An independent statutory body
accountable to the Victorian Parliament

SUBMISSION IN RESPONSE

TO THE

PRODUCTIVITY COMMISSION

INQUIRY INTO THE DISABILITY

DISCRIMINATION ACT 1992

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1. INTRODUCTION

1.1 The Equal Opportunity Commission of Victoria

The Equal Opportunity Commission ("the Commission") is the statutory authority responsible for administering the *Equal Opportunity Act 1995* (Vic). The Commission provides a complaints resolution service in relation to discrimination, harassment and vilification complaints, and promotes equality and human rights through a range of activities.

Because disability discrimination complaints constitute the largest number of complaints lodged with the Commission, and because the Commission is committed to developing stronger mechanisms for protecting human rights, the Commission is pleased to contribute to the Productivity Commission's Inquiry into the DDA.

1.2 The Commission's Approach to Disability Discrimination Issues

The Commission's approach to disability discrimination is based on the principles of the *Equal Opportunity Act*, the provisions of international human rights instruments and a focus on people with disabilities as bearers of rights. The Commission's submission is informed by its experience in working with disability discrimination issues, and by the Commission's contact and consultations with people with disabilities.

1.3 Productivity and Human Rights

The Inquiry Terms of Reference direct the Productivity Commission to quantify the costs and benefits of the DDA, and assess it against national competition policy principles and the Government's guidelines on regulation impact statements. The Commission notes that there are a number of difficulties involved in quantifying the extent and the effects of disability discrimination. Further, the Commission considers that the value of protecting human rights and addressing discrimination cannot be fully captured in economic terms. Although the Commission acknowledges that measuring the effectiveness of anti-discrimination schemes is essential, it warns against the application of a rigid costs/benefits analysis without regard for the over-riding value and importance of protecting human rights.

2. DISABILITY DISCRIMINATION

2.1 Disability in Victoria

"People with disabilities" encompasses a wide range of people with an equally diverse range of experiences. Australian Bureau of Statistics ("ABS") data shows that around 18% of the Victorian population has a disability lasting six months or more that restricts everyday activities, and a further 16.5% has a lasting disability that does not restrict everyday activities. This amounts to one third of the population. However, because the DDA covers presumed, past and future illness or disability, the legislation has a potential impact on every individual within the community.

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The Commission refers to a number of data sets to demonstrate the ongoing nature of discrimination against people with disabilities.

2.2.1 Complaints of Disability Discrimination

In Victoria, complaints of disability discrimination have steadily increased over time. In the last financial year 794 disability discrimination complaints were lodged with the Commission, constituting 22.7% of all complaints lodged.

2.2.2 Other Indicators of Inequity and Discrimination

A range of data sets are referred to. These illustrate that people with disabilities in general have a lower labour participation rate, a higher long term unemployment rate and lower school and vocational education and training participation rates than people without disabilities. People with disabilities are poorer on average than those without disabilities, and can be subject to unacceptably high levels of social and community exclusion.

The statistical data confirms the picture provided anecdotally to the Commission by people with disabilities, who state that disability discrimination remains rife, that it operates daily in many physical, attitudinal and procedural guises and that it has a major impact on their lives. The quantitative and qualitative evidence available indicates that the need for effective anti-discrimination legislation is as critical as ever.

3. THE EFFECTIVENESS OF THE DDA

The Issues Paper poses a number of questions about how the effectiveness of the DDA should be measured and whether it has been effective in meeting its objectives.

3.1 Measuring the Effectiveness of the DDA

The Commission notes that the DDA has only been in operation for ten years, and that this is a short period within which to measure the effectiveness of any legislation directed at large-scale social reform. It is also noted that the DDA is both a consequence and a cause of changing attitudes and policies towards people with disabilities. It is difficult to distinguish changes that have occurred as a result of the DDA from changes that have resulted from broader attitudinal and policy shifts.

3.2 The Value of the DDA

3.2.1 The Impact of the DDA on Individuals

The Commission acknowledges that, by lodging complaints or by using threat of liability as a negotiating tool, thousands of individuals have used the DDA to effect change. Some, although not enough, of these complaints have resulted in changes for others in the future. The importance of making an avenue for seeking redress available for people who have experienced discrimination cannot be understated and this mechanism should not be weakened in any way. The Commission also acknowledges feedback from people with disabilities that the existence of the DDA, as a piece of legislation specifically designed to address disability discrimination, has symbolic significance and is empowering for many people.

3.2.2 The Broader Effects of the DDA

In addition to providing people affected by disability discrimination with an essential and often effective instrument to seek redress, the DDA has played a key role in putting disability discrimination issues on the agenda in a number of ways. The DDA provisions relating to voluntary action plans and disability standards, for example, have encouraged a greater level of attention, communication and consultation in relation to disability discrimination issues than would otherwise have occurred. The Commission also acknowledges HREOC's achievements in using public inquiries to raise awareness and encourage community discussion about particular issues.

3.3 The Limitations of the DDA

While acknowledging the many positive outcomes that have occurred as a result of the DDA, the Commission notes that, as discussed in section 2, the objects of the legislation are far from being realised.

The Commission has also received feedback that the DDA has been less effective in addressing particular forms of discrimination including: discrimination that is embedded in processes, practices and attitudes; indirect and more subtle discrimination; and discrimination experienced by people with mental illnesses, intellectual disabilities and acquired brain injuries. Feedback also suggests that the DDA has had minimal or insufficient impact in protecting the rights of indigenous people with disabilities and people with disabilities from non-English speaking backgrounds.

4. THE NEED FOR A NEW APPROACH

The DDA, like other Australian anti-discrimination legislation, relies predominantly on an individual complaints model to address discrimination. The Commission considers that there are a number of problems associated with reliance on this approach and therefore has a current focus on developing stronger and more effective mechanisms for encouraging compliance with equal opportunity legislation.

4.1 The Limitations of Relying on a Complaints-based Approach

4.1.1 Depending on People Affected by Discrimination to Instigate Change

There are various concerns about anti-discrimination legislation that primarily relies upon complaints to enforce anti-discrimination laws.

Firstly, It is inappropriate and ineffective to place responsibility for instigating change upon those members of the community who have been effected by discrimination. We know that, for a range of reasons, only an extremely small proportion of people who are subjected to discrimination lodge complaints. Fewer still are prepared to face exposure to the greater formality, legalism and costs risk associated with pursuing a complaint through the court system if it does not resolve at conciliation.

4.1.2 Ineffectiveness in Addressing Systemic Issues

The complaints-based approach is also ineffective in addressing the systemic nature of discrimination. The process used can individualise acts of discrimination, and ignore the social and historical context to discriminatory conduct. Although the Commission considers that access to a confidential complaints resolution service is highly important for some complainants, exclusive use of such a system fails to achieve large-scale change or to prevent repeated instances of discrimination of the same type or by the same respondent.

4.1.3 The Need to Check Compliance

Various indicators suggest that most employers, service-providers, providers of education and others who are responsible under the DDA for taking steps to prevent disability discrimination do not take this responsibility seriously. We need to move from a system that merely requires retrospective action on an individual complaint to one which requires employers and others to proactively comply with the provisions of the DDA.

4.2 Alternative Approaches to Promoting Equity

Several jurisdictions throughout the world have moved beyond the complaints-based model and have instituted a more proactive approach to requiring compliance with equal opportunity legislation.

These include schemes targeted at ensuring employers take steps to ensure that their recruitment and management practices create a workforce that reflects the diversity of the community, as in the Canadian *Employment Equity Act 1996* and Northern Ireland's *Fair Employment and Treatment Order 1998*. Other schemes are directed at public bodies, and place a statutory duty on such bodies to address discrimination and promote equality in their various policy, program development and service delivery functions. Examples of this

include the section 75 "equality duty" in the *Northern Ireland Act 1998*, and the United Kingdom's *Race Relations Act 1976*, as amended in 2000. The Government of the United Kingdom is currently proposing to impose a statutory compliance duty on employers and to extend the obligations of public bodies to the promotion of ten forms of discrimination.

4.3 Conclusion

This movement towards active compliance models in the area of equal opportunity legislation indicates that such models are considered necessary to ensure the effectiveness of anti-discrimination provisions, that they promote inclusive and productive societies and are economically feasible.

The Commission considers that to improve our current approach to addressing disability discrimination we need to develop a system that:

- shifts primary responsibility for enforcing equal opportunity laws and initiating change away from people with disabilities and onto other community, government and business stakeholders;
- imposes clear and positive duties upon public and private authorities to take action to address entrenched and systemic discrimination within their sphere of influence; and
- features strong mechanisms to ensure compliance.

5. IMPROVING EXISTING ASPECTS OF THE DDA

5.1 Representative Actions

The Commission considers that provision for representative actions is an essential aspect of anti-discrimination legislation and that representative complaints have some capacity to achieve systemic change. The Commission considers that the DDA should be amended to enable HREOC and other organisations able to demonstrate a "sufficient interest" in an issue to initiate complaints. This would help to address the system's present reliance on individuals affected by discrimination. The Commission also notes that the DDA imposes a number of fairly technical requirements on representative complaints, which may limit the effectiveness of this avenue.

5.2 Disability Standards

In areas that lend themselves to the development of more prescriptive and technical standards, disability standards can assist potential respondents and complainants by providing greater clarity about how, when and where premises and services should be made accessible to people with disabilities.

The Commission considers that measures should be put in place to ensure that standards do not operate to lower the provisions of the DDA in any way, and to ensure that the disability sector can negotiate disability standards on a level playing field with industry players. Provided these are taken into account the Commission considers that the capacity to create standards should be made available in relation to all areas covered by the DDA. The Commission further suggests that the DDA should include monitoring and enforcement mechanisms to ensure widespread compliance with disability standards.

5.3 Action Plans

Actions plans have the potential to be a highly effective compliance mechanism, particularly when they are prepared using sound consultation processes and contain provisions to ensure that they are incorporated in the ongoing work of the organisation. Action plans of some sort are an important component of most of the overseas compliance schemes referred to at section 4.2.

However, the low numbers of action plans lodged to date indicates that there is neither enough incentive to submit an action plan nor enough threat of sanction for organisations that fail to prevent discrimination. The Commission suggests that the following amendments should be considered:

- the extension of the capacity to develop action plans beyond providers of goods and services to all organisations and individuals covered under the DDA;
- a requirement that all public authorities, and larger private employers, prepare and submit action plans; and
- the introduction of additional Government-funded incentives, if the development of action plans remains voluntary for the private sector.

5.4 Temporary Exemptions

The Commission supports HREOC's current approach to the use of temporary exemptions and suggests that it may be beneficial to entrench this approach in the provisions of the DDA.

5.5 Inquiries

The Commission considers that the use of public inquiry processes holds considerable potential to achieve systemic outcomes and notes that HREOC already uses its inquiry powers to good effect in a number of ways. The Commission recommends increased use of this approach and, noting that HREOC's capacity to conduct inquiries is restricted by resources, suggests that an increased allocation of resources for HREOC to undertake this function may improve the effectiveness of the DDA.

5.6 Interaction between the DDA and other Commonwealth Legislation

5.6.1 Ensuring other Legislation Complies with the DDA

The Commission recommends that certain measures should be taken to ensure that existing and future Commonwealth legislation complies with the objects of the DDA.

5.6.2 Referral of Discriminatory Awards

The Commission also suggests that the power to refer discriminatory awards to the Australian Industrial Relations Commission should be extended to apply to acts conducted under an award that would be unlawful under the DDA. It would also be appropriate to provide HREOC with the power to intervene in matters before the Australian Industrial Relations Commission which involve a potentially discriminatory variation to an award.

5.7 Definition of Disability

The Commission strongly supports the use, in the DDA, of a broad and inclusive definition of "disability". The Commission considers that, depending upon the decision of the High Court in the matter of *Purvis*, the definition of "disability" may require amendment to ensure that the DDA covers discrimination on the basis of the manifestations of a disability.

5.8 Definitions of Discrimination - Indirect Discrimination

The Commission suggests that consideration be given to amending the definition of indirect discrimination in the DDA to mirror the definition used in the *Sex Discrimination Act 1984* (Cth). This would move the burden of proving the reasonableness of a condition or requirement from complainants to respondents, who are more likely to be able to access the relevant information.

5.9 Reasonable Adjustment

The Commission suggests that the obligation to make reasonable adjustments to accommodate the needs of people with disabilities is central to effective disability

discrimination legislation. The United Kingdom's *Disability Discrimination Act* 1995 places clear and specific duties on employers, providers of goods and services and education providers to change physical features, work arrangements or other practices that create barriers for people with disabilities. The Commission believes that similar provisions would serve a powerful educative function, would clarify the obligations imposed by the DDA and should be considered for inclusion in the legislation.

6. COMPETITION AND ECONOMIC EFFECTS OF THE DDA

6.1 The Benefits of Addressing Discrimination

The Commission emphasises that it does not consider that the benefits of inclusive, non-discriminatory society can or should be measured using economic measures alone. It is entirely appropriate that resources within the community be allocated to the prevention of discrimination. However, the Commission also acknowledges that there are a number of economic reasons why business and society as a whole should act to reduce discrimination.

6.1.1 Costs of Allowing Disability Discrimination - Societal Impact

Failure to address unreasonable barriers to the full participation of over one third of the population costs the community in a number of ways. Discrimination-based exclusion from education and employment results in increased costs to government through income support, public housing, employment assistance programs, and a range of support services. Under-utilisation of the labour force resulting from exclusion of people with disabilities can also result in a loss of national output. Discriminatory barriers to social and community participation lead to an increased need for government to fund health care and support services. These are some examples of the range of costs that government and the community as a whole bears while disability discrimination is not addressed.

6.1.2 Costs of Allowing Disability Discrimination - Impact on Business

A growing body of evidence indicates that businesses that actively prevent disability discrimination, and other forms of discrimination, can benefit through higher revenue and decreased costs. This evidence suggests that, in their capacities as employers and providers of goods and services, business enterprises cannot afford not to tackle discrimination.

6.2 Costs and Competition Restrictions Arising under the DDA

6.2.1 Costs Resulting from the DDA

The costs that an organisation may incur as a result of complying with the DDA include: any fees required for the provision of advice about the requirements of the DDA; fees or allocation of internal human resources to develop and implement policies and procedures to ensure compliance with the DDA; costs of making any necessary adjustments; and costs of responding to or preventing complaints lodged under the DDA.

6.2.2 Factors Mitigating the Competition Effects of the DDA

The Commission suggests that the costs to business of complying with the DDA are:

- often overstated or misunderstood because of stereotypical assumptions about the needs and capacities of people with disabilities;
- offset to some degree by the financial benefits of addressing discrimination and enabling access and participation by people with disabilities;
- mitigated by the operation of the "unjustifiable hardship" concept, which adjusts the costs imposed upon a business to take into account the capacity of the business to bear the cost involved; and
- not currently applied in a consistent manner across all businesses because the present system does not adequately encourage broad compliance across the business community.

7. THE IMPACT OF OVERLAPPING ANTI-DISCRIMINATION JURISDICTIONS

7.1 The Effects of Overlapping Jurisdictions

Feedback indicates that the existence of two available anti-discrimination statutes may cause confusion for some complainants, suggesting a need for improved information about the differences between each statute to be made available.

In relation to potential respondents, the Commission suggests that where the key principles of the DDA and the relevant State or Territory statute are similar, the application of two Acts should not substantially increase the cost of compliance. It is the Commission's experience that more respondents are concerned about the overlap between anti-discrimination, industrial relations and occupational health and safety schemes than the existence of parallel anti-discrimination systems.

7.2 Factors Affecting Complainants' Choice of Jurisdiction

A range of factors influence complainants' choice between the DDA and the *Equal Opportunity Act* (Vic). Major factors causing people to lodge complaints under the Victorian legislation include the complaint-handling time-frames provided for in the *Equal Opportunity Act* and the availability of local, personal contact and assistance in formulating complaints. The main reasons given for choosing the DDA include the perception that DDA complaints may lead to broader changes at a national level and that the DDA is a specialised piece of legislation tailored to be used to address disability discrimination.

7.3 Scope for Cooperative Arrangements between Jurisdictions

The Commission considers that, while two significantly different complaints-handling systems remain in place, separate handling of complaints may be more efficient. However, the Commission suggests that there is scope to continue and increase collaboration between the State and Territory Commissions and HREOC in relation to education, policy and social advocacy functions.

7.4 A Single Federal Equal Opportunity Act

The Commission notes that there are mixed views regarding whether the Commonwealth should introduce a single statute dealing with disability, age, racial and sex discrimination. Although a single Act may prevent unintended anomalies between the approaches to different forms of unlawful discrimination and may more clearly acknowledge that some people experience discrimination on a number of grounds concurrently, many people believe that the DDA should be retained because of its symbolic importance as a statute created specifically to address disability discrimination.

1. INTRODUCTION

1.1 The Equal Opportunity Commission

The Equal Opportunity Commission Victoria ("the Commission") is the statutory authority responsible for administering the *Equal Opportunity Act 1995* (Victoria). The objectives of the *Equal Opportunity Act* are[1]:

(a) to promote recognition and acceptance of everyone's right to equality of opportunity;

(b) to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes;

(c) to eliminate, as far as possible, sexual harassment;

(d) to provide redress for people who have been discriminated against or sexually harassed.

In accordance with the provisions of the *Equal Opportunity Act 1995* and the *Racial and Religious Tolerance Act 2001*, the Commission provides an impartial complaints resolution service in relation to discrimination, harassment and vilification complaints. The Commission also promotes equality and human rights through a range of activities. These include providing information, training and education programs[2] and contributing to the consideration of issues related to human rights, such as those raised in the Productivity Commission Inquiry into the *Disability Discrimination Act* ("the Inquiry").

The *Equal Opportunity Act* prohibits discrimination on the basis of various attributes, including impairment[3], in a number of areas of public life, namely employment, education, accommodation, the provision of goods and services, the disposal of land, clubs, sport and local government.

The Commission is committed to developing stronger and more effective mechanisms for protecting human rights and encouraging compliance with anti-discrimination legislation. The Commission is eager, therefore, to contribute to the discussion about options for strengthening the current provisions of the *Disability Discrimination Act 1992* ("the DDA").

In addition, the Commission has a keen interest in the effective operation of legislation, at both state and federal levels, that addresses discrimination against people with disabilities. Although discrimination on the basis of impairment is only one of fifteen types of discrimination prohibited under the *Equal Opportunity Act*, the Commission

[1] Section 3, *Equal Opportunity Act 1995* (Vic).
[2] A copy of the Commission's current training calendar is annexed as Attachment A.
[3] Section 4, *Equal Opportunity Act 1995* (Vic) defines "impairment" in broad terms as:
- (a) total or partial loss of a bodily function;
- (b) the presence in the body of organisms that may cause disease;
- (c) total or partial loss of a part of the body;
- (d) malfunction of a part of the body including;
  - (i) a mental or psychological disease or disorder;
  - (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder;
- (e) malformation or disfigurement of a part of the body.

receives more complaints of discrimination on the basis of impairment than any other form of discrimination[4]. The Commission is therefore pleased to contribute to this Inquiry.

1.2 The Commission's Approach to Disability Discrimination Issues

In addition to the principles espoused in the *Equal Opportunity Act*, the Commission's approach is based on the various international human rights instruments that inform domestic anti-discrimination law.

Existing international instruments establish a range of fundamental and universal human rights. These range from political and civil rights, such as the right to equality before the law, to economic and social rights, such as the right to work, to education, and to participate in society[5]. Although, with one exception, the seven major international human rights conventions do not specifically address the rights of people with disabilities, these conventions apply to all persons, irrespective of ability. A person's disability does not alter that person's rights. Rather it creates a risk that various rights will not be realised as a result of discriminatory environmental and attitudinal barriers within the social fabric and structures of society.

A focus on people with disabilities as the bearers of equal and identical rights underpin the Commission's approach to disability issues and the contents of this submission. The submission draws upon the Commission's experience in providing advice and information to people with disabilities, investigating and conciliating complaints of disability discrimination, and training employers, service-providers and others regarding their responsibilities under anti-discrimination legislation. The Commission acknowledges, however, that many of the issues raised in the Inquiry should be guided by the views and experiences of people with disabilities. Consequently, the submission is also based upon information received by the Commission during its ongoing communication with people with disabilities and disability advocacy groups. To ensure that the submission reflects the views and priorities of people with disabilities, the Commission has undertaken targeted consultation with people with disabilities in relation to this Inquiry[6]. The Commission would like to acknowledge the contributions of the various community members who have provided input.

1.3 Productivity and Human Rights

The Commission notes that the Terms of Reference for the Inquiry direct the Productivity Commission to assess the DDA with regard to national competition policy principles and the Government's guidelines on regulation impact statements. The Terms of Reference also require the Productivity Commission to quantify the benefits and costs of the DDA for people with disabilities and others in the community.

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[4] Impairment-based discrimination complaints constituted 22.7% of complaints lodged at the Commission in the year 2001/02.

[5] International Covenant on Economic Social and Cultural Rights, Article 15

[6] The Commission discussed the Productivity Commission's Inquiry at a Disability Outreach Project Forum on 8 April 2003, invited community input into the Commission's submission and followed up with interested individuals to discuss the issues raised in the Inquiry in detail.

In relation to an assessment of the DDA against competition policy principles and the Government's guidelines on regulation impact statements, the Commission notes its firm view that the elimination of disability discrimination is central to the operation of a fair and well-functioning society. This submission is based, therefore, on the premise that effectively addressing discrimination, including discrimination against people with disabilities, should be a paramount concern for Australian governments.

In relation to quantifying the benefits, costs and overall effects of the DDA, the Commission notes the difficulty inherent in calculating the degree of discrimination suffered by any group within a society, and in measuring the disadvantage, economic hardship, social dislocation and emotional suffering that results from discrimination.

Similarly, the Commission suggests that the benefits of protecting human rights cannot easily be quantified, and cannot be fully captured in economic terms[7]. Neither the enjoyment of rights nor the value of a society that respects, values and includes all of its members, regardless of ability, can be reduced to a dollar sum. Even the financial benefits that would flow from a non-discriminatory society are largely theoretical, because there are no examples of such a society that we may rely upon to base our calculations[8].

By contrast, many of the costs involved in attempting to protect rights can be easily measured. The resources required to administer anti-discrimination legislation and to educate the community about equal opportunity laws and principles are readily identifiable. The costs that employers, providers of goods and services, educational institutions and governments must bear in order to make reasonable adjustments to accommodate the needs of people with disabilities are also relatively simple to identify and calculate. The same is true of the cost of obtaining external advice about compliance, allocating staff time for training and for the development of policies and action plans, and obtaining legal representation to answer a discrimination complaint.

The Commission acknowledges the importance of measuring the effectiveness of anti-discrimination legislation, and is currently undertaking a research project in relation to that issue[9]. However, the Commission warns against the application of a traditional or rigid costs/benefits analysis without regard for the over-riding value and importance of addressing discrimination.

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[7] See, eg, *Disability Discrimination Act Access to Goods, Services and Facilities, Regulatory Impact Assessment: The Government's assessment of the costs and benefits of introducing the later rights in Part III of the Disability Discrimination Act 1995* (2003) Department for Work and Pensions, UK, at 13

[8] Michelle Hannon makes this argument in relation to the financial benefits of a non-discriminatory education system in Michelle Hannon, 'The Disability Discrimination Act: Protection Against Discrimination in the Provision of Education' (2000) 17 *Law in Context Special Issue - Explorations on Law and Disability in Australia*, 28, at 46

[9] The "Realising Rights" Project is discussed in section 4.4.

2. DISABILITY DISCRIMINATION

In this section the Commission examines how many people in Victoria and in Australia are potentially affected by the DDA. Various indicators that demonstrate that people with disabilities continue to face a broad range of barriers are also discussed. This data confirms the feedback received by the Commission from people with disabilities, who state that disability discrimination remains a serious social problem, and that it operates daily in many physical, attitudinal and procedural guises with major impact upon their lives.

2.1 Disability in Victoria

Australian Bureau of Statistics ("ABS") data indicates that people with disabilities represent approximately 19% of the Australian population (3.6 million people)[10]. For the purposes of the most recent relevant survey the ABS defined a person with a disability as any person with a limitation, restriction or impairment that has lasted for at least six months and restricts everyday activities. This definition is narrower than the definition under the DDA, therefore a considerably greater proportion of the population may require the protection offered by the DDA.

A further 3.1 million or 16.6% of people in Australia have an impairment or long term condition that does not restrict their everyday activities. This section of the population is an important group to consider in relation to the DDA because much disability-based discrimination relies upon stereotypes and assumptions about the capacity of persons with a disability, rather the actual limitations that disability imposes on people's day to day activities.

Within Victoria, around 18% of the population have a disability as defined by the ABS and a further 16.5% have an impairment or condition that does not restrict their everyday activities. Therefore, over a third of the Victorian and Australian populations have an ongoing impairment or long term condition as a result of which they may suffer discrimination.

The Commission notes that "people with disabilities" encompasses a wide range of people with an equally diverse range of experiences. The DDA's definition of disability extends coverage to people whose abilities are affected by physical disabilities, sensory disabilities, mental health issues and psychiatric disabilities, chronic and temporary illness, intellectual disability and health problems associated with ageing. The DDA also covers presumed, past and future illness and disability. Arguably, the DDA has a potential effect upon every individual within the community, including those who do not currently have a disability.

2.2 Discrimination and Inequity Experienced by People with Disabilities

In the absence of a single measurement or tool that will comprehensively capture the full extent of disability discrimination in Australia, it is necessary to refer to a number of

[10] Australian Bureau of Statistics (ABS), (1998) *Disability, Ageing and Carers,* Cat 4430.0

different data sets to demonstrate the ongoing nature of discrimination against people with disabilities.

2.2.1 Complaints of Disability Discrimination

One indicator of the extent of disability discrimination within the community is the number of complaints lodged under various anti-discrimination laws. In Victoria complaints of discrimination on the basis of disability have increased over time, and now constitute the largest proportion of complaints received by the Commission.

Discrimination on the ground of impairment has been included in the Victorian *Equal Opportunity Act* since 1983[11]. The figures at Table A show the number of complaints of disability discrimination lodged at the Commission in selected years since that time. Table B shows the number of complaints made to the Commission under the DDA compared with the number of complaints made under the *Equal Opportunity Act*, and Table C shows the number of disability discrimination complaints made to the Commission in each area.

A. Disability Discrimination Complaints Registered at the Equal Opportunity Commission

Year	Disability complaints	Percentage of all complaints	Year	Disability complaints	Percentage of all complaints
1982/83	18	5.8%	**1994/95**	788	29.2%
1983/84	140	19.4%	**1995/96**	484	23.8%
1984/85	165	22.7%	**1996/97**	511	20.7%
•	•	•	**1997/98**	690	26.3%
1990/91	98	22.48%	**1998/99**	702	20.8%
1991/92	120	17.4%	**1999/2000**	678	17.3%
1992/93	232	20.6%	**2000/01**	771	22.4%
1993/94	192	11.9%	**2001/02**	794	22.7%

B. Disability Discrimination Complaints Registered at the Equal Opportunity Commission: Complaints under the DDA and the Equal Opportunity Act 1994/95 - 2001/02

Year	Disability Discrimination Act	Equal Opportunity Act	Year	Disability Discrimination Act	Equal Opportunity Act
1994/95	595	193	**1998/99**	191	515
1995/96	296	188	**1999/2000**	118	560
1996/97	315	196	**2000/01**	74	697
1997/98	354	336	**2001/02**	91	703

* Note that the above figures do not include complaints lodged by people from Victoria under the DDA that were not sent to the Commission but were sent directly to HREOC.

[11] The *Equal Opportunity (Discrimination against Disabled Persons) Act 1982* introduced "impairment" as a protected attribute and came into effect on 1 May 1983. However, "impairment" was defined to include only physical or mental impairment until the *Equal Opportunity Act 1984* was introduced. The definition was further extended to include the presence in the body of organisms causing disease by the *Health (General Amendment) Act 1988*.

C. Disability Discrimination Complaints Registered at the Equal Opportunity Commission by Area 1991/92 - 2001/02

	Employment	Education	Clubs	Accom.	Goods & Services	Sport
1991/92	96	2	5	3	14	*
1992/93	148	2	59	17	6	*
1993/94	162	0	23	5	2	*
1994/95	437	63	1	39	248	*
1995/96	296	32	15	24	117	0
1996/97	214	113	2	26	155	0
1997/98	347	58	7	11	266	1
1998/99	427	59	19	18	176	3
1999/2000	429	28	11	27	172	11
2000/01	448	34	13	23	247	6
2001/02	563	50	5	19	154	3

* Sport was not listed as a separate area in these years.

The Commission notes that the increase in complaints may be explained in a number of ways, and does not necessarily show that levels of discrimination have risen. The increase may result from a growing awareness of anti-discrimination laws among people with disabilities. The figures do not accurately depict the extent of discrimination experienced in each area nor the true extent of discrimination suffered by people with disabilities. The only safe conclusion that can be drawn from the continuing rise in disability discrimination complaints is that discrimination is ongoing, and that increasing numbers of people with disabilities have the information, support and determination to pursue formal complaints about unfair treatment.

2.2.2 Other Indicators of Inequity and Discrimination

A range of other indicators highlight the relative inequality experienced by people with a disability compared with others in the community.

Employment and Education

People with a disability have a lower labour participation rate than people without a disability. 12% of people with a disability in Victoria were unemployed in 1998 compared with 8% of people without a disability[12]. People with disabilities are also more likely to experience long-term unemployment[13]. Nationally, the long-term unemployment rate for people who did not have a long-term health condition was 2.4%, compared with 3.6% among people with a long-term health condition and 5.2% among people with a disability[14].

People with disabilities are similarly under-represented in the education sphere. In Victoria, where 10.1% of people aged 5 - 24 years have a disability[15], people with a disability represented only 3% of school students in 2001[16]. While 13.1% of people aged

[12] ABS (1998) *Disability, Ageing and Carers, Summary Tables: Victoria,* Product No. 4430.2.40.01 Note that these indicators refer to people with a disability as defined by the ABS.
[13] Long term unemployment refers to unemployment that continues for 52 weeks or more.
[14] ABS (2000) *Australian Social Trends 2000, Work - Under-utilised Labour: Long-term Unemployment,* Cat No. 4102.0
[15] ABS (1998) *Disability, Ageing and Carers, Summary Tables: Victoria,* Product No 44330.2.40.001 This figure refers to people with a disability as defined by the ABS.
[16] SCRCSSP (Steering Committee for the Review of Commonwealth/State Service Provision) (2003) *Report on Government Services 2003*, Productivity Commission, Canberra, Table 3A.16.

15 - 64 have a disability, only 3.9% of vocational education and training students reported having a disability[17].

Income and Economic Status

The economic position of people with disabilities reflects their low access to education and employment, as well as the fact that remuneration rates paid to workers with a disability are not subject to the same degree of legislative and industrial regulation as that which is applied to mainstream wage setting[18]. A census conducted by the Department of Family and Community Services in June 2000 found that, of Australian workers with a disability, 41% earned less than $60 per week, and only 10% earned more than $400 per week.

Taking into account income supplementation through social security, economic disadvantage among people with disabilities in Victoria remains clear. In Victoria, 48.5% of people with disabilities earned less than $20,124 per annum in 1998, compared with 31.6% of people without a disability[19]. These earnings disparities contribute to the relatively poor economic status of people with disabilities.

Social and Community Participation

The available data relating to social and community participation also points to the exclusion of people with disabilities. Census data collected in Victoria in May 2001 through the Commonwealth/State Disability Agreement Minimum Data Set indicated that only 20% of disability services consumers were able to fully maintain social relationships and that 19% reported that they did not participate at all. The same data showed that only 25% of consumers were able to fully participate in recreation or leisure activities[20]. Lack of access to the necessary accommodation and support services also compounds the experience of discrimination and exclusion. A study of unmet demand for services conducted by the Australian Institute of Health and Welfare found that on a snapshot day in 2001 12,500 people in Australia needed but did not have access to accommodation and respite services, and 5,400 people needed employment support.[21]

Feedback from People with Disabilities

These statistics provide a quantitative illustration of the evidence provided anecdotally to the Commission by people with disabilities. People with disabilities report that they experience a range of human rights abuses and a variety of forms of discrimination on a regular basis.

Inadequate provision of housing, lack of access to public transport, institutional abuse, and barriers that prevent access to public premises and services are among the many issues that people with disabilities report. The Commission also hears from many people who state that they are excluded from employment because employers perceive that they will not "fit in" or that the adjustments required to assist them will be too costly or simply "too hard". Similarly, the Commission is contacted by many parents of children with

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[17] Ibid, Table 4A.11 Source: ANTA 2002, *Annual National Report 2001: Vocational Education and Training Performance*, Volume 3, Brisbane.

[18] Sharan Burrows, President of the ACTU (12 July 2002) Paper presented to 'Workers with a Disability' Conference, Melbourne.

[19] ABS (1998) *Disability, Ageing and Carers, Summary Tables: Victoria*, Product No 44330.2.40.001

[20] SCRCSSP, *Report on Government Services 2003*, Productivity Commission, Canberra, Box 13.7

[21] Australian Institute of Health and Welfare (AIHW) (2002) *Unmet Need for Disability Services: Effectiveness of Finding and Remaining Shortfalls* (Cat. No. DIS 26) Canberra

disabilities. These parents report that they are struggling to enrol their children into schools, or to have their children accepted into basic school activities. Other parents tell the Commission that they are unable to arrange adequate facilities to enable their children to effectively learn within the education system.

In summary, a large proportion of the community has a disability and is potentially affected by the effectiveness of anti-discrimination legislation in Australia. The quantitative and qualitative evidence available indicates that the need for effective anti-discrimination legislation is as critical as ever.

3. THE EFFECTIVENESS OF THE DDA

The Issues Paper poses a number of questions about how the effectiveness of the DDA should be measured, and whether the DDA has been effective in achieving its various objectives.

3.1 Measuring the effectiveness of the DDA

Some commentators consider that, "evaluating the effectiveness of legislation aiming to achieve social change is unavoidably problematic"[22]. Certainly, many measures of the effectiveness of anti-discrimination law, such as the number of complaints lodged, are ambiguous and are subject to various interpretations.

The Commission notes that the DDA has been in operation for only ten years, and that this is a short period within which to measure the success of any new system aimed at orchestrating large-scale social reforms. Many of the strategies enshrined in the DDA are long-term strategies.

The Commission further notes that it is difficult, if not impossible, to distinguish the changes in attitudes and conduct effected by the DDA from changes that have resulted from other forces of change within society. The last three decades have seen an enormous shift in government and social policy in relation to people with disabilities. Prior to the 1970s the main service and accommodation option available to people with disabilities was care in an institution. Most options for education and employment were also in a segregated, sheltered setting.

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. However, it has been argued that many de-institutionalisation efforts have focused on the "bricks and mortar" of physical integration at the expense of measures intended to achieve true participation[23]. Anti-discrimination legislation, including the DDA, that addresses attitudinal barriers to equal participation and which compels community stakeholders to accommodate the needs of people with disabilities has been and remains an essential aspect of de-institutionalisation.

The DDA is both a consequence and a cause of changing attitudes to the human rights of people with disabilities, and the overall changes in social relationships and behaviours cannot be easily attributed to one or the other.

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[22] Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, at 327

[23] See, eg, Lesley Chenoweth 'Closing the Doors: Insights and Reflections on Deinstitutionalisation', Melinda Jones and Lee Ann Basser Marks (eds) (2000) *Explorations on Law in Context Special Issue; Law and Disability in Australia*, 77, at 86

3.2 The Value of the DDA

3.2.1 The Impact of the DDA on Individuals

The Commission considers the DDA to be a valuable and essential piece of legislation. As has been charted by the Human Rights and Equal Opportunity Commission ("HREOC") in their publication marking the DDA's ten year anniversary[24], the DDA has been used by many individuals and organisations within Australia to create change. Thousands of individuals have used the DDA complaints mechanism to seek redress for, or resolution of, discrimination against them. Many have used the DDA as a tool of last resort, after they have exhausted all other means, and consequently have succeeded in forcing individuals or organisations to make reasonable adjustments to enable participation of people with disabilities. The importance of making this avenue available to people with disabilities cannot be overstated; neither should this avenue be removed or weakened.

The Commission notes that, although this is not always or regularly the case, the resolution of individual complaints has at times resulted in change for other people in the future. A significant example of this is the complaint lodged against Telstra by Geoffrey Scott on the basis that Telstra would not rent him a telephone typewriter (TTY) on the same basis on which standard voice telephones were provided to other domestic Telstra customers[25]. The complaint resulted in an order that Telstra should provide a voucher to all profoundly deaf people to enable them to buy a TTY. Telstra subsequently decided to make this system available to all people with a severe hearing loss or speech impediment. Although relatively few complaints result in benefits of this scale, many complaints under the DDA do result in changes to policy, practice or physical facilities or buildings which will improve access for other persons with disabilities in the future.

Further, for every person or group of people who lodge a formal complaint with HREOC there are many more who strategically use the DDA (or relevant state and territory laws) to negotiate the removal of discriminatory barriers. Much of the information that the Commission provides daily via the telephone enquiry line or through community training sessions is used by community members to effect change without these members ever making a formal complaint. It is impossible to capture this use of the DDA in HREOC or Commission statistics, but this use of the DDA benefits many members of the community who have a disability.

Another impact of the DDA that is not reflected in HREOC or other available data is the extent to which the existence of the DDA, as a specific piece of legislation designed and created to address disability discrimination, has been empowering for some people with a disability. Community members report that even for those who have never used the DDA, the Act has had a substantial and important symbolic value for many people with disabilities[26]. The DDA has helped to reinforce the notion that people with disabilities have enforceable rights, and this educative function has operated among people with disabilities as well as those without disabilities.

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[24] Human Rights and Equal Opportunity Commission (HREOC) (2003) *Don't judge what I can do by what you think I can't: Ten years of achievements using Australia's Disability Discrimination Act*

[25] *Scott & Ors v Telstra Corporation Ltd* (1995) EOC 92-717

[26] See also Peter Handley, 'Caught between a Rock and a Hard Place: Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act' (2001) 36 *Australian Journal of Political Science* 515, at 517

3.2.2 The Broader Effects of the DDA

The DDA has been recognised as a unique piece of anti-discrimination legislation within Australia because it contains some provisions that depart from the traditional reliance on individual complaints as the sole means for enforcing equal opportunity[27]. These provisions, particularly those relating to disability standards and voluntary action plans, potentially allocate responsibility for the actualisation of rights beyond individual complainants to the State and also to the full range of employers, providers of goods and services and other stakeholders who currently play a role in maintaining discriminatory and excluding practices.

The limitations of voluntary action plans and disability standards, in their current forms, as mechanisms for enforcing compliance will be discussed later. Despite these limitations, the Commission considers that these mechanisms have encouraged broad-based analysis of how disability discrimination might be identified, addressed and avoided among a broad range of stakeholders. For example, although only the Disability Standards for Accessible Public Transport have been finalised, the processes of discussing and developing draft standards on education, access to premises and employment have contributed to a greater level of communication and consultation regarding disability discrimination issues than would otherwise have occurred. The Commission notes, for example, the progress that has been made towards upgrading the access provisions of the Building Code of Australia, using the ability to endorse these provisions as a standard under the DDA as an impetus[28].

Similarly, the development and lodgement of 253 voluntary action plans illustrates that some service providers have turned their attention to the needs and rights of people with disabilities. This may not have occurred, even to the limited extent that it has, without the threat of liability for discriminatory conduct and without the capacity for formal recognition of action plans as provided in the DDA.

The Commission also notes HREOC's achievements in using public inquiries to raise awareness and encourage broad community participation in relation to disability discrimination issues. Examples such as the 1998 Inquiry on Captioning and the 1999 Inquiry into Mobile Phones and Hearing Aids demonstrate that public inquiries, whether prompted by complaints or initiated by HREOC, have potential to achieve changes that benefit many people.

The Commission acknowledges, therefore, that the DDA has not only given people who are affected by disability discrimination an essential and often effective instrument to encourage or compel organisations to address specific instances of exclusion and discrimination. The DDA has also played a key role in putting disability discrimination issues on the agenda in a number of ways.

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[27] See, eg, Lee Ann Basser & Melinda Jones, 'The Disability Discrimination Act 1992 (Cth): A Three-dimensional Approach to Operationalising Human Rights' (2002) 26 *Melbourne University Law Review* 254

[28] Media Release (Dec 2002) *Accessibility and the Built Environment*, Australian Building Codes Board Office, Canberra

3.3 The Limitations of the DDA

While acknowledging that the DDA has had positive impact in many areas, and has achieved positive outcomes for some people with disabilities, the Commission notes that the objects of the legislation are far from being realised.

The Commission has received feedback from individuals and disability advocacy groups that the DDA has been more effective in addressing some forms of discrimination than others. Many note that while the DDA has been useful in relation to instances of explicit and direct discrimination, more covert discrimination remains difficult to challenge. Some members of the community with disabilities consider that while there have been changes in the nature of discrimination in the past ten years, the overall impact of discrimination remains the same. Community members suggest, for example, that employers have resorted to strategies involving indirect discrimination to exclude people with disabilities as they have become more aware of the potential consequences of directly and blatantly discriminating against applicants and employees who have a disability.

Similarly, many consider that the DDA has been more useful for people who encounter obvious barriers to access or participation, such as physical barriers that restrict or prevent access to premises. On the other hand, discrimination that is embedded in processes, practices and attitudes is seen to have been more difficult to challenge using the DDA. Related to this is the view that the DDA has been more useful for people with physical and sensory disabilities, and that it has done little to address the forms of discrimination experienced by people with mental illnesses, intellectual disabilities or acquired brain injuries.

In addition to the above groups, the Commission also received feedback that the DDA has been less effective in protecting the rights of people with multiple disabilities, people in institutions and supported residential services, indigenous people with disabilities and people with disabilities from non-English speaking backgrounds.

The Commission notes that anti-discrimination legislation has not been able to address some of the most fundamental human rights issues for people with disabilities, such as the removal of freedoms through compulsory care or allegations of abuse experienced in the context of institutions. The Commission acknowledges, however, that the solution to this is unlikely to be found within the framework of anti-discrimination legislation, and instead what is required is a strong watchdog to ensure that all service provision to people with disabilities recognises their human rights, and is of high quality.

In general, there are few indications that discrimination against people with disabilities is decreasing. The number of complaints of disability discrimination complaints lodged in Victoria each year continues to rise. Complaints of a similar nature, against respondents operating within the same area or against the same respondents, continue to be lodged repeatedly with the Commission and with HREOC. Finally, an array of indicators of social disadvantage and marginalisation demonstrate that discrimination against people with disabilities remains at an unacceptable level within Australia and that after ten years of the DDA and over twenty years of state anti-discrimination laws people with disabilities have not yet achieved equity.

4. THE NEED FOR A NEW APPROACH

Over the past twelve months the Commission has begun to focus on developing stronger and more effective mechanisms for encouraging compliance with anti-discrimination legislation. Current anti-discrimination legislation within Australia, as in most parts of the world, relies primarily on an individual complaints model to protect the rights of people with disabilities and other groups within the community who experience unjustified discrimination.

Although the DDA, as noted before, contains several provisions that potentially depart from exclusive reliance on such a model, it is generally acknowledged that the "the driver of change towards a more accessible and equal Australia remains the complaint process"[29]. The Commission has identified a number of problems with this approach, prompting the Commission's current focus on finding more effective mechanisms for addressing discrimination and realising human rights.

4.1 The Limitations of Relying on a Complaints-based Approach

It is now widely recognised that discrimination and the barriers to equality in our community are entrenched and systemic in nature, and that they do not result only from the actions of individuals. Rather, they are based on long standing discriminatory views and behaviour built upon over time and reinforced overtly and subtly by unquestioned policies, laws and practices throughout the structures and institutions of our society.

4.1.1 Depending on People Affected by Discrimination to Instigate Change

One concern about current, complaints-based approaches to addressing discrimination is that they rely upon those people who are affected by discrimination and disadvantage to initiate social change. It seems inappropriate to place responsibility for rectifying an unfair system predominantly on the victims of that system. It is also impractical. Disadvantage and inequality often operate to disempower those members of the community affected by them. It follows that, in many instances, the people who most need to use anti-discrimination laws will be least able to access the level of information, support, confidence, time and energy they need to lodge a complaint. Certainly, feedback from people with disabilities and disability advocacy groups suggests that those people most at risk of human rights abuses as a result of a disability are generally not well equipped to bring or sustain legal action. Where people rely upon the assistance of carers, the people in caring roles also lack the economic resources, time, energy or information to support a complaint in many instances.

We know that only an extremely small proportion of people who experience disability discrimination lodge complaints, either with the Commission or with HREOC. Research conducted for the Commission in 1999 found that 72% of people who experience discrimination choose to do nothing about it[30].

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[29] HREOC (2003) *Don't judge what I can do by what you think I can't: Ten years of achievements using Australia's Disability Discrimination Act*, at 66

[30] *Victoria - the place to be equal: A summary of research into the impact of the Equal Opportunity Act 1999* (2000)Research conducted by Newton Wayman Research Pty Ltd for the Equal Opportunity Commission Victoria

The reasons that people do not take action about discrimination include:

- lack of awareness that they can and have a right to take action;
- in particular, lack of awareness that the DDA or the EOA covers the type of disability they have;
- lack of recognition that they have experienced discrimination or a perception that the behaviour they have encountered is just normal;
- lack of information about disability discrimination legislation or about how to go about making a complaint of discrimination;
- fear of the consequences of taking on a powerful organisation which has power over the complainant's work, accommodation, care and support, access to basic services and goods or another aspect of their life;
- belief that they need legal representation to make a complaint and inability to bear costs of representation;
- perception that making a complaint is too costly, both financially and emotionally;
- lack of access to non-legal support to make the complaint;
- anxiety and fear about a formal legal process and difficulties in proving a case; and
- fear of exposure and public discussion about their private issues.

Similar reasons prevent people who lodge complaints with HREOC or the Commission from pursuing their complaints in the relevant court or tribunal if their matter is not resolved through conciliation. In particular, feedback received by the Commission suggests that people are intimidated by the prospect of formal and more legalistic court proceedings and dissuaded by the additional costs they need to pursue complaints with legal assistance. Community members state that in relation to complaints under the DDA, many people are concerned that they risk being forced to pay the respondent's costs if they pursue a complaint to the Federal Court or to the Federal Magistrates Service if they are unsuccessful. The Commission notes that this concern is valid. The Federal Court and Federal Magistrates Service do not order that costs follow the event as a matter of course. However, in the period between September 2000 and September 2002 the Federal Magistrates Service ordered unsuccessful applicants to pay respondents' costs in 64% of unlawful discrimination cases, and the Federal Court ordered costs in 50% of cases[31].

4.1.2 Ineffectiveness in Addressing Systemic Issues

A complaints-based approach does not address the systemic nature of discrimination. A range of commentators have criticised what they see as the privatisation of discrimination as a public policy issue[32]. Specifically, it is stated that the individualised approach to addressing discrimination characterises discriminatory acts as 'one off', or atypical, actions by aberrant, blame-worthy individuals. This ignores the social and historical context which supports discriminatory behaviour. It is also stated that the approach to handling complaints of discrimination by private investigation and conciliation protects

[31] Human Rights and Equal Opportunity Commission (2003) *Change and Continuity: Review of the federal Unlawful Discrimination Jurisdiction September 2000 - September 2002*

[32] See, eg, Margaret Thornton (1990) *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Melbourne, Oxford University Press and Peter Handley, "Caught Between a Rock and a Hard Place: Anti-Discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act' (2001) *Australian Journal of Political Science*, 515

discrimination from public scrutiny and limits the capacity of individual complaints to effect broader change.

The Commission considers that access to a confidential complaints-resolution system is important for some complainants. Individuals who have been subjected to discrimination should always have access to a system that they can use to resolve or seek redress for their particular issues. 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 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.

However, the Commission agrees that the current system frequently fails to achieve large scale change or to prevent repeated instances of discrimination by the same respondent. In recognition of this fact, the Commission has initiated informal[33] and formal[34] processes to address systemic discrimination while operating within the parameters of the *Equal Opportunity Act 1995*. Even with such processes in place, the complaints-based model remains insufficient to fully address the system-wide, entrenched discrimination that exists throughout the community.

4.1.3 The Need to Check Compliance

Complaints-based systems such as the DDA do not sufficiently ensure compliance with equal opportunity legislation.

Employers in Victoria have been liable for complaints of discrimination if they fail to take steps to prevent disability discrimination in the workplace for over 20 years. The additional liability imposed by the DDA has been in place for ten years. However, in 2003, most employers appear not to take this liability seriously. Research conducted for the Commission has found that up to 66% of employers do not have policies and practices in place to prevent discrimination and harassment[35]. The low proportion of service-providers in Australia that have lodged voluntary action plans under the DDA demonstrates that this failure to take responsibility for addressing disability discrimination is not limited to employers. The Commission notes that only 29 private enterprises have made use of the action plan provisions of the DDA and have lodged a

[33] The Commission has initiated internal procedures with a view to addressing systemic issues that come to the Commission's attention through individual complaints. These procedures ensure that individual complaints result in systemic outcomes whenever possible and have already achieved a number of positive systemic outcomes during the resolution of complaints. The Commission is currently implementing a system for monitoring and reporting the outcomes of all complaints that feature a systemic issue so that the full effects of this approach can be measured.

[34] The Commission's more formal strategies to address systemic discrimination utilise its powers to conduct investigations and inquiries. For example, the Commission is undertaking a major inquiry into discrimination in the recruitment industry in collaboration with key industry players, particularly the Recruitment and Consultants Services Association and the Victorian Employers Chamber of Commerce and Industry. The aim of the inquiry is to identify the extent to which members of the recruitment industry are aware of and comply with Victorian equal opportunity legislation, identify particular challenges that recruitment agencies face in complying with equal opportunity legislation and develop strategies to promote compliance. The Commission aims to conduct one such inquiry each year.

[35] *Victoria - the place to be equal: A summary of research into the impact of the Equal Opportunity Act 1995* (2000) Research conducted in 1999 by Newton Wayman Research Pty Ltd for the Equal Opportunity Commission Victoria

voluntary action plan with HREOC. While there are examples of industries, businesses, educational institutions, local government and government departments taking action to ensure that they are complying with the terms of the DDA, this practice is far from widespread.

Most Australian anti-discrimination legislation, including the DDA, does not contain mechanisms that require organisations and individuals to take steps to ensure that they are complying with the legislation. Without such mechanisms the capacity of the DDA to achieve its objects will be severely limited, and the pace of change unacceptably slow. We need to move from a system that merely requires retrospective action on an individual complaint of disability discrimination to one which requires employers and others to proactively comply with the legislation.

4.2 Alternative Approaches to Promoting Equity

Most countries throughout the world have adopted similar schemes to those used in Australia when legislating to tackle discrimination. However, several jurisdictions have moved beyond the complaints-based model and have instituted a more proactive approach to requiring compliance with equal opportunity legislation.

4.2.1 Canada - The *Employment Equity Act 1995*

The Canadian *Employment Equity Act 1995* aims to address disadvantage in employment experienced by women, visible minorities, Aboriginal people and persons with disabilities. It gives the Canadian Human Rights Commission the power to audit the performance of public employers and private employers employing more than one hundred persons to ascertain whether they are complying with the legislation.

The legislation requires employers to take active measures to assess and address inequity within their workforce, in particular to:

- survey their employees and undertake a workforce analysis to establish whether gaps in representation of designated groups exist;
- if gaps are found, analyse employment systems to identify barriers for the designated groups;
- develop a plan to remove barriers, implement positive measures to correct the effects of past exclusion, and establish hiring and representation goals; and
- monitor progress in implementing their employment equity plan.

The compliance work of the Human Rights Commission involves examining documentation, conducting on-site visits, and interviewing managers, employees and union representatives. The Human Rights Commission also monitors ongoing compliance, including employers' progress against hiring and promotion goals.

Persuasion and negotiation are the preferred approaches to dealing with instances of non-compliance. However, if employers fail to cooperate, refuse to sign undertakings or do not satisfy the undertakings they agreed to, the Human Rights Commission may issue a compliance notice requiring certain actions within a specific time frame. If a direction is not fulfilled, the Commission may ask a Tribunal to issue an order of compliance.

A legislative review of the *Employment Equity Act* conducted in 2002 reported that only 3.7% of audited employers were in compliance as the time of the initial audit. However, in about 80% of cases, employers were in compliance when the compliance officer returned to do a follow-up audit, demonstrating that a cooperative approach can be effective when backed by strong legislative enforcement provisions[36]. Moreover, it has not yet been necessary for a Tribunal hearing to be held to enforce compliance.

The Commission notes, however, that even under a strong approach of this sort, the rate of progress has been slower for people with disabilities than for other groups designated under the legislation. Data collated by the Human Rights Commission showed that representation of people with disabilities within both the public and private sectors improved only marginally between 1998 and 2000, although progress in the public sector was more substantial[37].

4.2.2 Northern Ireland

Two different statutory compliance systems in relation to anti-discrimination provisions operate in Northern Ireland and are worth considering.

Fair Employment and Treatment (Northern Ireland) Order 1998

The first approach relates to discrimination on the basis of religion and political belief. The *Fair Employment and Treatment (Northern Ireland) Order* 1998 prohibits discrimination on these grounds in the employment context. The Order requires most public sector employers and all private sector employers with more than ten full-time employees to submit a monitoring return annually to the Commission. The monitoring return must supply details of the religious/community background of all employees.

Employers are also required to review their recruitment, training and promotion practices at least once every three years. Where fair participation is not being provided the Equality Commission may direct an employer to undertake affirmative action practices.

The Equality Commission has the power to investigate the employment practices of any employer at any time. Where the Commission considers that affirmative action is required to ensure fair participation, it may seek an undertaking from the employer. If an undertaking is not given or not complied with, the Commission can issue a legally enforceable direction. Employers who do not comply with the legislation after repeated requests face criminal penalties, the loss of Government grants and exclusion from public contracts.

The Northern Ireland Act 1998

The second compliance system of note in Northern Ireland targets discrimination perpetuated by public authorities. The aim of this approach is to counter inequality and discrimination in government policy making, program development and service provision. The strong legislative compliance requirements were developed because previous mandates[38] to eliminate discrimination in this context had had minimal impact.

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[36] *Legislative Review of the Employment Equity Act: A Discussion Paper* (January, 2002) Employment Equity Branch of the Canadian Human Rights Commission, Ottawa, Canada

[37] *Legislative Review of the Employment Equity Act: Report and Recommendations to the House of Commons Standing Committee on Human Resources Development and the Status of Persons with Disabilities* (April, 2002) Employment Equity Branch of the Canadian Human Rights Commission, Ottawa, Canada

[38] The previous mandates were contained in a policy titled "Policy Appraisal and Fair Treatment" (PAFT).

The *Northern Ireland Act 1998*, based on the Belfast (Good Friday) Agreement of 1998, set a constitutional framework for Northern Ireland. Equality and human rights are woven throughout both the Agreement and the *Northern Ireland Act*. In particular, section 75 of the *Northern Ireland Act* places a statutory duty on all public authorities, including government departments, government agencies and organisations, and District Councils to promote equality of opportunity.

Each public authority is required to prepare and submit an "equality scheme". Equality schemes must state how the authority, when fulfilling its ordinary functions, will address inequality. The eight forms of discrimination that must be addressed include discrimination against people with disabilities.

Equality schemes must be submitted to the Equality Commission for approval within a legislatively imposed time frame. The Equality Commission has the power to refer an equality scheme to the Secretary of State for non-compliance, request revised schemes, investigate complaints and generate investigations. Public authorities are also required to publish equality impact assessments detailing whether the work of the authority has had any adverse or positive impacts upon the promotion of equality.

The statutory equality duty took effect on 1 January 2000. The first eighteen months were spent on the development of equality schemes and an evaluation of the section 75 duty is commencing in 2003.

4.2.3 United Kingdom

Race Relations (Amendment) Act 2000

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[39] to promote racial equality and prevent racial discrimination. The Commission for Racial Equality ("CRE"), 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.

The *Race Relations Act* also empowers the Home Secretary to impose specific duties on public authorities stating what the authority must do in order to better comply with the legislation. This power has been used to require a number of public authorities to prepare and publish a "Race Equality Scheme". A Race Equality Scheme must articulate how the authority will:

- assess whether their functions and policies are relevant to race equality;
- monitor their policies to see how they affect race equality;
- assess and consult on policies they are proposing to introduce;
- publish the results of their consultations, monitoring and assessments; and
- train their staff on the new duties.

If the CRE is satisfied that a public authority is not complying with its specific duties, 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, the CRE can apply to a court to order compliance.

[39] The list of authorities is included in Schedule 1A to the *Race Relations Act 1976* and includes police, health services, educational bodies, local government, armed forces, transport authorities and government departments.

It is worth noting the background to the 2000 amendments and the introduction of a positive and enforceable compliance scheme. For almost 25 years the *Race Relations Act* had prohibited racial discrimination, provided a complaints mechanism in relation to acts of discrimination and empowered the CRE to investigate and take enforcement action. However, an inquiry conducted in 1999 highlighted that most organisations and institutions urgently needed to take action to address "institutional racism"[40]. The majority of organisations failed to take action, necessitating the imposition of a statutory duty on public authorities[41].

The Commission notes that although this is a relatively new system, the Government of the United Kingdom has introduced a bill to extend the model so that is applies to other forms of discrimination as well as racial discrimination.

The Equality Bill 2003

The United Kingdom Parliament is currently considering a Bill that would consolidate the existing *Sex Discrimination Act 1975*, *Race Relations Act 1976* and the *Equal Pay Act 1970*, extend the prohibition of discrimination to cover other grounds such as sexual orientation and religion, create an Equality Commission and extend the duties under the *Race Relations Act* to cover other forms of discrimination. Under the Equality Bill:

- All public bodies must have regard to the need to promote equality and eliminate discrimination on the basis of ten grounds, including disability;
- The Secretary of State may, by order, impose specific duties on public bodies to ensure better compliance with the legislation. The order may require that a public body or a category of public bodies assess compliance, assess the likely impact of their policies and practices on designated groups, arrange staff training or monitor and report upon the effects of policies and practices;
- Designated employers may be required to conduct workforce reviews and implement employment equity plans to ensure workforce equity between persons regardless of disability, race or sex.

The Bill, if passed, will grant the Equality Commission broad enforcement powers, including the power to conduct investigations, require organisations and individuals to provide undertakings that they will take steps to comply, and issue compliance notices. If an organisation does not take the steps required in a compliance notice the Equality Commission may apply to a tribunal for an order enforcing compliance.

4.3 Conclusion

Although the above overseas examples target various different forms of discrimination and various different manifestations of that discrimination, each represents a movement towards a proactive approach to enforcing non-discrimination.

This movement towards active compliance models in the area of equal opportunity legislation indicates that such models are considered necessary to ensure the effectiveness of anti-discrimination provisions. The adoption and maintenance of these

[40] *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny* (February 1999) available at http://www.archive.official-documents.co.uk/

[41] The General Duty to Promote Racial Equality: Guidance for public authorities on their obligations under the *Race Relations (Amendment) Act 2000* (2001) Commission for Racial Equality, London

models by the legislatures of various developed countries also suggests that the approach promotes inclusive and productive societies, and is economically feasible.

The Commission considers that to improve our current approach to addressing disability discrimination we need to develop a system that:

- shifts primary responsibility for enforcing equal opportunity laws and initiating change away from people with disabilities and onto other community, government and business stakeholders;
- imposes clear and positive duties upon public and private authorities to take action to address entrenched and systemic discrimination within their sphere of influence; and
- features strong mechanisms to ensure compliance.

The Commission is currently undertaking a research project to identify the most effective compliance models and to develop strategies for government and the business community for the prevention of systemic discrimination in employment**.** It is anticipated that this project, titled "Realising Rights", will be completed early in 2004[42].

Although it would be premature to recommend a particular system prior to the outcome of the "Realising Rights" research, the Commission strongly suggests that the implementation of a strong system for ensuring compliance would complement and strengthen the current mechanisms of the DDA.

[42] The draft Research Brief and Research Questions in relation to the 'Realising Rights' Project are annexed at Attachments B and C. It is expected that these will be further amended before finalisation.

5. IMPROVING EXISTING ASPECTS OF THE DDA

The Issues Paper seeks comment on a number of specific issues related to improving the existing provisions of the DDA. In this section, the Commission will address a number of these questions in light of the information and views provided thus far.

5.1 Representative Actions

The Issues Paper asks:

- ***What scope is there to use representative actions to achieve systemic change?***
- ***Should the DDA be amended to allow HREOC and other appropriate bodies to initiate complaints?***

The Commission considers that the provision for representative complaints is an essential aspect of anti-discrimination legislation. By enabling people affected by the same conduct to pool resources and to seek common resolution of the issues they have experienced, representative actions have some capacity to achieve systemic change.

The Commission notes that the provisions of s89(2) impose a number of fairly technical requirements upon representative complaints. Consequently, most people require legal assistance to effectively lodge a representative complaint. This may limit people's access to the representative complaints provisions, and reduce their effectiveness.

Representative complaints in their current form require affected individuals, or their carers or support persons, to initiate action. The Commission considers that the DDA should be amended to enable HREOC and other appropriate organisations to initiate complaints where a breach of the DDA comes to their attention. A provision enabling representative organisations to lodge complaints could be particularly useful because the disability sector features a number of strong and effective advocacy groups.

The Commission considers that 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. The provisions relating to representative complaints should therefore ensure that people with disabilities have control over their own agendas.

To define which organisations or bodies would be appropriate for this purpose, the Commission recommends that the DDA include provisions similar to those in the *Racial and Religious Tolerance Act 2001* (Vic). Subsections 19(3) and (4) of that statute provide that a representative body may complain on behalf of a person or persons if that body has a "sufficient interest" in the complaint. Sufficient interest is to be found if:

> "the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to affect the interests of the body or the interests or welfare of the persons it represents"[43].

[43] s19(4), *Racial and Religious Tolerance Act 2001* (Vic)

5.2 Disability Standards

- ***What are the advantages and disadvantages of mandatory disability standards?***
- ***What are the disadvantages and advantages of being able to formulate disability standards in some areas of discrimination listed in the DDA and not others?***
- ***Should the DDA be amended to allow disability standards to include independent monitoring and enforcement arrangements?***

The Commission considers that standards can, in some areas, improve the effectiveness of the DDA by articulating in greater detail precisely what organisations must do to comply with the legislation. This is particularly so in areas which lend themselves to the development of more quantitative and technical standards. In such areas, detailed standards provide more information and clarity for both potential complainants and potential respondents about how, when and where services should be made accessible.

The Standard for Access to Public Transport is one positive example. Transport-providers can now be clear about their present and future obligations. They have access to guidance about what specific action they must take to avoid liability under the DDA.

Arguably, the existence of standards in some areas will encourage compliance, as service-providers may be more likely to invest in making changes if they are guaranteed that the changes will be sufficient to meet their legislative obligations. Detailed standards will also result in economic benefit across the community because each complying organisation will not have to seek advice and develop its own position regarding what is required to meet legislative obligations.

The existence of standards can also assist complainants. Where a sufficiently detailed standard is in force, potential complainants can be informed with a greater level of certainty about whether they have a valid complaint. The evidentiary burden on complainants can also be reduced because specific issues about the reasonableness of particular barriers do not have to be argued and proven on a case by case basis.

However, the process of negotiating and developing standards has proven to be slow, and the development of detailed standards has proven more feasible in some areas than others. In particular, it appears that standards are more useful in relation to areas that require more specific and technical adjustments, such as transport and access to premises. In broader areas, such as employment, it has proven difficult to elaborate on the provisions of the DDA in a meaningful or constructive way.

The Commission considers that it is important that measures are in place to ensure that standards do not operate to lower the provisions of the DDA in any way. It is also critical that the disability sector is provided with adequate support and resources to negotiate standards on a level playing field with industry players.

However, provided these issues are taken into account, the Commission 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.

Further, the Commission strongly suggests that the effectiveness of the DDA standards provisions are limited because they can be enforced only as a result of complaints. The

Commission considers that the DDA should include monitoring and enforcement mechanisms to ensure widespread compliance with disability standards.

5.3 Action Plans

- ***Are there sufficient incentives under the DDA to submit voluntary action plans?***
- ***Why have relatively few businesses submitted voluntary action plans?***

The Commission considers that action plans have the potential to be a highly effective compliance mechanism. This is particularly true when an action plan:

- is developed using a process of thorough consultation within the organisation and with a range of people with disabilities external to the organisation developing the plan;
- acknowledges, identifies and addresses existing barriers to equity as well as articulating strategies to prevent discriminatory acts in the future;
- is detailed and allocates responsibility for specific measures in the plan; and
- sets a clear schedule for action with provision for progress against the plan to be monitored and evaluated.

It is noted that action plans are an important component of each of the anti-discrimination compliance schemes referred to at section 4.2.

Community consultation has indicated that some of the plans that have been lodged with HREOC are perceived within the community as being too vague and too general. In addition, some are seen to be simply "pieces of paper" that are not actively incorporated into the ongoing work of the organisation in question. The Commission cannot comment on whether these perceptions are accurate, and acknowledges the value of those action plans that have been lodged with HREOC notwithstanding the varied quality of the plans.

The numbers of service-providers that have been motivated to take up responsibility and develop action plans remains low. Progress in the private sector has been particularly slow. Only 29 "business enterprises" had lodged action plans as at January 2003. The low number of action plans that have been lodged indicates that there is neither enough incentive to submit action plans nor enough threat of sanction for organisations that fail to take action to prevent discrimination.

The Commission suggests, therefore, that a number of amendments to the action plan provisions in the DDA should be considered, including:

- That the DDA provisions relating to action plans should not focus solely on providing incentives or requirements for the development of action plans, but should also ensure that lodged plans are implemented;
- That the capacity for the development of action plans should be extended beyond providers of goods and services to all organisations and areas covered by the DDA;
- That all public authorities be required to prepare and submit action plans outlining the steps that they will take to promote and progress equity for people with disabilities within their sphere of operation. Such a duty could be based on the equality duty in the *Northern Ireland Act* or the proposed duty in the United Kingdom's Equality Bill. This would reflect government's responsibility to

demonstrate good practice in addressing discrimination. A similar scheme could be established in relation to larger private sector employers;

- That, if the development of action plans remains voluntary for private sector bodies, the introduction of additional incentives be considered. For example, the Government could offer financial incentives such as a reduction in business-related taxation for employers who develop and implement disability action plans. Government funding or access to government contracts could be made contingent on an organisation's development of, and compliance with, an action plan. The Victorian Government has established one example of a system that links eligibility for government contracts with equal opportunity practices[44]. This approach would demonstrate shared responsibility for addressing discrimination, and would share the costs of complying with the DDA between business and government.

5.4 Temporary Exemptions

- ***Should there be a formal link between action plans and exemptions?***
- ***Under what circumstances should temporary exemptions be granted?***

The Commission supports HREOC's current approach to the use of exemptions, which characterises exemptions as a positive mechanism for assisting organisations to manage the transition to non-discrimination. It may be useful to enshrine this approach by amending the DDA to specify criteria for granting exemption applications based on HREOC's current policy, which direct HREOC to take into account:

- Why immediate compliance with the DDA is not possible;
- Whether the applicant has undertaken a review to identify discriminatory practices and circumstances;
- Any measures already implemented or planned by the applicant to achieve the object of the DDA, including the development of an action plan; and
- terms or conditions that the applicant is prepared to meet and which promote achievement of the objects of the DDA.

In many instances it will be appropriate to link the granting of a temporary exemption to the formulation of an action plan. This could be reflected by introducing criteria in the above terms into the DDA.

[44] In June 2002 the Attorney-General established a Government Legal Services Panel of legal firms. All external legal services purchased by Victorian Government Departments must now be obtained from one of the firms on the Legal Services Panel. To be eligible for inclusion on the panel, legal firms had to demonstrate a commitment to the furtherance of equal opportunity in their work practices. The Legal Services to Government Panel Contract requires firms on the Legal Services Panel to report annually on the percentage of work allocated and fees paid to male and female barristers. The contract also requires member firms to document equal opportunity policies and procedures and provide these on request, and to co-operate with any audit of the firm's equal opportunity policies, procedures and practices.

5.5 Inquiries

- ***What is the scope for greater use of inquiries to achieve systemic change?***
- ***Are there any impediments to the use of the inquiry process?***

The Commission considers that using public inquiry processes holds considerable potential to achieve systemic outcomes. It notes that HREOC already uses its inquiry powers to good effect.

HREOC's process for dealing with temporary exemption applications utilises a public inquiry process. This enables HREOC's decision to be informed by the widest possible range of perspectives and serves a positive educational function by enabling community discussion about the issues involved.

HREOC also has specific powers to hold public inquiries in relation to individual complaints which have broader, system-wide implications, and has used these powers since 1999 to investigate a small number of complaints using the public inquiry process. When used, this approach demonstrates that the extent of systemic change that results from an individual complaint depends partly on the process used to handle the complaint. A more open and public approach to the investigation of appropriate complaints involves a range of community and industry participants in the discussion of disability discrimination issues, increases the likelihood that the resolution of the complaint will have a broader, systemic outcome, and results in more publicity for the issue and for any positive outcomes.

The Commission recommends increased use of this approach and, noting that HREOC's capacity to conduct inquiries is limited by resources, suggests that an increased allocation of resources for HREOC to undertake this function may improve the effectiveness of the DDA.

5.6 Interaction between the DDA and other Commonwealth Legislation

- ***Can the relationship between the DDA and other Commonwealth legislation be improved? How?***

5.6.1 Ensuring that other Legislation Complies with the DDA

Section 47(2) of the DDA effectively makes the DDA subordinate to all other Federal legislation. The Commission believes that this position should be reversed. It is noted that, although the DDA has been in operation for ten years, there has been no review or audit to ensure that other legislation is consistent with the objects of the DDA.

The Commission considers, therefore, that:

- An analysis of all Federal legislation, regulations and other legislative instruments should be conducted to assess whether these instruments comply with the DDA and to assess, where non-compliance is identified, whether it is necessary and justified;
- The development of new legislation and legislative instruments should include a mandatory assessment to ensure compliance with minimum human rights standards, including the DDA; and

- Amend s47 to provide that the DDA is primary legislation, subject to specific, rather than blanket, exceptions where legislative discrimination against people with disabilities is considered necessary.

5.6.2 Referral of Discriminatory Awards

Under section 46PW of the *Human Rights and Equal Opportunity Act 1986*, where the President is made aware that a discriminatory act has been conducted under an award, she or he must refer the award to the Australian Industrial Relations Commission. This only relates to discriminatory acts that would be unlawful under the *Sex Discrimination Act 1984*. The Commission considers that this provision should be extended to apply to acts that would be unlawful under the DDA. It would also be appropriate to vest HREOC with the power to intervene in matters before the Australian Industrial Relations Commission which involve a potentially discriminatory award.

5.7 Definition of Disability

- ***What have been the effects of the DDA's broad definition of disability?***
- ***Are any elements of the DDA's definition of disability too narrow or too broad?***

The Commission strongly supports the use, in the DDA, of an inclusive definition of disability. The broad definition:

- Prevents many unnecessary disputes over what constitutes a disability;
- Avoids an excessive focus on complainants and their medical categorisation in disability discrimination matters;
- Reflects that disability is one aspect of a person's existence rather than an unchanging, identifying category;
- Minimises the need to involve medical professionals in disability discrimination matters; and, most importantly;
- Extends protection to a broad range of people who are affected by discrimination and prevents people from being denied redress because of a technical, definitional problem.

The Commission considers that the broad definition of disability should be retained.

It is noted, however, that there is currently some doubt about whether the DDA applies to discrimination on the basis of a manifestation of a disability. In particular, the decision of the Full Bench of the Federal Court in *Purvis v State of New South Wales (Department of Education and Training)*[45] has indicated that there is a distinction between a disability and conduct that directly results from that disability.

The *Purvis* matter involved a student with a disability that manifested itself in behavioural problems, including aggressive behaviour. The student was suspended and ultimately expelled from his State high school.

HREOC found that the school had discriminated against the student on the basis of his disability. This decision was based on a finding that the student's difficult behaviour was

[45] [2002] FCA 503

so closely connected with his disability that less favourable treatment on the ground of the behaviour amounted to less favourable treatment on the basis of the disability[46].

The HREOC decision was overturned on review by Emmett J of the Federal Court. Emmett J held that:

> ..there is a distinction to be drawn between a disability within the meaning of the Act, on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not **necessarily** less favourable treatment by reason of the disability[47].

Emmett J further held that in the circumstances, for the purposes of the definition of "disability" at section 4 of the DDA:

> …it is the disorder or malfunction or the malfunction, disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability[48].

Emmett J found that HREOC had erred in its interpretation of the phrase "discrimination on the ground of a disability". This position was approved on appeal by the Full Federal Court.

The Commission considers that this establishes a dangerous precedent which has the potential to undermine the effectiveness of the DDA. In many instances, discrimination against a person with a disability does not occur in response to that person's diagnosed condition, but in response to the way the person acts or looks. The *Purvis* matter is currently on appeal to the High Court[49]. The Commission suggests that 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"[50].

5.8 Definitions of Discrimination - Indirect discrimination

- ***Could the definitions of direct and indirect discrimination be improved?***

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.

It is also stated that the technical requirements of the definition may place too onerous a burden on complainants. Under the definition of indirect discrimination at section 6 of the DDA, a complainant must first prove that they have been required to comply with a

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[46] (Unreported, HREOC, 13 November, (2000), cited in *Purvis v State of New South Wales (Department of Education and Training)* [2002] FCA 503 [20]
[47] *State of New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199 [36]
[48] Ibid [37]
[49] *Alexander Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education and Training) and Human Rights and Equal Opportunity Commission* No. 5423 of 2002
[50] See section 7(2)(b) of the *Equal Opportunity Act 1995* (Vic)

requirement or condition with which they cannot comply but which a substantially higher proportion of people without the disability would be able to comply. The complainant also bears the burden of proving that the requirement or condition is not reasonable. This 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.

The Commission notes that other jurisdictions have adopted different approaches to defining discrimination that occurs as a result of the imposition of conditions, requirements and standards.

Supreme Court of Canada: The *Meiorin* and *Grismer* cases

For example, the British Columbia *Human Rights Code 1996* prohibits discriminatory practices in employment, the provision of goods and services and a number of other areas. The Act establishes exceptions where a discriminatory practice in employment is based on a bona fide occupational requirement[51] and where there is a bona fide justification for a discriminatory practice in the provision of goods and services. The Code does not define direct or indirect discrimination, therefore the tests used to determine whether conditions and requirements are discriminatory have been developed through case law. Several decisions in 1999 substantially changed and, arguably, simplified the law with respect to discrimination arising from the imposition of policies, standards and conditions.

In the *Meiorin*[52] and *Grismer* [53]cases, the Supreme Court of Canada established a single test to assess whether standards, conditions and policies constituted unlawful discriminatory practice. The same test is applied in cases of direct and indirect discrimination, and turns on the following questions:

- Is there a standard which discriminates either directly or indirectly based on a prohibited ground?
- Is the standard rationally connected with the function being performed?
- Did the respondent adopt the standard with an honest and good faith belief that the standard was necessary for the fulfilment of its purpose or goal?
- Is the standard reasonably necessary for the respondent to accomplish its purpose or goal?

The last element of the test also requires that respondents prove that it would cause them undue hardship to accommodate the needs of the complainant and other individuals affected by the discriminatory standard[54].

This test avoids two of the main problems in the DDA's definition of indirect discrimination by:

- removing the requirement that a complainant prove that a "substantially higher" proportion of people without the complainant's disability would be able to meet the requirement or standard; and

[51] Section 13(4) of the British Columbia *Human Rights Code 1996*
[52] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (1999) 35 C.H.R.R. D/257 (S.C.C.)
[53] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868
[54] Section 15(2) of the *Canadian Human Rights Act 1985*

- placing the onus upon the respondent to demonstrate that the standard, requirement or condition is reasonably necessary and that the standard, requirement or condition is the least discriminatory approach possible.

The Commission acknowledges that the above test has been developed in a different legislative context, and that the *Meiorin* and *Grismer* decisions have been followed by further litigation. However, alternative definitions of indirect discrimination can also be found closer to home, in the context of Australian anti-discrimination legislation.

***Sex Discrimination Act 1984* (Cth)**

Under the *Sex Discrimination Act 1984*, reasonable requirements and conditions will not constitute indirect discrimination, but the onus is placed on a respondent to establish their requirements or conditions are reasonable. Section 5(2) of the *Sex Discrimination Act* provides that:

> …a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person[55].

The Commission suggests that consideration should be given to amending the DDA's definition of indirect discrimination to mirror the definition used in the *Sex Discrimination Act 1984*.

5.9 Reasonable Adjustment

- ***Should 'reasonable adjustment' be defined in the DDA?***

In many situations equal treatment of people with disabilities requires some accommodation by employers, educators, providers of goods and services, and so on. The concept of "reasonable accommodation" or "reasonable adjustment" is central to equality and non-discrimination principles generally. They rely on an acknowledgement that creating equal opportunity does not equate with providing identical treatment to every person and every group. Rather, non-discrimination often requires that a group or individual be treated differently in order to generate an equal and just outcome[56].

It has been argued, and accepted in varying degrees, that section 5(2) of the DDA establishes a principle of "reasonable accommodation". Section 5(2) provides that:

> For the purpose of subsection 5(1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

[55] Section 7B of the *Sex Discrimination Act* states that a person does not discriminate pursuant to section 5(2) if the condition, requirement or practice that they are imposing or proposing to impose is reasonable in the circumstances.

[56] For an early articulation of this principle, see the judgement of Judge Tanuka in the *South West Africa* cases ICJ Rep. 1962, 318 (1st phase) and ICJ Rep. 1966, 4 (2nd phase)

Some decisions have interpreted section 5(2) as imposing a positive duty upon respondents to make reasonable adjustments to accommodate a person's disability[57]. However, this approach has not been consistently applied and other decisions have held that there is no such positive obligation, or that it is a more limited duty[58].

The Commission considers that the inclusion of a duty to make reasonable adjustments is central to effective disability discrimination legislation. Without modification to premises, equipment, practices or job design, for example, the duty not to discriminate against people with disabilities will have minimal effect.

Further, feedback suggests that the inclusion of a provision that articulates a positive duty to make reasonable adjustments to accommodate the needs of people with disabilities would serve a useful educative function. Many respondents remain focussed on an understanding of non-discrimination as meaning refraining to act in particular ways. The concept that compliance with the DDA also requires more active steps can be difficult to convey.

The *Disability Discrimination Act 1995* (UK)

The United Kingdom's *Disability Discrimination Act 1995* is an example of equivalent legislation that provides clear and specific duties to make adjustments. The various duties have come into effect at different stages[59].

The *Disability Discrimination Act 1995* places a duty on employers to identify any arrangements or physical features in place that place people with disabilities at a "substantial disadvantage", and to take reasonable steps to prevent such disadvantage[60]. The Act lists examples of steps that an employer may have to take in relation to a person with a disability, such as:

(a) making adjustments to premises;
(b) allocating some of the disabled person's duties to another person;
(c) transferring him to fill an existing vacancy;
(d) altering his working hours[61].

The Act exempts small business from these provisions, and also enables regulations to be made to provide more detail about the duty on employers.

Providers of education will be required to provide auxiliary aids, by way of reasonable adjustment, from September 2003. Since October 1999, service providers have had to make reasonable adjustments to practices, policies or procedures that made it impossible or unreasonably difficult for people with disabilities to use their service. Service providers have also had to provide reasonable alternative methods of accessing a service when physical features make it unreasonably difficult for people with disabilities to access the service. The duty in relation to physical features will be increased in October 2004 when service providers will be required to remove or alter any physical features that prevent access for people with disabilities or provide a reasonable means of avoiding

[57] See, eg, HREOC's decision in *Mrs J obo of herself and AJ v A School*, supported (in relation to this issue) by the Federal Court on review, *A School v HREOC & Anor* [1998] 1437 FCA
[58] See, eg, *Commonwealth of Australia v Humphries* [1998]1031 FCA and *State of New South Wales (Department of Education) v HREOC and Purvis* [2001[FCA 1199
[59] The Equality Bill, currently before the House of Lords, would retain these provisions.
[60] S6, *Disability Discrimination Act 1995* (UK)
[61] S6(3), *Disability Discrimination Act 1995* (UK)

the feature[62]. The provisions place a cap on the costs that service-providers are expected to bear in complying with the Act[63].

The Commission suggests that similar provisions, articulating the positive duty to make reasonable adjustments to accommodate the needs of people with disabilities, should be considered for inclusion in the DDA.

[62] S21, *Disability Discrimination Act 1995* (UK)
[63] S21(7), *Disability Discrimination Act 1995* (UK)

6. COMPETITION AND ECONOMIC EFFECTS

The Issues Paper seeks comment on the following questions:

- ***What are the potential economic and competition effects of the DDA? How should they be measured?***
- ***Put another way, what are the direct and indirect costs and benefits of the DDA?***
- ***What are the costs of reasonable adjustments? Who bears these costs? Who should bear the costs? What is their impact on competition?***

6.1 The Benefits of Addressing Discrimination

Before discussing, in general terms, some of the costs to business, and any restrictions to competition that occur as a result of the DDA, the Commission wishes to emphasise the costs associated with failing to eliminate discrimination against people with disabilities.

The Commission has already stated that it does not consider that the value of an inclusive, non-discriminatory society can or should be assessed using economic measures alone. Discrimination against people with disabilities causes exclusion and injustice, and results in immeasurable hardship, frustration, inequity and suffering. The elimination of disability discrimination and the protection of human rights is central to the operation of a fair and well-functioning community. It is entirely appropriate that economic resources within the community be allocated towards the prevention of discrimination.

However, there are also some economic reasons why business and society as a whole should act to reduce disability discrimination.

6.1.1 Costs of Allowing Disability Discrimination - Societal Impact

As discussed in section 3 of the submission, almost one fifth of the Australian population has a lasting disability that restricts their everyday activities. Taking into account people whose everyday activities are not restricted, over one third of people in this country have an ongoing disability.

Given the association between age and disability[64], Australia's ageing population and falling fertility rates, the proportion of the population to have a disability and face discriminatory barriers to full participation in society is likely to increase.

Failure to address unreasonable barriers to the full participation of over one third of the population will cost the community in a myriad of ways. These include:

- Discrimination-based exclusion from education and employment results in increased costs to government through income support, provision of public housing or supported accommodation, employment assistance programs, and a range of support services required to assist with the effects of social exclusion that can be related to unemployment;
- Discrimination-based exclusion of people with disabilities from the labour market, namely under-utilisation of the labour force, can cause a serious loss of potential national output[65]. This costs the Australian community as a whole;

[64] ABS (1998) *Ageing and Carers*, Cat 4430.0)
[65] Naresh Agarwal (1982) *Economic Costs of Employment Discrimination*, Commission on Equity: Government of Canada

- Injuries that result from negotiating inadequately accessible premises cause increased use of medical and health-care resources; and
- Discriminatory barriers to social and community participation result in increased costs to government through health care and support services required to deal with the impact of social marginalisation and isolation.

The effects of discrimination and exclusion also impact upon the family, friends and other carers of people with disabilities. Therefore both the economic and social costs of disability discrimination extend beyond the direct targets of discriminatory practice. The government and the community as a whole bear a range of costs while discrimination is not addressed. In summary, the costs of failing to address discrimination is a charge to the country's economy, negatively affecting its competitiveness.

Conversely, many of the adjustments necessary to enable participation by people with disabilities will enhance access and participation by others in the community. Improvements to physically accessible public transport, for example, will increase mobility among parents of young children and elderly people. The range of financial and non-financial benefits of eliminating disability discrimination extends far beyond individuals with disabilities.

6.1.2 Costs of Allowing Disability Discrimination - Impact on Business

A growing body of evidence indicates that businesses that actively address disability discrimination and other forms of discrimination can benefit through higher revenue and decreased costs.

The "business case" for addressing disability discrimination states that preventing discrimination in the recruitment and management of workers with disabilities:

- Increases the pool of available talent and skill by removing artificial restraints on the proportion of the population from which employees can be drawn;
- Promotes new sources of ideas and problem-solving;
- Avoids the high costs associated with staff turnover;
- Can increase employee loyalty, resulting in lower absentee rates and increased productivity[66]; and
- Can initiate an employee-customer chain of satisfaction that results in higher profit[67].

Research has also challenged the myth that workers with a disability are less productive than workers without a disability[68]. A study of two samples of call centre workers, for example, found that levels of task engagement, attendance, efficiency and effectiveness

[66] Robert Drago and M. Wooden, 'The Determination of Labor Absence: Economic Factors and Workgroup Norms Across Countries' (1992) 45 *Industrial and Labor Relations Review*, 772

[67] Trevor Wilson (1996) *Diversity at Work: The Business Case for Equity*, John Wiley & Sons: Etobicoke, Ontario

[68] For discussion of a number of studies demonstrating higher retention rates, higher workplace safety performance and equal of higher job performance see Simon Zadek and Susan Scott-Parker (2001) *Unlocking the Evidence, The New Disability Business Case*, Employers Forum on Disability, London

were the same[69]. This study also found that workers with disabilities were significantly longer serving than other employees.

Another survey found that 82% of business managers had found that the attendance of employees with disabilities was the same or better than that of employees without a disability. The same survey found that 79% of managers considered that the performance of employees with disabilities was the same or better than that of other employees[70].

Businesses involved in the provision of goods and services also benefit financially by addressing discrimination against clients and customers with disabilities. Making adjustments to enable access by people with disabilities substantially increases the customer base, potentially resulting in increased sales. As noted above, such adjustments will extend access not only to people with disabilities and their carers but other groups in the community.

6.2 Costs and Competition Restrictions Arising under the DDA

6.2.1 Costs Resulting from the DDA

The costs that an organisation or business may incur as a result of complying with the DDA include:

- Legal or consultancy fees for the provision of advice about the requirements of the DDA, where specialist advice is required;
- Consultancy fees or allocation of internal human resources to develop and implement policies and procedures to ensure compliance with the DDA;
- Costs associated with making any adjustments or providing any services that are required to comply with the DDA; and
- Legal fees arising from the need to respond to or resolve complaints and other business costs associated with workplace disruption.

6.2.2 Factors Mitigating the Competition Effects of the DDA

The True Costs of Reasonable Adjustments

The Commission acknowledges that some adjustments required to enable participation and access by people with disabilities are costly. However, the Commission considers that the number of necessary adjustments that involve substantial cost is often overstated. This may reflect stereotypical, discriminatory attitudes about the capacity and needs of people with disabilities.

The DDA allows organisations flexibility in deciding the most appropriate way to remove discriminatory barriers. Many of the adjustments required to remove discrimination against people with disabilities relate to practices, policies, behaviours and job definition, and are cost neutral or require negligible resources. In the workforce, for example, many employees with disabilities do not require any adjustment to their work environment. Research conducted in the NSW public sector found that 6% of employees

[69] Kevin Hindle, Jack Noble and Brian Phillips (1999) *Are Workers With a Disability Less Productive? An Empirical Challenge to a Suspect Axiom*, Paper submitted to the refereed stream of the ANZAM 99 Conference, University of Tasmania

[70] J. Morrell (1990) *The Employment of People with Disabilities*, IFF Research Ltd, London

have a disability but of this group, only 1.9% require workplace adjustments[71]. Data from the United Kingdom indicates that only 4% of disabled people of working age require additional aids in the workplace[72]. The Commission notes that, in its experience, the majority of disability-discrimination complaints do not involve people with disabilities wanting to perform functions that far exceed their capacity. People with disabilities are usually in the best position to understand and judge their abilities and generally seek basic adjustments that will enable their full capacity to be reached.

Impact of the Concept of "Unjustifiable Hardship"

The Commission suggests that the strongest factor that mitigates the competition effects of the DDA is the concept of "unjustifiable hardship".

The DDA provides that employers, providers of goods and services and others are only required to make reasonable adjustments when these will not impose an unjustifiable hardship upon the employer, provider of goods or services, and so on.

Section 11 of the DDA provides that 'unjustifiable hardship' is to be determined taking into account all relevant circumstances, including, "the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship"[73].Therefore the DDA specifically enables the size and financial position of an organisation, and its resultant capacity to fund the required adjustments, to be taken into account in determining whether the organisation is under an obligation to make these adjustments. This concept prevents the requirements of the DDA from having a disproportionate impact on small business and adjusts the costs imposed upon an organisation in accordance with its capacity to bear these costs.

Inconsistent Compliance Restricts Competition

The DDA is in its relatively early stages of operation and, as noted, only the minority of organisations bear the costs of compliance. These organisations are those "unlucky" enough to be subject to a complaint or conscientious enough to proactively comply. While only a small proportion of businesses comply with the DDA, this may have an adverse impact on competition. A model that ensured comprehensive compliance with the DDA would minimise unfair restrictions to competition that arise under the current situation.

In summary, the Commission considers that the costs to business of complying with the DDA are:

- Often overstated or misunderstood because of stereotypical assumptions about the needs and capacities of people with disabilities;
- Offset to some degree by the financial benefits of addressing discrimination;
- Mitigated by the operation of the "unjustifiable hardship" concept, which adjusts the costs imposed upon a business to take into account the capacity of the business to bear the cost involved; and
- Not currently applied in a consistent manner across all businesses, because the present system does not adequately encourage broad compliance across the business community.

[71] Office of the Director of Equal Opportunity in Public Employment (2000) *People with a Disability - Comparative tables 2000 - NSW Public Sector*
[72] Simon Zadek and Susan Scott-Parker (2001) *Unlocking the Evidence: The New Disability Business Case,* Employers Forum on Disability, London
[73] S11(c), *DDA*

7. THE IMPACT OF OVERLAPPING ANTI-DISCRIMINATION JURISDICTIONS

Finally, the Issues Paper raises various issues relating to the co-existence of the DDA with state and territory disability discrimination provisions.

7.1 The Effects of Overlapping Jurisdictions

- ***What is the effect of the overlap between Commonwealth and State and Territory anti-discrimination legislation?***

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.

The Commission acknowledges that some potential respondents perceive the requirement that they comply with two legislative schemes to avoid liability for disability discrimination as an excessive burden. It is certainly true that in some instances, for example in relation to ensuring that premises are accessible, agencies and businesses must deal with a number of regulatory schemes, including those relating to discrimination.

However, the Commission suggests that the existence of parallel Commonwealth and State/Territory schemes should not substantially increase the costs of compliance, particularly where, as in Victoria, the general principles and provisions of the two statutes are similar. When Victorian employers purchase training from the Commission, for example, they arrange and pay for one training session that, in covering the general principles of anti-discrimination law, adequately addresses each scheme. Provided organisations obtain information about the key provisions they will be able to meet their obligations under both the DDA and the relevant State or Territory Act.

Moreover, staff at the Commission who have frequent contact with respondents and potential respondents state that they are more often concerned about the overlap between anti-discrimination legislation, industrial relations legislation and occupational health and safety requirements than the existence of parallel anti-discrimination systems.

7.2 Factors Affecting Complainants' Choice of Jurisdiction

- ***What factors affect the (complainants') choice of jurisdiction?***

The Commission's contact with people seeking to make disability discrimination complaints and community feedback from people who have lodged or considered lodging a complaint indicates that the following factors affect complainant's choice of jurisdiction:

- Lack of awareness about one of the Acts;

- A desire to have their complaint dealt with in the shortest possible time frame leads many complainants to lodge under the *Equal Opportunity Act*. Section 108 of the Victorian Act requires that the Commission complete the investigation of the complaint and determine whether it will be declined or referred to conciliation within 60 days of the complaint being lodged. In urgent situations this can be reduced to 30 days. This is seen by many people as a legislative guarantee that their complaint will not be hampered by delays;
- The availability of local, personal contact with the body that handles complaints and the availability of face to face assistance with the formulation of complaints is very important to some people who choose to use the *Equal Opportunity Act*;
- An awareness of the 1999 changes that require non-conciliated complaints to be heard by the Federal Court creates concern that complaints under the DDA will be dealt with in a more formal, legalistic manner if they do not resolve at conciliation. This is causing some people to choose the state legislation;
- The high profile of the DDA among community members and among disability advocates leads some to prefer the DDA. The DDA is the Federal anti-discrimination statute most used by Victorians;
- The perception that the DDA is a specialised piece of legislation, tailored to address disability discrimination specifically, and to be used by people with disabilities encourages some to use the DDA;
- The belief that a complaint lodged under the DDA may have broader impact and the capacity to lead to change at a national level leads some people interested in achieving a systemic outcome to use the DDA.

7.3 Scope for Cooperative Arrangements between Jurisdictions

- ***Are there any impediments to the development of cooperative arrangements with States and Territories on disability discrimination?***

Until February 2003, co-operative arrangements in relation to handling of complaints were in place between HREOC and the Commission. Most recently this arrangement involved the Commission providing a 'post-box' function in relation to complaints under the DDA, the *Sex Discrimination Act* and the *Racial Discrimination Act*. Complainants could send Federal complaints to the Commission and these would be forwarded to HREOC for lodgement. The Commission also provided information about the Federal Acts and assisted complainants to formulate their complaints under the DDA and other Federal anti-discrimination statutes. Prior to 1999 the Commission also investigated and conducted conciliations in relation to Federal complaints.

The two complaints-handling systems are different in a number of ways, including:

- The *Equal Opportunity Act* establishes strict time frames for the handling of complaints, which do not apply to HREOC complaints;
- A different level of assistance with the formulation of complaints is provided for under the *Equal Opportunity Act* and is provided by the Commission; and
- Under Federal provisions, any information not included in the original statement of complaint cannot be relied upon if the matter is later heard in Court. This is not so in relation to complaints under the Equal Opportunity Act.

The Commission acknowledges the benefits to complainants of being able to access assistance from a State or Territory Commission to finalise and submit complaints under the DDA. However, there is the potential for procedural problems to arise when one body is dealing with substantially different complaints-handling provisions and systems. Consequently, separate handling of complaints may be more efficient while two distinct systems are in place.

In relation to other functions, such as community education and consultation, HREOC already collaborates with state and territory commissions. One recent example was the "The DDA: Ten Years On" forums and workshops. In relation to policy development, community education and social advocacy, the Commission considers that there is considerable potential for the Commission and other state and territory counterparts to work co-operatively with HREOC.

7.4 A Single Federal Equal Opportunity Act

- ***What would be the costs and benefits of the Commonwealth adopting omnibus legislation that covers discrimination on the grounds of sex, race, disability and age?***

Feedback from community members indicated that there are mixed views about whether the introduction of a single Federal Act dealing with disability, age, racial and sex discrimination would be positive.

On one hand it is considered that a single equal opportunity act would:

- facilitate consistency between approaches to various forms of unlawful discrimination, and prevent the anomalies and unintended discrepancies that have arisen from piecemeal introduction and amendment of the various anti-discrimination statutes;
- 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 during the Commission's consultations 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. Related to this is the view that some people may be more likely to use the legislation to seek redress for discrimination if they believe that the statute has been developed for use by and for people with disabilities.