean a person without sight, a person whose sight is severely impaired, a person who cannot hold or manipulate books or focus or move his or her eyes, or a person with a perceptual disability (s.10).

arrangements affect the availability of accessible material in tertiary education. The need to first search for existing accessible versions of a particular text, for example, is said to be made more time consuming by the lack of a single national database of accessible tertiary materials (HREOC 2002g). HREOC (2002d) suggested the lack of a database was likely to be leading to duplication of effort, as well as delaying delivery of accessible materials.

Another perceived problem is the lack of a formal mechanism to allow access to material in electronic formats, from which to produce accessible versions. HREOC noted that although it:

> … understands publisher concerns regarding protection of intellectual property, direct access to digital material (from which in most cases print material is subsequently generated by publishers) would clearly be more efficient as a means of meeting the needs of many people with a print disability than existing systems using permission under the Copyright Act to scan print materials into computer formats. (sub. 219, p. 41)

As a result of these and other issues, inquiry participants suggested the need for reforms, particularly the establishment of a central repository of electronic formats of books (Association for the Blind of WA; trans., p. 795). The Association for the Blind of WA noting:

> … the intent of the DDA could be enhanced by specific provisions within the Copyright Act requiring publishers to make all their publications available in electronic or other accessible formats. (sub. 83, p. 4)

As well as resulting in significant time and cost savings (see, for example, NILS, trans. p. 1944), the Association for the Blind of WA suggested a further benefit of a legal deposit system for electronic copies would be:

> … where a book may not be a current edition and the publisher wipes routinely its electronic publication files. They don't hang onto them necessarily … a legal deposit system would get around that because there would always be a copy. (trans., p. 798)

Changes to the Copyright Act are beyond the scope of this inquiry. The Productivity Commission notes, however, that any changes to that Act would only influence processes with Australian publishers. Further, as noted by HREOC (2002g), potential effective solutions could involve legislative change and/or voluntary codes of practice and best practice guidelines by the publishing industry.

Box 14.4 **Selected features of the Australian *Copyright Act 1968***

- The statutory licence scheme under Part VB of the Copyright Act allows copyright material to be copied and communicated by institutions assisting people with disabilities, without the prior approval of the copyright owner, upon payment of 'equitable remuneration' to Copyright Agency Limited (CAL), the body that administers the Act. The *Digital Agenda Act 2001* extended these licences by allowing electronic copying and communication of the material. A three-year review of the Digital Agenda Act amendments, including this provision, was flagged in the second reading speech of the Bill.
- As well as various reporting requirements, one condition of a statutory licence is that 'the person who makes the reproduction must be satisfied, after reasonable investigation, that no new version in the form being copied can be obtained within a reasonable time at an ordinary commercial price'.
- Part VB does not prevent a voluntary licence arrangement between a copyright owner and institution to allow copyright material to be copied or communicated without infringing copyright.
- The Act also establishes a legal deposit scheme, whereby a hard copy of any work published in Australia must be deposited with the National Library of Australia and the relevant State library. This requirement does not apply to electronic materials.

Source: Cordina (2002); HREOC (2002g); NLA (2003).

The Productivity Commission also notes HREOC's efforts to encourage progress in this area, such as through establishing roundtables and forums. HREOC also held discussions with Copyright Agency Limited (CAL), after which CAL began developing a database of material produced under the statutory licence provisions of the Copyright Act (HREOC 2002g). Such initiatives, and others that may result from the recommendations of HREOC forums (HREOC 2002d), can be effective ways of facilitating change in this area. The Association for the Blind of WA, for example, noted that a similar process was undertaken in the United States, resulting in a Bill incorporating changes for educational publishing and electronic depositories (trans., p. 795). The general benefits of cooperation between people with disabilities and publishers are also noted in chapter 7.

DRAFT FINDING 14.4

There appears to be merit in investigating further an Australian electronic book repository for educational (and other) publications.

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Conduct of the Inquiry

The following pages outline the inquiry process and lists the organisations and individuals that have participated to date. The Commission is to make a final report to the Australian Government in 2004.

Following receipt of the terms of reference on 5 February 2003, the Commission placed a notice in the press inviting public participation in the inquiry and released an issues paper to assist inquiry participants in preparing their submissions. The Commission received 248 submissions before releasing the draft report. Those who made submissions are listed in section 1.

The Commission also held informal discussions with organisations and government departments and agencies. This visit program assisted the Commission to obtain a wide understanding of the issues and the views of inquiry participants. Organisations visited by the Commission are listed in section 2.

In May, June, July and August 2003 the Commission held public hearings in all capital cities. In addition, public hearings were held via teleconference with participants from New South Wales and Queensland. Hearings were attended by 128 individuals and organisations (section 3).

In June 2003, the Commission conducted a series of visits in Alice Springs, to discuss issues relating to the inquiry and to Indigenous Australians. The Commission held forums in the Central Hume and Upper Hume regions of Victoria, and in Perth.

Submissions, transcripts of hearings, notes from the forums and Alice Springs visit notes are publicly available.

Section 1 Submissions received

Participant	*Submission no.*
Aboriginal and Torres Strait Islander Commission (ATSIC)	59
Access Design and Inspection Consultants	18, 228
ACROD	45
ACT Disability Advisory Council	214
ACT Discrimination Commissioner	151
Advocacy Tasmania Inc	130
Advocates for Survivors of Child Abuse	185
Agnes Misztal	160
Albert Hopkins	208, 217
Andrew Van Diesen	93
Animal Welfare Advisory Council	216
Anita Smith	127
Ann Want, Australian Chemical Trauma Alliance	194
Anne McGerr	177
Anti-Discrimination Board of New South Wales	101
Anti-Discrimination Commission Queensland	119
Anti-Discrimination Commission Tasmania	136
Antonio Mastronardi (Senior)	24
ARAFMI Hunter	36
Association for Children with Disability (Tasmania) Inc	140
Association for the Blind of Western Australia	83
Association of Independent Schools of South Australia	135
Association of Independent Schools of Victoria	99
Attorney-General's Department	115
Australian Airports Association	213
Australian Association of Special Education – South Australian Chapter	38, 186
Australian Association of the Deaf	229
Australian Associations of Christian Schools	148
Australian Building Codes Board	153
Australian Chemical Trauma Alliance	152
Australian Communication Exchange	31

(continued on next page)

Section 1 (continued)

Participant	*Submission no.*
Australian Council of Trade Unions (ACTU)	134
Australian Education Union	39
Australian Federation of Aids Organisations in conjunction with National Association of People Living with HIV/AIDS	88
Australian Federation of Deaf Societies	233
Australian Institute of Health and Welfare	188
Australian Parent Advocacy Inc	164
Australian Taxi Industry Association	201
Becky Llewellyn	9
Betty Moore	42, 47
Blind Citizens Australia	72
Brian O'Hart	85
Bruce L. Young-Smith	80
Cadence FM	132
Carers Australia	32
Carol O'Donnell	159
City of Melbourne	224
Communication Project Group	17
Community and Institutional Parents' Action on Intellectual Disability	21
Cora Barclay Centre	174
Council for Equal Opportunity in Employment	204
Cyril Dennison	107
Darwin Community Legal Service	110
David Buchanan SC	163
David Cutlan	173
David W. Norton	111
Deafness Association of Northern Territory	73, 89
Deafness Forum of Australia	71
Debbie-Lee McAullay	25
Dennis Denning	109
Derrick Yee	14

continued on next page

Section 1 (continued)

Participant	*Submission no.*
Des LeFevre	48
Dianne Sulman and family	226
Disability Action Inc.	43
Disability Coalition	67
Disability Council of New South Wales	64, 221
Disability Discrimination Legal Service	76
Disability Justice Advocacy Inc.	53
Disability Officer, Victorian Tertiary Students Association Network	4
Disability Rights Network of Community Legal Centres	74
Disability Rights Victoria	95
Disability Services Commission, Western Australia	44
Don Hughes	69, 170
Dorothy Bowes, Allergy, Sensitivity and Environment Health Association Queensland	155, 222
Dorothy Morris	195
Dorothy Wentworth-Walsh	156
E. Hutson	193
Equal Opportunity Commission South Australia	178
Equal Opportunity Commission Victoria	129
Equal Opportunity Commission Western Australia	236
Frank Fisher	200
Frank Hansford-Miller	23
Frank Schleger	190
Gary Batch	189
Gippsland Carers Association Inc.	203
Gold Coast City Council	205
Graeme Taylor	210
Harry New	198, 218
Helen Mikolaj	176
Hilary Royes	28
Housing Connection (New South Wales) Inc.	161

continued on next page

Section 1 (continued)

Participant	*Submission no.*
Human Rights and Equal Opportunity Commission (HREOC)	143, 219, 235
Ian Harrison	124
Independent Living Centre New South Wales Inc.	92, 180
Insurance Council of Australia	234
Intellectual Disability Review Panel	207
Intellectual Disability Services Council (South Australia)	162
Investment and Financial Services Association	142, 242
ISAAC-Australia	182
J. Tyers, B. Hamon, B. Edis, G. Hill, A. Milner, B. Grey, B. McCann	34
Jack Frisch	120, 196
Jan Hammill	116
Janet Hope in conjunction with Margaret Kilcullen	165
Jason Gray	27
Jean C. Bailey	98
Jean Young-Smith	227
Jenny Guneratne	2
Job Watch	90, 215
Joe Harrison	55
John S. Fisher	231
John Uri	197
Jondale Pty Ltd	166
Julie Bates	248
Justine Woore	11
K.F. Pennefather	144
Kaerest Houston	19
Kevin Balaam	187
Kiefel Family	168
Kincumber Lodge Resident Advocacy Group	22, 37
Larry Laikind	70
Law Council of Australia	82
Law Institute of Victoria	81

continued on next page

Section 1 (continued)

Participant	*Submission no.*
Leichhardt Council Disability Access Committee	75
Mackay Regional Council for Social Development	87
Mansfield Community Forum	202
Mark Hunter	51
Marrickville Council	157
Maurice Corcoran	181
Maxine Singer	8
ME/Chronic Fatigue Syndrome Association of Australia	211
Media Entertainment and Arts Alliance	60
Melville Miranda	40, 54, 61, 79, 96, 105, 128, 131, 133, 141, 145, 149, 158, 169, 184, 230, 232, 237, 238, 240, 241, 243, 244, 245
Mental Health Coalition of South Australia	171
Mental Health Coordinating Council	84
Mental Health Council of Australia	150
Mental Health Legal Centre	108
Michael and Denice Bassanelli	175
Multicultural Mental Health Access Program	183
National Association of People Living with HIV/AIDS in conjunction with Australian Federation of AIDS Organisations	88
National Capital Authority	154
National Catholic Education Commission	86
National Council of Independent Schools' Association	126
National Council on Intellectual Disability	112
National Disability Advisory Council	225
National Ethnic Disability Alliance	114
National Library and Information Services in conjunction with IT-Test Consortium	206
New South Wales Nurses' Association	52
Northern Territory Disability Advisory Board	121
New South Wales Council for Intellectual Disability	117
New South Wales Government	220
New South Wales Office of Employment Equity and Diversity	172

continued on next page

Section 1 (continued)

Participant	*Submission no.*
Office of Mental Health, Western Australia	94
Office of the Public Advocate, Queensland	246
Pam McGillivray	63
Paraplegic and Quadriplegic Association of Queensland	123, 138
Paraplegic and Quadriplegic Association of Tasmania	106
ParaQuad Victoria	77
Paul Jenkin	100
Pete Casey	3
Peter Hesse	5
Peter Simpson	192
Peter Young	199
Physical Disability Council of Australia	113
Physical Disability Council of New South Wales	78
Physical Disability Council of the Northern Territory	125
Public Advocate in Victoria	91
Public Interest Advocacy Centre	102
Queensland Parents for People with a Disability	103
Recruitment and Consulting Services Association	29
Richard Gailey	147
Richard Llewellyn	12
Richmond Valley Access Committee	65
Rita Struthers	118
Robert A. Daly	247
Robert and Pauline Atkins	26
Robert Buckley	104, 223
Robin and Sheila King	56
Ronald J. Soreng	10, 16, 57
Rosalie Leaney	50
Rosemary Shanks	7
Royal Institute for Deaf and Blind Children	97
Sally Martin	239

continued on next page

Section 1 (continued)

Participant	*Submission no.*
SANE Australia	62
Souraya Bramston	33
SPARC Disability Foundation Inc.	15
Stella Hondros	167, 179
Stephanie Mortimer	13
Stephen Kendal	146
Sussex Street Community Law Service (Western Australia)	49
Tedicore (Telecommunications and Disability Consumer Representation)	122
Terry Humphries	66
Tom Byrnes	46
Tony and Heather Tregale	30
Toowoomba City Council	35
Trevor Oddy	58
Troy Ellis	41
Val Pawagi	1, 191, 209
Victor Camp	20
Villamanta Legal Service	212
Wayne A Nevinson	137
Women with Disabilities Australia	139
Women's Health Victoria	68
Ze Qun Niu	6

Section 2 Visits

Organisation
Aboriginal and Torres Strait Islander Commission (ATSIC)
Advocacy Tasmania Inc.
Alice Springs Disability Services Centre
Anti-Discrimination Board of New South Wales
Anti Discrimination Commission Northern Territory
Anti-Discrimination Commission Queensland

continued on next page

Section 2 (continued)

Organisation

Anti-Discrimination Commission Tasmania

Association for Children with a Disability (Tasmania)

Association for the Blind of Western Australia

Association of Independent Schools of Northern Territory

Association of Independent Schools of Victoria

Attorney-General's Department

Australian Bureau of Statistics (ABS)

Central Australian Aboriginal Congress

DDA Standards Project

Deafness Forum of Australia

Department of Premier and Cabinet, South Australia

Department of Premier and Cabinet, Tasmania

Department of Health and Community Services, Northern Territory

Disability Action Inc.

Disability Advocacy Service

Disability Discrimination Legal Service

Disability Services Commission, Western Australia

Disability Services Queensland

Employers Making a Difference

Equal Opportunity Commission South Australia

Equal Opportunity Commission Victoria

Equal Opportunity Commission Western Australia

Ethnic Disability Advocacy Centre

Human Rights and Equal Opportunity Commission (HREOC)

Integrated disAbility Action

Investment and Financial Services Association

Mental Health Council of Australia

National Association of People Living with HIV/AIDS

National Council on Intellectual Disability

National Disability Advisory Council

National Ethnic Disability Alliance

continued on next page

Section 2 (continued)

Organisation

Northern Territory Government

Ntaria Council, Hermannsburg

Office of Disability, Department of Family and Community Services

Office of the Public Advocate, Victoria

People with Disabilities (Western Australia) Inc.

Physical Disability Council of Australia

Tangentyere Council

Waltja Tjutangku Palyapayi Aboriginal Association Inc.

Section 3 Public hearing participants

Darwin 27 May

Deafness Association of the Northern Territory

Darwin Community Legal Service

Northern Territory Disability Advisory Board

Bruce Young-Smith

Robyn Lesley

Jean Young-Smith

Debra Lovett

Darwin Community Legal Service

Brisbane 29 May

Paraplegic and Quadriplegic Association of Queensland

Dennis Denning

Larry Laikind

Physical Disability Council of Australia

Mark Hunter

Maroochy Shire Council

Brisbane 30 May

Rita Struthers

C. Dennison

V. Camp

continued on next page

Section 3 (continued)

Brisbane 30 May (continued)
Anti-Discrimination Commission Queensland
Tedicore (Telecommunications and Disability Consumer Representative)
Hobart 4 June
Anita Smith
Anti-Discrimination Commission Tasmania
David Norton
Advocacy Tasmania Inc.
Hobart 5 June
Association for Children with a Disability (Tasmania) Inc.
Disability Rights Network of Community Legal Centres
Mary Guy
K.F. Pennyfather
Cadence FM
Des Le Fevre
Daryl McCarthy
Canberra 19 June
National Council of Independent Schools Associations
Deafness Forum of Australia
Australian Association of Christian Schools
Trevor and Maree Oddy
Val Pawagi
Stephen Kendal
Carers Australia
Australian Building Codes Board
National Capital Authority
Canberra 20 June
Mental Health Council of Australia and Beyond Blue
Alexa McLaughlin
Australian Chamber of Commerce and Industry
Action for Autism and Autism/Aspergers Advocacy Australia
ACT Human Rights Office

continued on next page

Section 3 (continued)

Perth 30 June
Brian O'Hart
Rosalie Leaney
Agnes Misztal
Multiple Chemical Sensitivities Self-Help Group
Association for the Blind of Western Australia
People with Disabilities Western Australia
Perth 1 July
Association of Independent Schools of Western Australia
Disability Services Commission, Western Australia
Debbie-Lee McAulley
Department of Planning and Infrastructure, Western Australia
Adelaide 3 July
Communication Project Group
Intellectual Disability Services Council Inc.
Disability Action Inc.
Association of Independent Schools of South Australia
John Teasdale, Tony Borosewicz and Pauline Ryan
Equal Opportunity Commission South Australia
Multicultural Mental Health Access Program
Adelaide 4 July
Cora Barclay Centre
Mental Health Coalition of South Australia and Mental Illness Fellowship of South Australia
SPARC Disability Foundation Inc.
Maurice Corcoran
Australian Association of Special Education – South Australian Chapter
Michael and Denice Bassanelli
Christopher Dugdale
Sydney 14 July
Disability Council of New South Wales
David Cutlan

continued on next page

Section 3 (continued)

Sydney 14 July (continued)
Maxine Singer
Human Rights and Equal Opportunity Commission (HREOC)
Leichardt Municipal Council
Sydney 15 July
Royal Institute for Deaf and Blind Children
Peter Simpson
Physical Disability Council of New South Wales
Richard Gailey
Gary Betch
Independent Living Centre New South Wales
John Uri
People with Disability Australia
Sydney 17 July
Australian Taxi Industry Association
Investment and Financial Services Association
Public Interest and Advocacy Centre
Antonio Mastonardi
Office of Employment Equity and Diversity, New South Wales
International Society of Augmentative and Alternative Communication, Australian Chapter
National Ethnic Disability Alliance
Mental Health Coordinating Council of New South Wales
Sydney 18 July
Ann Want
Jack Frisch
Melinda Jones
National Association of People Living with HIV/AIDS
Marrickville Council
Melbourne 22 July
Wendy Kiefel
Frank Fisher

continued on next page

Section 3 (continued)

Melbourne 22 July (continued)
Tom Byrnes
Intellectual Disability Review Panel
Council for Equal Opportunity in Employment
Australian Deafblind Council
Niu Ze Qun
Office of the Public Advocate, Victoria
Association of Independent Schools of Victoria
Melbourne 23 July
Blind Citizens Australia
ME/Chronic Fatigue Syndrome Association of Australia
Disability Rights Victoria
Andrew Van Diesen
Disability Discrimination Legal Service
Dr Harry New
Australian Education Union
Elizabeth Ann Don
Melbourne 24 July
Margaret Ryan
Albert Hopkins
Yooralla
Barb Edis, Cameron West, Andrea Milner and Rhonda Joseph
ParaQuad Victoria
Melbourne 25 July
Jim McNabb (in camera)
Villamanta Legal Service
Equal Opportunity Commission Victoria
Job Watch
Kevin Balaam
Advocates for the Survivors of Child Abuse
National Library and Information Service
Breast Cancer Network Australia

continued on next page

Section 3 (continued)

Melbourne 19 August (Teleconference)

Betty Moore

Dorothy Bowes

Robin and Sheila King

Jan Hammill